



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2014

Mr. William Christian
Counsel for the Del Mar College District
Graves Dougherty Hearon & Moody
P.O. Box 98
Austin, Texas 78767

OR2014-22936

Dear Mr. Christian:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 548040.

Del Mar College (the "college"), which you represent, received a request for all e-mails received from or by any employee or representative of the college regarding a specified public information request from the requestor. You state the college will provide some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

¹Although you also raise section 552.101 of the Government Code in conjunction with the attorney-client privilege under Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Additionally, although you raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2.

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See id.* § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See TEX. R. EVID. 503(b)(1)*. The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See TEX. R. EVID. 503(b)(1)*. Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the submitted e-mail strings and attachments consist of communications between attorneys for the college and college employees. You state these communications were made in furtherance of the rendition of professional legal services to the college. You further state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the submitted information. Accordingly, the college may generally withhold the submitted e-mail strings and attachments under section 552.107(1) of the Government Code. We note, however, some of these e-mail strings include e-mails

and attachments received from or sent to the requestor, who is a non-privileged party. Furthermore, if the e-mails and attachments received from or sent to the requestor are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if the non-privileged e-mails and attachments, which we have marked, are maintained by the college separate and apart from the otherwise privileged e-mail strings in which they appear, then the college may not withhold these non-privileged e-mails and attachments under section 552.107(1) of the Government Code.

To the extent the non-privileged e-mails and attachments exist separate and apart, we note they contain personal e-mail addresses subject to section 552.137 of the Government Code.³ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). One of the e-mail addresses at issue belongs to the requestor, who has a right of access to his own e-mail address under section 552.137(b). *See id.* § 552.137(b). The remaining e-mail address at issue, which we have marked, is not excluded by subsection (c), and you do not indicate the owner of the e-mail address has consented to release of her e-mail address. Upon review, the college must withhold the e-mail address we have marked under section 552.137 of the Government Code.

In summary, the college may generally withhold the submitted information under section 552.107(1) of the Government Code. However, to the extent the non-privileged e-mails and attachments we have marked exist separate and apart from the otherwise privileged e-mail strings, the college must withhold the personal e-mail address we have marked under section 552.137 of the Government Code. The college must release the remaining non-privileged information.

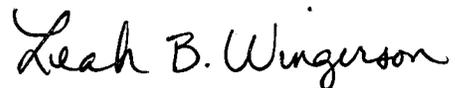
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Leah B. Wingerson". The signature is written in a cursive, flowing style.

Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/bhf

Ref: ID# 548040

Enc. Submitted documents

c: Requestor
(w/o enclosures)