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ATTORNEY GENERAL OF TEXAS

August 31, 2015

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

OR2015-18123

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# 577514 (DMC No. 015-0030).

Del Mar College (the "college"), which you represent, received a request for any information related to the requestor's three prior requests. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, you note some of the submitted information was the subject of previous requests for information, as a result of which this office issued Open Records Letter No. 2015-08385 (2015). In Open Records Letter No. 2015-08385, we determined the college may withhold

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 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(1) of the Government Code. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2.

<sup>2</sup>We 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.

certain information under section 552.107(1) of the Government Code and must release the remaining information to the requestor. In response to our ruling, the college filed a lawsuit against our office. *See Del Mar College District v. Attorney Gen. of Tex.*, No. D-1-GN-15-002127 (419th Dist. Ct., Travis County, Tex.). Accordingly, to the extent the submitted information is at issue in the pending litigation, we will allow the trial court to resolve whether the information at issue must be released to the public. As to the remaining information in Open Records Letter No. 2015-08385 that is not subject to litigation, we have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the college may rely on Open Records Letter 2015-08385 as a previous determination, and withhold or release the information responsive to the current request in accordance with that ruling. *See Open Records Decision No. 673 (2001)* (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We will now address your argument for the information not subject to the prior ruling. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See Gov't Code § 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. ORD 676 at 6-7. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. 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. *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 a 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, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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. *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 that 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).

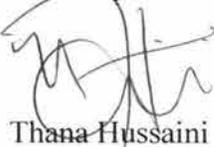
You claim the information in Exhibit B is excepted from disclosure under section 552.107(1) of the Government Code. You state the information at issue consists of communications between an attorney for the college and a representative of the college, and the communications were made for the purpose of facilitating the legal representation of the college. You further state these communications were intended to be confidential 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 information at issue. Thus, the college may withhold Exhibit B under section 552.107(1) of the Government Code.

In summary, we will allow the trial court to resolve the issue of whether the information that is the subject of pending litigation must be released to the public. To the extent the remaining information not at issue in the pending lawsuit is identical to the information previously requested and ruled upon by this office, we conclude the college may rely on Open Records Letter No. 2015-08385 as a previous determination and withhold or release the identical information in accordance with that ruling. The college may withhold Exhibit B under section 552.107(1) of the Government Code.

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

Sincerely,



Thana Hussaini  
Assistant Attorney General  
Open Records Division

TSH/som

Ref: ID# 577514

Enc. Submitted documents

c: Requestor  
(w/o enclosures)