ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 30, 2014

Ms. Jordan Hale
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2014-13207

Dear Ms. Hale:

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# 531468 (OAG PIR No. 14-38684).

The Office of the Attorney General (the "OAG") received a request for (1) communications between Texas Attorney General Greg Abbott or the OAG and three named companies and (2) all requests under the Act and responsive documents mentioning three named companies for a specified time period. You state the OAG does not have information responsive to the second category of the request.[1] You state the OAG will release some of the information responsive to the first category of the request with redactions made pursuant to Open Records Decision No. 684 (2009).[2] You claim the submitted information is excepted from disclosure

[1]The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

[2]Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

under sections 552.101, 552.103, and 552.107 of the Government Code. Additionally, you state the release of the information at issue may implicate the interests of Pearson Education, Inc. ("Pearson"). Accordingly, you state, and provide documentation demonstrating, the OAG notified Pearson of the request for information and of its right to submit arguments stating why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.[3]

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from Pearson explaining why its information should not be released to the requestor. Thus, we have no basis to conclude the release of the submitted information would implicate Pearson's interests, and none of the submitted information may be withheld on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information other statutes make confidential. You raise section 15.10(i)(1) of the Business and Commerce Code, which reads as follows:

> (1) Except as provided in this section or ordered by a court for good cause shown, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.

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[3]This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Tex. Bus. & Com. § 15.10(i)(1). You explain section 15.10(b) of the Business and Commerce Code authorizes the OAG to issue a Civil Investigative Demand ("CID") when the attorney general has reason to believe any person may be in possession, custody, or control of any documentary material or may have information relevant to a civil antitrust investigation. *Id.* § 15.10(b). You assert portions of the information in Exhibit B, which you have marked, were provided to the OAG in response to a CID the Antitrust Section of the OAG's Consumer Protection Division issued to Pearson. You state none of the permitted disclosures in section 15.10(i) apply in this instance. After review of the information at issue and consideration of your arguments, we agree the OAG must withhold the information you have marked in Exhibit B under section 552.101 in conjunction with section 15.10(i)(1).

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that 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. 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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. 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 to only 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. *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).

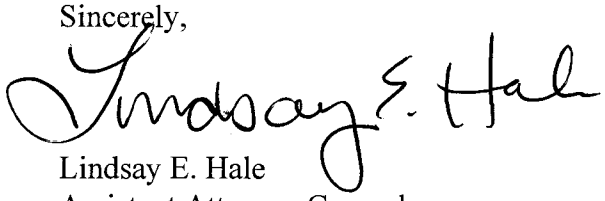
You state the information in Exhibit C consists of communications regarding a specified school finance case between OAG attorneys and staff; representatives of the TEA, which is a client agency of the OAG; and certain Pearson employees who were designated as fact and expert witnesses for the OAG in the school finance case. You explain the communications at issue were made for the purpose of providing legal services to OAG and the TEA. Additionally, you state the communications were not intended to be disclosed and they have remained confidential. Based on your representations and our review, we find Exhibit C consists of privileged attorney-client communications the OAG may withhold under section 552.107(1) of the Government Code.[4]

In summary, the OAG must withhold the information you have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 15.10(i)(1) of the Business and Commerce Code. The OAG may withhold Exhibit C under section 552.107(1) of the Government Code. The OAG must release the remaining 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 providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

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[4]As our ruling is dispositive, we need not address your remaining argument against disclosure of Exhibit C.

Ref: ID# 531468

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Pearson Education, Inc.
c/o Mr. Bruce P. Keller
Debevoise & Plimpton, LLP
919 Third Avenue
New York, New York 10022
(w/o enclosures)