



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 27, 2017

Mr. Allen M. Keller
Counsel for Lumin Education
Schulman, Lopez, Hoffer & Adelstein, LLP
517 Soledad Street
San Antonio, Texas 78205-1508

OR2017-14233

Dear Mr. Keller:

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# 663374.

Lumin Education ("Lumin"), which you represent, received a request for a specified category of information pertaining to a named individual.¹ You state you have released some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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 "to facilitate

¹Lumin sent the requestor an estimate of charges, which required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See* Gov't Code § 552.263(a). You inform us Lumin received the required deposit on April 6, 2017. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

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 state Attachments 4.1 through 4.12 consists of communications between Lumin’s legal counsel and Lumin’s administration made for the purpose of facilitating the rendition of legal services. You also indicate these communications were intended to be confidential and that the confidentiality has been maintained. Upon review, we find Lumin has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, Lumin may generally withhold Attachments 4.1 through 4.12 under section 552.107(1) of the Government Code. We note, however, some of these otherwise privileged e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we marked, are maintained by Lumin separate and apart from the otherwise privileged e-mail strings in which they appear, then Lumin may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

Section 552.135 of the Government Code provides, in part, the following:

(a) “Informer” means a student or former student or an employee or former employee of a school district who has furnished a report of another person’s or persons’ possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer’s name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov’t Code § 552.135(a)-(b). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of “law,” a school district that seeks to withhold information under this exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* §§ 552.135, .301(e)(1)(A). Additionally, individuals who provide information in the course of an investigation, but do not report a violation of law, are not informants for the purposes of section 552.135 of the Government Code. Thus, section 552.135 protects the identity of an informer but does not protect witness information or statements. You state some of Attachments 5.1 through 5.15 should be withheld because it identifies employees who reported possible violations of sections 37.123 and 37.124 of the Education Code. Upon review, we conclude Lumin must withhold the information we marked that identifies the employees under section 552.135 of the Government Code. However, we find Lumin has failed to demonstrate any of the remaining information is identifying information for purposes of section 552.135. Therefore, Lumin may not withhold any of the remaining information pertaining to the employees on that ground.

Section 552.137 of the Government Code 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).² *See id.* § 552.137(a)-(c). Accordingly, Lumin must withhold the personal e-mail address, which we marked, under section 552.137, unless the individual to whom the e-mail address belongs affirmatively consents to its release. *See id.* § 552.137(b).

In summary, Lumin may generally withhold Attachments 4.1 through 4.12 under section 552.107(1) of the Government Code. However, if the non-privileged e-mails are maintained separate and apart from the otherwise privileged e-mail strings in which they appear, then Lumin may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. Lumin must withhold the information we marked under section 552.135 of the Government Code. Lumin must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the individual to whom the

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

e-mail address belongs affirmatively consents to its release. Lumin 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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/bw

Ref: ID# 663374

Enc. Submitted documents

c: Requestor
(w/o enclosures)