KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 28, 2019

Ms. Lissette Villarruel
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500 North Akard Street, Suite 3150
Dallas, Texas 75201

OR2019-17866

Dear Ms. Villarruel:

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# 770616.

Uplift Education ("Uplift"), which you represent, received a request for all communications and information pertaining to investigations involving the requestor and multiple categories of communications among named individuals pertaining to specified subjects. You state Uplift has released some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.110, 552.111, 552.117, 552.122, and 552.136 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure and rule 503 of the Texas Rules of Evidence. Additionally, you state release of the submitted information may implicate the interests of a named individual and Gallup, Inc. ("Gallup"). Accordingly, you state, and provide documentation showing, Uplift notified these third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released.[1] *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released); *id.* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances).

[1]As of this date, we have not received comments from the named individual explaining why the submitted information should not be released.

We have considered your arguments and reviewed the submitted representative sample of information.[2]

Initially, you state Uplift sought clarification from the requestor for multiple portions of the request for information. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You state Uplift has not received a response from the requestor regarding one portion of the request. Thus, for the portion of the request for which you have sought but not received clarification, we find Uplift is not required to release information in response to this portion of the request. However, if the requestor clarifies this portion of the request for information, Uplift must seek a ruling from this office before withholding any responsive information from the requestor. *See* Gov't Code 552.222; *City of Dallas*, 304 S.W.3d at 387. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990).

You contend some of the submitted information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b). We note section 552.110 protects the interests of private parties that provide information to governmental bodies, not the interests of governmental bodies themselves. *See generally* Open Records Decision No. 592 (1991). Accordingly, we do not consider your arguments under section 552.110 of the Government Code.

We note 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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Gallup explaining why the submitted information should not be released. Therefore, we have no basis to conclude Gallup has a protected proprietary interest in the submitted information. *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

[2]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.

that information is trade secret), 542 at 3. Accordingly, Uplift may not withhold the submitted information on the basis of any proprietary interest Gallup may have in it.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). Although you argue the release of portions of the submitted information could harm Gallup by giving an advantage to its competitors, such an interest in protecting the information belongs to Gallup and not Uplift. Therefore, we find Uplift may not withhold the information at issue under section 552.104(a) of the Government Code.

As you acknowledge, a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

> (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The information at issue consists of a completed investigation that is subject to section 552.022(a)(1). Uplift must release the completed investigation pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* You seek to withhold the information at issue under section 552.107(1) and the attorney work product privilege of section 552.111 of the Government Code. However, sections 552.107(1) and 552.111 are discretionary in nature and do not make information confidential under the Act. *See* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, Uplift may not withhold the submitted information under section 552.107 or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your assertion of the attorney-client privilege under Texas Rules of Evidence 503 and your assertion of the attorney work product privilege under Texas Rules of Civil Procedure 192.5 for the completed investigation.

Texas Rule of Evidence 503(b)(1) provides the following:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:
>
> > (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
> >
> > (B) between the client's lawyer and the lawyer's representative;
> >
> > (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
> >
> > (D) between the client's representatives or between the client and the client's representative; or
> >
> > (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You represent the investigation report, which you marked, was prepared by outside counsel for Uplift regarding an investigation that was conducted by that same legal counsel. You state the report was provided to Uplift officials to facilitate the rendition of professional legal services and advice to Uplift. You also state the information at issue was intended to be and has remained confidential. Based on these representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney's entire investigative report protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Therefore, we conclude Uplift may withhold the completed investigation you marked under rule 503 of the Texas Rules of Evidence.[3]

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed above for rule 503. 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* ORD 676 at 6-7. 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*, 922 S.W.2d at 923.

You state Exhibits G-1 through G-11 consist of communications between attorneys for Uplift and Uplift officials that were made for the purpose of providing legal services to Uplift. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have established the information at issue consists of privileged attorney-client communications Uplift may generally withhold under section 552.107(1) of the Government Code.[4] We note, however, some of these e-mail strings include e-mails or attachments received from and sent to a non-privileged party. Furthermore, if the e-mails and attachments received from and sent to the non-privileged party 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 and attachments, which we marked, are maintained by Uplift separate and apart from the otherwise privileged e-mail strings in which they appear, then Uplift may not withhold these non-privileged e-mails or attachments under section 552.107(1). In that event, we will address your remaining arguments against disclosure of the non-privileged e-mails and attachments.

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[3]As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

[4]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." *See* Gov't Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as:

> (1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

> a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7. Upon review, we find you have failed to demonstrate the applicability of the attorney work product privilege to any portion of the remaining information. Therefore, Uplift may not withhold any of the remaining information as attorney work product under section 552.111 of the Government Code.

As noted above, section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the

decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland*, 22 S.W.3d at 351 (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* ORD 561 at 9. For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561.

You state portions of the remaining information consist of advice, opinions, and recommendations communicated between Uplift officials and third party consultants with whom Uplift shares a privity of interest regarding policymaking matters of Uplift. Upon review, we find Uplift may withhold the information we marked under section 552.111 of the Government Code. However, the remaining information is either factual in nature or consists of internal administrative matters that do not rise to the level of policymaking. Therefore, we find Uplift has failed to demonstrate the remaining information constitutes internal communications containing advice, recommendations, or opinions reflecting the

policymaking processes pertaining to Uplift. Accordingly, Uplift may not withhold any of the remaining information under section 552.111 of the Government Code.

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 protected by other statutes, such as section 21.355 of the Education Code, which provides, in part:

> (a) A document evaluating the performance of a teacher or administrator is confidential and is not subject to disclosure under [the Act].
>
> (b) Subsection (a) applies to a teacher or administrator employed by an open-enrollment charter school regardless of whether the teacher or administrator is certified under Subchapter B.

Educ. Code § 21.355(a), (b). The Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because "it reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 (1996). You argue Exhibits K-1 and K-2 consist of evaluations of Uplift employees in their performance as teachers and administrators at Uplift, an open-enrollment charter school. Upon review, we find some of the information at issue, which we marked, consists of evaluations of teachers and administrators for purposes of section 21.355. Therefore, Uplift must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Upon review, however, we find the remaining information at issue does not evaluate the performance of a teacher or administrator for purposes of section 21.355. Thus, Uplift may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of

a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential.

Accordingly, to the extent the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, Uplift must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, Uplift may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the employees whose information is at issue did not timely request confidentiality under section 552.024, Uplift may not withhold the information under section 552.117(a)(1). Nevertheless, we find you have failed to demonstrate any of the remaining information at issue consists of the current and former home address or telephone number, emergency contact information, social security number, or family member information of a current or former employee of Uplift. Therefore, Uplift may not withhold any of the remaining information at issue under section 552.117 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. You assert some of the remaining information is protected by common-law privacy. Upon review, however, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern, and Uplift may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.122(a) of the Government Code excepts from disclosure "[a] test item developed by an educational institution that is funded wholly or in part by state revenue[.]" Gov't Code § 552.122(a). In Open Records Decision No. 626 (1994), this office determined the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated." ORD 626 at 6. The question of whether specific information falls within the scope of section 552.122(a) must be determined on a case-by-case basis. *Id.* at 7. Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *See* Open Records Decision No. 118 (1976). *See generally* ORD 626 at 4-5. Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987).

We understand Uplift is an educational institution that is funded wholly or in part by state revenue. You state Exhibits L-1 and L-2 contain questions from common assessments administered by Uplift to students. You also state the purpose of the assessments is to evaluate the learning or knowledge of students, track student progress, and potentially determine the likelihood students may pass certain examinations. Further, you inform us Uplift reuses its test questions for practice examination and future common assessments. Thus, we understand you to assert release of the information at issue would compromise the effectiveness of future examinations. Based on your representations and our review, we find some of the information at issue, which we marked, qualifies as "test items" under section 552.122(a) of the Government Code. Therefore, Uplift may withhold the information we marked under section 552.122(a) of the Government Code. However, we find none of the remaining information at issue consist of test items under section 552.122(b) of the Government Code, and Uplift may not withhold it on that basis.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, we find Uplift must withhold the account number we marked under section 552.136 of the Government Code. However, we find you have not demonstrated any of the remaining information consists of a credit card, debit card, or charge card number, or is an access device number used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, we find you have failed to demonstrate the applicability of section 552.136 of the Government Code to the remaining information, and Uplift may not withhold any of it on that basis.

We note some of the remaining information at issue appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

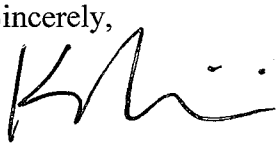
In summary, Uplift may withhold the completed investigation you marked under rule 503 of the Texas Rules of Evidence. Uplift may generally withhold Exhibits G-1 through G-11 under section 552.107(1) of the Government Code; however, Uplift may not withhold the marked non-privileged e-mails or attachments if they are maintained separate and apart from the otherwise privileged e-mail strings in which they appear. Uplift may withhold the information we marked under section 552.111 of the Government Code. Uplift must withhold the information we marked under section 552.101 of the Government Code in

conjunction with section 21.355 of the Education Code. To the extent the employees whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, Uplift must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, Uplift may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. Uplift may withhold the information we marked under section 552.122(a) of the Government Code. Uplift must withhold the account number we marked under section 552.136 of the Government Code. Uplift must release the remaining information; however, Uplift may only release any information subject to copyright in accordance with copyright law.

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,



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Enc. Submitted documents

c: Requestor
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