



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 30, 2020

Mr. W. Montgomery Meitler  
Senior Counsel  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494

OR2020-02899

Dear Mr. Meitler:

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# 809387 (PIR# 40153).

The Texas Education Agency (the "TEA") received a request for e-mails between named TEA employees including specified terms and information pertaining to specified contracts during a stated period of time.<sup>1</sup> You state the TEA will release some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.116 of the Government Code. Additionally, you state release of some of the information at issue may implicate the proprietary interests of Educational Testing Service and NCS Pearson, Inc. Accordingly, you state, and provide documentation demonstrating, the TEA notified these interested 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. *See* Gov't Code § 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

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<sup>1</sup> You state, and provide documentation demonstrating, the TEA sought and received clarifications of the information requested. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, you state some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2019-36465 (2019). In that ruling, we concluded the TEA may withhold the information we marked under section 552.104(a) of the Government Code and must release the remaining information. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Thus, the TEA may continue to rely on Open Records Letter No. 2019-36465 as a previous determination and withhold or release the identical requested information 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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, 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 either of the interested third parties explaining why the information at issue should not be released. Thus, we have no basis to conclude the third parties have a protected proprietary interest in the information at issue. *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. Therefore, the TEA may not withhold any portion of the submitted information on the basis of any proprietary interest the third parties may have in it.

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. This section encompasses information made confidential by other statutes, such as section 39.030(a) of the Education Code, which provides:

In adopting academic skills assessment instruments under [subchapter B, chapter 39 of the Education Code], the State Board of Education or a school district shall ensure the security of the instruments and tests in their preparation, administration, and grading. Meetings or portions of meetings held by the State Board of Education or a school district at which individual assessment instruments or assessment instrument items are disclosed or

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<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.

adopted are not open to the public under Chapter 551, Government Code, and the assessment instruments or assessment instrument items are confidential.

Educ. Code § 39.030(a). You state the TEA has the authority to adopt and administer the State of Texas Assessments of Academic Readiness (“STAAR”) test pursuant to the academic skills assessment program adopted by the State Board of Education under chapter 39 of the Education Code. *See id.* §§ 39.022, .023. You inform us the information you marked concerns the development of the assessment program and test items for the STAAR assessments. Based on these representations and our review, we agree the information you marked is confidential under section 39.030(a) of the Education Code and the TEA must withhold it under section 552.101 of the Government Code.

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 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). 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: (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 assert the information you marked consists of privileged communications between TEA attorneys and TEA employees in their capacities as clients. You state these

communications were made in furtherance of the rendition of professional legal services to the TEA. Further, you 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 information at issue. Accordingly, the TEA may withhold the information you marked under section 552.107 of the Government Code.

Section 552.116 of the Government Code provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state the information you marked consists of working papers created or used during the course of an audit conducted by the TEA's Division of Internal Audit in conducting an audit of the TEA's contracts and procurements processes. You explain the audit was authorized by section 7.055(b)(12) of the Education Code and chapter 2102 of the Government Code. *See* Educ. Code § 7.055(b)(12) (commissioner "shall appoint an agency auditor"); Gov't Code §§ 2102.003 (defining types of audits), .005 (requiring state agencies to conduct internal audit programs), .007 (relating to duties of the internal auditor). Based on these representations and our review, we agree the information

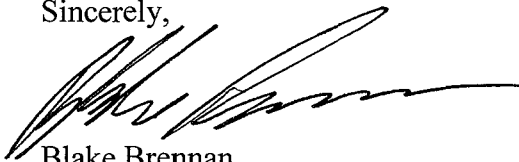
at issue constitutes audit working papers under section 552.116. Accordingly, the TEA may withhold the information you marked under section 552.116 of the Government Code.

In summary, the TEA may continue to rely on Open Records Letter No. 2019-36465 as a previous determination and withhold or release the identical requested information in accordance with that ruling. The TEA: (1) must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 39.030(a) of the Education Code; (2) may withhold the information you marked under section 552.107 of the Government Code; (3) may withhold the information you marked under section 552.116 of the Government Code; and (4) 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Blake Brennan  
Assistant Attorney General  
Open Records Division

BBX/rm

Ref: ID# 809387

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: 2 Third Parties  
(w/o enclosures)