



May 11, 2000

Mr. David Hodgins
Bracewell & Patterson
711 Louisiana, Suite 2900
Houston, Texas 77002-7781

OR2000-1855

Dear Mr. Hodgins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135058.

The Hurst-Eules-Bedford Independent School District (the “district”), which you represent, received two requests for statements taken in the district’s investigation of former football coach Ed Hickman. You assert that the district has no information responsive to this request, but submit information to this office for review which you relate may be construed as responsive. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.131 of the Government Code and that release of some of the information is prohibited by section 1232g of title 20 of the United States Code, the Family Educational Rights and Privacy Act of 1974. We have considered the exceptions you claim and reviewed the submitted information.

The requestor seeks all statements taken from one specified individual, and those of all other individuals interviewed in the district’s investigation into the conduct of Mr. Hickman. We first note that the requested information here includes information responsive to a previous request where this office issued Open Records Letter No. 2000-0504 (2000). In the prior request, dated November 1, 1999, the district was asked to provide “[a]ll complaints and allegations submitted to the school district concerning Trinity High School Head Football Coach Ed Hickman in the past three years.” You indicate that the district released previously requested information to the requestor in accordance with the earlier ruling. We construe the

previously ruled on information to be responsive to the current request.¹ In response to the current request, the district must either release the previously submitted information in conformity with the prior ruling, or certify to this requestor that this information has been previously provided. Gov't Code § 552.232. You must release the information at issue in Open Records Letter No. 2000-0504 in accordance with that decision.

We note that the material that you have now submitted to this office for review appears to have been generated after the district's receipt of the earlier request and consists of notes and synopses prepared by attorneys. This information includes paraphrased statements of individuals who were interviewed in the course of the subject investigation, and is therefore responsive to the current request. You assert that this information is excepted from disclosure under section 552.111 as attorney work product.

A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). *But see* Tex. R. Civ. P. 192.5. To satisfy the first prong of the work product test a governmental body must demonstrate that 1) 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 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996) (citing *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993)).

You relate that in regard to the subject matter of the investigation, Mr. Hickman was represented by three legal counsel from two separate firms, who made several threats of legal action. You relate that Mr. Hickman had a statutory right to appeal any termination of employment. You have also supplied a copy of the settlement agreement reached between Mr. Hickman and the district wherein the parties waive their rights to litigate this matter. We conclude that you have demonstrated from the totality of the circumstances that litigation was reasonably anticipated at the time that the legal representatives of the district developed the information subject to this request, and that those representatives believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

¹While it may be argued that the previously requested information materials are not statements of individuals interviewed, we consider such a construction to be hyper-technical. *See* Open Records Decision No. 561 (1990) (governmental body must make good faith effort to relate request to information which it holds).

In determining that information reveals the mental processes, conclusions, and legal theories of the attorney, we note that the work product exception generally does not extend to a neutral recital of facts obtained by the attorney. Open Records Decision No. 647 at 4 (1996). In this regard, you argue,

[a]lthough the attorney work product privileged does not apply to facts an attorney may acquire in an investigation or a neutral recital of the facts, if an attorney's notes indicate how an attorney would use the facts, if at all, or suggest trial strategy, or indicate the lawyer's reaction to the facts, they may be protected under the work product privilege. *Owens-Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749 (Tex. 1991).

After reviewing the documents at issue, and your arguments, we do not believe that these documents consist of neutral recitals of facts, but rather that they reveal counsel's mental processes and opinions. Accordingly, we conclude that the district has demonstrated the second prong of the work product test. The district may therefore withhold the submitted documents as attorney work product under section 552.111 of the Government Code.

As the above discussion disposes of this request, we do not discuss the application of the other exceptions to disclosure that you have raised other than to note that the release of confidential information is prohibited. See Gov't Code 552.352. This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

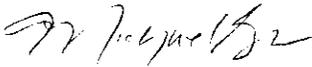
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/nc

Ref: ID# 134058

Encl Submitted documents

cc: Ms. Paula Caballero
Star-Telegram Staff Writer
3201 Airport Freeway, Suite 109
Bedford, Texas 76021
(w/o enclosures)