



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2005

Mr. Marc Barenblat
Staff Attorney
State Board for Educator Certification
1701 North Congress Avenue, 5th Floor
Austin, Texas 78701

OR2005-05295

Dear Mr. Barenblat:

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# 226142.

The State Board for Educator Certification (the "board") received a request for all documents relating to a "note" attached to the requestor's educator certification. You claim that some of the responsive information is excepted from disclosure pursuant to sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990).

¹ We assume that 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). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.114 exempts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. We note that the board is not an educational agency or institution for purposes of FERPA. Thus, FERPA and section 552.114 are generally inapplicable to the board. Although FERPA generally does not govern access to records in the custody of governmental bodies that are not educational agencies or institutions, there are exceptions to this rule. FERPA permits certain entities to have access to education records held by an educational agency or institution. 20 U.S.C. § 1232g(b)(1). In addition, FERPA allows education records to be released to any individual, agency, or organization with the written consent of the student's parents. *Id.* However, a governmental body that receives the education records pursuant to section 1232g(b)(1) is prohibited from subsequently releasing this information without the written consent of the parents of the student. *Id.* § 1232g(b)(4)(B). In this instance, you do not indicate the statutory authority under which the board received the records at issue. *Id.* § 1232g(b)(1). If the board received the information at issue from an educational agency under the written consent of the student's parents pursuant to section 1232g(b)(1), this information must be withheld from the requestor under FERPA unless the board received written consent from the parents to release this information to the requestor. *Id.* § 1232g(b)(1), (b)(4)(B). However, if the board did not obtain these documents from the educational agency under the written consent of the student's parents, the information may not be withheld under FERPA.

You claim that regardless of whether FERPA applies to the information you have marked in Exhibit C, this information is protected under common law privacy. Section 552.101 also encompasses the common law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see*

Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Upon review of the submitted information, we conclude that none of it is protected by common law privacy. Accordingly, you may not withhold any of the submitted information pursuant to section 552.101 in conjunction with common law privacy.

We note that the submitted information includes social security numbers. The 1990 amendments to the federal Social Security Act make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I). We have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, prior to releasing any social security number information, you should ensure that such information is not obtained or maintained by the board pursuant to any provision of law enacted on or after October 1, 1990.

The board asserts that the information in Exhibit D constitutes attorney work product. Section 552.111 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.” 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); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material 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 that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. TEX. R. CIV. P. 192.5; 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 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 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.

You inform us that the board enforces standards of conduct for certified educators in Texas public schools, including enforcement of an educator’s code of ethics, under chapter 21 of the Education Code. *See* Educ. Cod § 21.031(a), 21.041(b)(8). You further explain that the board litigates enforcement proceedings under the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, and rules adopted by the board under subchapter B of chapter 21 of the Education Code. *See* Educ. Code § 21.041(b)(7). You state that the information in Exhibit D was created by an attorney of the board in anticipation of litigation. *Cf.* Open Records Decision No. 588 (1991) (contested case under APA constitutes litigation for purposes of statutory predecessor section 552.103). Upon review of your arguments and the submitted information, we find that you have demonstrated that the information in Exhibit D was prepared in anticipation of litigation. Therefore, you may withhold this information under section 552.111 of the Government Code as attorney work product.

In summary, the information in Exhibit D may be withheld under section 552.111. Social security numbers may be confidential under federal law. The remaining information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 226142

Enc. Submitted documents

c: Ms. Patricia Dorantes-Rodriguez
P.O. Box 220524
El Paso, Texas 79913
(w/o enclosures)