



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 1, 2005

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

OR2005-06901

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# 228247.

The State Board for Educator Certification (the "board") received a request for "all files on [a named individual]." You state that the board will release some of the requested information. You claim that the remaining information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.<sup>1</sup>

Initially, we note that some of the submitted documents contain student information for which the board raises section 552.101 of the Government Code in conjunction with the Family Educational Rights and Privacy Act of 1974 ("FERPA"). The board currently has a lawsuit pending against the Office of the Attorney General over the release of similar types of information, *State Board for Educator Certification v. Abbott*, Cause No. GV502481, 53rd District Court of Travis County, Texas. The board's arguments in the instant request for a decision are similar to the board's arguments in the pending litigation of the prior ruling.

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the board to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Accordingly, we are closing our file with regard to the student information for which the board raises FERPA without issuing a decision and will allow the trial court to determine whether the types of information at issue must be released to the public.

With respect to the rest of the submitted information, we address the board's claimed exceptions. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. The board raises section 552.101 in conjunction with section 1703.306 of the Occupations Code. Section 1703.306 governs information acquired from polygraph examinations and provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. Section 1703.306 is applicable to the polygraph information that we have marked. In this instance, however, the requestor identifies himself as an attorney for the polygraph examinee. Therefore, the marked information must be released to the requestor if he has written authorization from his client to obtain the information. *See id.* § 1703.306(a)(1). Otherwise, the board must withhold the marked polygraph information

under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Criminal history record information (“CHRI”) obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.”<sup>2</sup> Gov’t Code § 411.082(2). Federal law governs the dissemination of CHRI obtained from the National Crime Information Center network. Federal regulations prohibit the release to the general public of CHRI maintained in state and local CHRI systems. *See* 28 C.F.R. § 20.21(c)(1) (“Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given”) and (c)(2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself”). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* Open Records Decision No. 565 at 10-12 (1990); *see generally* Gov’t Code ch. 411 subch. F. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See* Gov’t Code § 411.089(b). We note that the board is authorized to obtain CHRI from the Texas Department of Public Safety and other criminal justice agencies. *See id.* §§ 411.090, .087(a)(2); Educ. Code § 22.082. Therefore, the board must withhold any responsive CHRI under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

The board also raises section 552.111 of the Government Code. This section excepts from public disclosure “an 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. The board asserts the attorney work product privilege under this exception. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *See 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

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<sup>2</sup>We note that the statutory definition of CHRI does not encompass driving record information maintained by the Texas Department of Public Safety under subchapter C of chapter 521 of the Transportation Code. *See* Gov’t Code § 411.082(2).

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 that seeks to withhold information under rule 192.5 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. *Id.*; Open Records Decision No. 677 at 6-8 (2002). 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; Open Records Decision No. 677 at 7.

You state that the information that you seek to withhold as attorney work product was prepared by attorneys, internal investigators, and other representatives of the board in anticipation of litigation. You state that this information relates to investigations of alleged inappropriate conduct with the students on the part of a certificated school administrator. You point out that the board enforces standards of conduct for certified educators in Texas public schools, including enforcement of an educator's code of ethics, and litigates enforcement proceedings under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. *Cf.* Open Records Decision No. 588 (1991) (contested case under statutory predecessor to APA constituted litigation for purposes of statutory predecessor to Gov't Code § 552.103). Having considered your arguments and reviewed the information in question, we have marked the information that the board may withhold on the basis of the attorney work product privilege under section 552.111 of the Government Code.

In summary: (1) the board must withhold the marked polygraph information under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code, unless the requestor has written authorization from his client to obtain the information under section 1703.306(a)(1); (2) any responsive CHRI must be withheld under section

552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code; and (3) the board may withhold the information that we have marked under section 552.111 of the Government Code. The rest of the submitted information that is not encompassed by the board's claims under FERPA is not excepted from disclosure and must be released.

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).

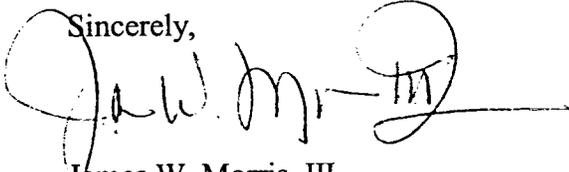
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a long horizontal line extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 228247

Enc: Submitted documents

c: Mr. Larry Watts  
P.O. Box 2214  
Missouri City, Texas 77459  
(w/o enclosures)