



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2005

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

OR2005-07136

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# 229853.

The State Board for Educator Certification (the "board") received a request for information relating to a named educator. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.¹

Initially, we note that the submitted documents include an educational transcript for which the board raises section 552.102(b) of the Government Code. 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. Accordingly, we are closing our file with regard to the information for which the board raises section 552.102(b) 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.

¹This 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).

With respect to the rest of the submitted information, we next address the board's claims under section 552.101 of the Government Code. This section excepts from public 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 that other statutes make confidential. The board raises section 552.101 in conjunction with section 261.201 of the Family Code, which provides in part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You state that the submitted information indicates the involvement of the Child Protective Services Division of the Texas Department of Family and Protective Services (the "department") in relation to investigations of alleged injury to a child. Having reviewed the submitted information, we have marked information that falls within the scope of section 261.201(a). We note that, under section 261.406 of the Family Code, the board is authorized to receive these types of records. *See id.* § 261.406(b) (providing that department shall send written report of its investigation to agency responsible for teacher certification and that release of such information is governed by Fam. Code § 261.201). We further note that an entity that is authorized to receive confidential information from the department is required to maintain the confidentiality of such records and prevent disclosure to any unauthorized person. *See Hum. Res. Code § 40.005(d)*. It does not appear that the requestor is an entity authorized to receive information that is confidential under section 261.201 of the Family Code. *See generally* Fam. Code § 261.201(a) (providing that records subject to Fam. Code § 261.201 may be disclosed only for purposes consistent with Family Code and applicable federal or state law or under rules adopted by investigating agency). Therefore, the board must withhold the information that we have marked under section 552.101 of the Government Code as information that is confidential by law.

Section 552.101 also encompasses section 58.001 of the Occupations Code, which provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing

agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 58.001. You state that the social security number contained in the remaining information is that of a certificate holder. Based on your representation, we conclude that the board must withhold this social security number under section 552.101 of the Government Code in conjunction with section 58.001 of the Occupations Code.²

You also seek to withhold a Form I-9 under section 552.101. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). In this instance, the release of the submitted Form I-9 would be “for purposes other than for enforcement” of the applicable federal law. A Form I-9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the board must withhold the Form I-9 under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

You also raise section 552.101 in conjunction with the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). When a governmental entity compiles an individual’s criminal history, the compiled information takes on a character that implicates the individual’s right to privacy in a manner that the same information in an uncompiled state does not. *See U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); Open Records Decision No. 616 at 2-3 (1993). Although you assert that some of the remaining information is private on this basis, we find that the information that you seek to withhold is not a compilation of criminal history information for the purposes of *Reporters Committee*. We therefore conclude that the board may not withhold the information in question under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we address your claim under 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

²As we are able to make this determination, we do not address your other claim with respect to the social security number under section 552.101.

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 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 on the part of a certified educator. 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.³

Lastly, we address section 552.130 of the Government Code. This section excepts from public disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document. Gov't Code § 552.130(a)(1), (3). We agree that the board must withhold the information that you have marked under section 552.130.

In summary: (1) the information that is confidential under section 261.201 of the Family Code must be withheld under section 552.101 of the Government Code; (2) the board must withhold the social security number under section 552.101 in conjunction with section 58.001 of the Occupations Code; (3) the Form I-9 must be withheld under section 552.101 in conjunction with section 1324a of title 8 of the United States Code; (4) the board may withhold the information that is excepted from disclosure under section 552.111 of the Government Code; and (5) the board must withhold the information that you have marked under section 552.130 of the Government Code. With the exception of the educational transcript, the board must release the rest of the submitted information.

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

³As we are able to make this determination, we do not address your claim with respect to this information under section 552.107 of the Government Code.

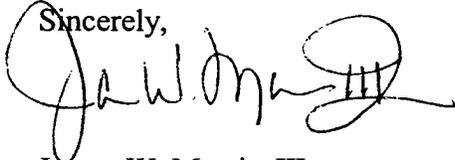
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



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

JWM/sdk

Ref: ID# 229853

Enc: Submitted documents

c: Mr. Will Ripley
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(w/o enclosures)