ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 16, 2005

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

OR2005-07409

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# 230488.

The State Board for Educator Certification (the "board") received a request for information held by the board regarding a named individual. You state that you will provide the requestor with a portion of the requested information. You claim, however, that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552,114, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, we note that a portion of the submitted information consists of student records for which the board raises section 552.101 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. Accordingly, we are closing our file with regard to the student records for which the board raises FERPA without issuing

[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). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

a decision and will allow the trial court to determine whether the types of information at issue must be released to the public.

We now address your claims for the remaining submitted information. 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." Gov't Code § 552.111. 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 a portion of the submitted information, which you have marked, was created by board attorneys 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 you have marked was prepared in anticipation of litigation. Therefore, you may withhold this marked information under section 552.111 of the Government Code as attorney work product.

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. Section 552.101 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.[2] Accordingly, we find that the social security number of the certificate holder that you have marked in Exhibit C is confidential under section 58.001 of the Occupations Code and thus must be withheld from disclosure under section 552.101 of the Government Code.

Section 552.101 also encompasses laws that make criminal history record information ("CHRI") confidential. 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" but does not include "driving record information maintained by [the Department of Public Safety ('DPS')] under Subchapter C, Chapter 521, Transportation Code." Gov't Code § 411.082(2). CHRI obtained from the National Crime Information Center or the Texas Crime Information Center is confidential under federal and state law.

Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *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."), (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."). Under chapter 411 of the Government Code,

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[2] As of the date of this letter ruling, two different sections of the Occupations Code are denominated as section 58.001. The section relating to "[t]he 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" was renumbered from section 56.001 of the Occupations Code to section 58.001 of the Occupations Code by the Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2(112), 2003 Tex. Gen. Laws 4140, 4146.

a criminal justice agency may obtain CHRI from DPS or from another criminal justice agency. *Id.* §§ 411.083(b)(1), .087(a)(2), .089(a). However, CHRI so obtained is confidential and may only be disclosed in very limited instances. *See id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Thus, to the extent that the submitted documents contain any CHRI that is confidential under federal law or subchapter F of chapter 411 of the Government Code, the board must withhold any such information under section 552.101 of the Government Code.

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; and identities of victims of sexual abuse. Upon review, we find that the remaining submitted information is of legitimate public interest and is, therefore, not protected by common law privacy. *See generally* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former Gov't Code § 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common law right of privacy). Accordingly, none of the remaining submitted information may be withheld under section 552.101 in conjunction with common law privacy.

You note that the documents in Exhibit C contain Texas driver's license information. Section 552.130 of the Government Code excepts from 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 motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. Therefore, the board must withhold the marked Texas driver's license information in Exhibit C.

Finally, you raise section 552.137 of the Government Code. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail address you have marked does not appear to be of a type specifically excluded by section 552.137(c). In addition, you inform us that the board has not received consent for the release of the e-mail address at issue. Therefore, the board must withhold the e-mail address you have marked under section 552.137.

In summary, we are closing our file with regard to the student records for which the board raises FERPA without issuing a decision and will allow the trial court to determine whether this information must be released to the public. The board may withhold the information marked as attorney work product under section 552.111 of the Government Code. The board must withhold the marked social security number under section 552.101 in conjunction with section 58.001 of the Occupations Code, the marked Texas driver's license information under section 552.130, and the marked e-mail address under section 552.137. To the extent that the submitted documents contain CHRI that was obtained pursuant to state and federal regulations, it must be withheld under section 552.101 as information made confidential by law. The remaining submitted information 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

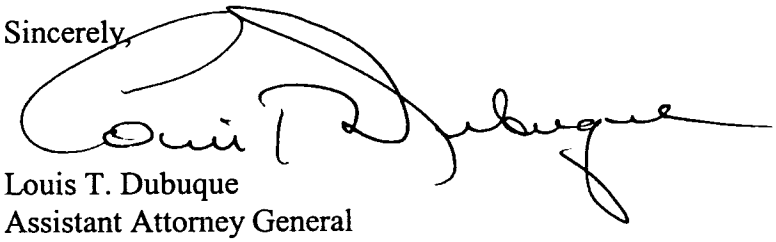
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



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LTD/seg

Ref: ID# 230488

Enc. Submitted documents

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(w/o enclosures)