



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 12, 2005

Mr. Marc Barenblat
Staff Attorney
State Board of Educator Certification
1701 North Congress Avenue, Fifth Floor
Austin, Texas 78701

OR2005-08279

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# 231955.

The State Board of Educator Certification (the "board") received a request for "all public records and documents related to the assertion contained in [the board's] June 16, 2005 letter that [the requestor's client] made 'false entries in the official records of one or more special education students.'" You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code as well as Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. Gov't Code § 552.304 (providing that member of public may submit comments stating why information should or should not be released).

Initially, we must address the requestor's assertion that the board failed to comply with the procedural requirements of section 552.301 of the Government Code. Within fifteen business days of receiving a request for information, a governmental body that wishes to withhold information from public disclosure must submit to this office: (1) general written

¹We 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.

comments stating the reasons why the stated exceptions apply that would allow the information to be withheld; (2) a copy of the written request for information; (3) a signed statement or sufficient evidence showing the date the governmental body received the written request; and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Sections 552.103 and 552.111 of the Government Code are discretionary exceptions under the Act and, therefore, do not overcome the presumption that the requested information is public information. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (claim of attorney work-product privilege under section 552.111 or Texas Rule of Civil Procedure 192.5 does not provide compelling reason for purposes of section 552.302 if it does not implicate third party rights), 665 at 2 n.5 (2000) (discretionary exceptions in general).

Although you inform us that the request for information was received by the board on June 27, 2005, the requestor asserts that he made an earlier request to the board for this same information via facsimile on June 24, 2005. In this regard, if the board received this earlier request on June 24, 2005, the fifteenth business day following the board's receipt of such request would have been July 18, 2005.² However, the board did not submit to this office its comments regarding the claimed exceptions or the representative sample of requested information until July 19, 2005. Although the requestor has provided for our review a copy of the June 24, 2005 request as well as a facsimile confirmation sheet, we are unable, based on the information provided, to conclusively determine whether the board received this earlier request on June 24, 2005. We must therefore rule conditionally on this issue.³

In this regard, if the board received the requestor's earlier request for information on June 24, 2005, we find that the board failed to comply with the procedural obligations of section 552.301(e) of the Government Code, and it may not withhold any of the requested information under the claimed discretionary exceptions of either section 552.103 or 552.111 of the Government Code. Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address the applicability of this

²We note that the board was closed on July 4, 2005.

³This office is unable to make factual determinations or resolve factual disputes in the opinion process. *See* Attorney General Opinions GA-0087 at 1, GA-0003 at 1 n. 2, JC-0534 at 1; Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986).

exception in the context of the board failing to meet its procedural obligations under section 552.301.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Criminal History Record Information (“CHRI”) generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) 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. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Upon review, we agree that information you have marked as CHRI is excepted from disclosure under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We therefore conclude that, in the event the board received the earlier request for information on June 24, 2005, it must withhold the CHRI you have marked and release the remaining submitted information to the requestor.⁴

If, however, the board did not receive the earlier request for information on June 24, 2005, then it did comply with its procedural obligations under section 552.301, and the claimed exceptions under sections 552.103 and 552.111 of the Government Code would not be waived. In this regard, we will address the applicability of these exceptions in the context of the board having complied with the procedural requirements of the section 552.301. Section 552.111 of the Government Code excepts from required 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. This section encompasses the work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *See*

⁴We note that the requestor’s client can obtain his own CHRI from DPS. Gov’t Code § 411.083(b)(3).

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 governmental body that seeks to withhold information as work product under section 552.111 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. *See* TEX. R. CIV. P. 192.5; Open Records Decision No. 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

(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.

If a requestor seeks access to an entire litigation file, and a governmental body seeks to withhold the entire file and demonstrates that the file was created in anticipation of litigation, we will presume that the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. *See* Open Records Decision No. 647 at 5 (1996) (citing *Nat'l Union Fire Ins. Co. v Valdez*, 863 S.W.2d 458, 461 (Tex. 1993)) (organization of attorney's litigation file necessarily reflects attorney's thought processes).

In this instance, the requestor seeks "copies of all public records and documents" regarding this investigation. 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. Code § 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 § 21.047(b)(7); 19 T.A.C. § 249.46 *et seq.* You represent to this office that the present request for information encompasses the board's entire case file with regard to the investigation referenced by the requestor. You explain that the file was created by attorneys and other representatives 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 to section 552.103 of the Government Code). Lastly, you inform us that, as a matter of practice, the board's file containing information compiled in conducting its investigation comprises its litigation file. Based on your representation that this request for information encompasses the board's litigation file in its entirety and your demonstration that the submitted information was prepared in anticipation of litigation, we conclude the submitted information qualifies as attorney work product excepted under section 552.111 of the Government Code. As such, if the board did not receive the earlier request for information on June 24, 2005, then we conclude that it may withhold the submitted information in its entirety pursuant to section 552.111.⁵

To summarize, if the board received the earlier request for this information on June 24, 2005, then it must withhold the CHRI you have marked under section 552.101 of the Government Code and release the remaining submitted information.⁶ If, however, the board did not receive the earlier request for information on June 24, 2005, then it may withhold the submitted information in its entirety as attorney work product under section 552.111 of the Government Code.

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).

⁵As we reach this conclusion under section 552.111 of the Government Code, we need address your claim regarding section 552.103 of the Government Code.

⁶Some of the submitted information that may be released is confidential with respect to the general public. As such, if the board receives a future request for this information from a person other than the requestor acting as a representative for his client or the client herself, the board should again seek our decision.

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,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/krl

Ref: ID# 231955

Enc. Submitted documents

c: Mr. Michael Shirk
Texas State Teachers Association
316 West 12th Street
Austin, Texas 78701
(w/o enclosures)