



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 21, 2007

Ms. Beverly Davidek
Escamilla & Poneck, Inc.
P. O. Box 200
San Antonio, Texas 78291-0200

OR2007-02094

Dear Ms. Davidek:

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# 271680.

The United Independent School District (the "district"), which you represent, received a request for information related to the proposed termination of the requestor's client, a teacher employed by the district. You claim that the requested information is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.103, 552.107, 552.111, 552.114, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We note that the United States Department of Education Family Policy Compliance Office (the "DOE") recently informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the

¹We note that the district failed to raise section 552.102 within the ten business day deadline mandated by section 552.301(b) of the Government Code. *See* Gov't Code § 552.301(b). However, because section 552.102 is a mandatory exception that can provide a compelling reason to withhold information, we will consider your arguments under this exception. *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).

purpose of our review in the open records ruling process under the Act.² Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). We note that FERPA is not applicable to law enforcement records maintained by the district police department that were created by the department for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, 99.8. However, you also have submitted unredacted education records maintained by the district for our review. These records are subject to FERPA. *See* 34 C.F.R. § 99.8(b)(2)(i). Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.³ However, we will consider the applicability of your remaining claimed exceptions to disclosure to the submitted information.

We next note that some of the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Some of the submitted information constitutes completed evaluations and investigations. Therefore, as prescribed by section 552.022, the district must release this information unless it is confidential under other law. The district raises section 552.103 of the Government Code for the evaluations and investigations, and additionally asserts sections 552.107 and 552.111 of the Government Code for the investigations. Sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex.

²A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

³In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov't Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103, 552.107, and 552.111 are not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the information contained in the records subject to section 552.022 under section 552.103, 552.107, or 552.111.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege also is found at Texas Rule of Evidence 503, and the attorney work product privilege also is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will consider your assertion of these privileges under rule 503 and rule 192.5 with respect to the information in the completed investigations. The district also raises sections 552.101, 552.102, and 552.117 for portions of the information subject to section 552.022. Because information that is subject to section 552.022(a)(1) may be withheld under mandatory exceptions, we will address your claims under sections 552.101, 552.102, and 552.117 of the Government Code for this information.

We begin with rule 503 of the Texas Rules of Evidence, which encompasses the attorney-client privilege and provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert that the investigative documents are protected by the attorney-client privilege. However, you have not shown that any of the information you seek to withhold under rule 503 constitutes or documents an attorney-client communication. *See* Open Records Decision Nos. 676 at 8 (2002), 542 (1990) (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). We therefore conclude that the district may not withhold any of the information that you claim is privileged under rule 503.

We next address your work product claim under rule 192.5 of the Texas Rules of Civil Procedure with respect to the information you seek to withhold in the investigations. Rule 192.5 encompasses the attorney work product privilege. For the purpose of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney’s representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney’s representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate 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 conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank 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. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney’s or an attorney’s representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). However, upon reviewing your arguments and the information at issue, we find that you have failed to establish that any of it consists of core work product. Therefore, none of this information may be withheld under rule 192.5 of the Texas Rules of Civil Procedure.

Section 552.101 of the Government Code 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 protected by other statutes. You claim that the submitted evaluations are excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *See id.* We note that section 21.352(c) specifically provides that “[e]ach teacher is entitled to receive a written copy of the evaluation on its completion.” It is well established that statutes governing access to a specific subset of information held by a governmental body prevail over the generally applicable provisions of the Act. *See, e.g.*, Open Records Decision No. 478 at 2-3 (1987) (Act does not govern special rights of access granted under other statutes).

You inform us that the teacher at issue held a certificate or permit required under chapter 21 and was teaching at the time of her evaluations. Thus, we find that the documents at issue constitute evaluations, as that term is commonly understood, of this teacher. Therefore, to the extent the evaluations are the type contemplated in section 21.352, the requestor has a right of access to his client’s evaluations under section 21.352(c). However, if the requestor does not have a right of access under section 21.352(c), then the evaluations are excepted

from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code.⁴

Section 552.101 also encompasses section 261.201(a) of the Family Code, which provides as follows:

(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). We note that the district is not an agency authorized to conduct a chapter 261 investigation. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). However, a portion of the submitted information subject to section 552.022 involves the report of alleged or suspected abuse made to the Child Protective Services Division of the Texas Department of Family and Protective Services (“CPS”), as well as other information used or developed in investigations by CPS and the district police department. Upon review, we find that this information is within the scope of section 261.201 of the Family Code. Therefore, this information, which we have marked, is confidential pursuant to section 261.201 of the Family Code and the district must withhold it under section 552.101 of the Government Code as information made confidential by law.

We note that the investigative reports contain the identity of the person who reported the suspected child abuse to CPS and the police department. Section 261.101 makes confidential the identity of a person reporting alleged or suspected child abuse or neglect in accordance with the reporting requirements of chapter 261 of the Family Code. *See Fam. Code* §§ 261.101(a), (d), .103(a). We note that both CPS and the police department are agencies that are authorized to conduct an investigation under chapter 261. *See id.* §§ 261.301, .401. Therefore, the district must withhold the identity of the person who reported the suspected child abuse contained in the investigative reports under section 552.101 in conjunction with section 261.101 of the Family Code.

⁴As our ruling is dispositive, we do not address your remaining arguments against disclosure of this information.

Section 552.101 also encompasses the doctrine of common law privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type 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. This office has also found that some kinds of medical information or information indicating disabilities or specific illnesses is protected under common law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the information that must be withheld under section 552.101 in conjunction with common law privacy.

We next address your arguments for the remaining information that is not subject to section 552.022. Section 552.101 also encompasses the Family Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). We find that some of the remaining information is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find that none of the release provisions of the FMLA apply to the information. Thus, we conclude that

the information we have marked is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the FMLA.

Section 552.103 of the Government Code provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You inform us that the teacher at issue has requested a hearing regarding the district's recommendation of termination pursuant to chapter 21 of the Education Code.

Section 21.256 of the Education Code provides that hearings requested under section 21.253 of the Education Code “shall be conducted in the same manner as a trial without a jury in a district court of [Texas].” Educ. Code § 21.256(e). Section 21.256 also specifically affords the person making the appeal the right to be represented by a representative of the person’s own choice, to hear evidence on which the charge is based, to cross-examine each adverse witness, and to present evidence. *See id.* § 21.256. It also states that the Texas Rules of Civil Evidence apply at the hearing. *See id.* We also note that, in a chapter 21 hearing, the hearing examiner may issue subpoenas for the attendance of witnesses and the production of documents, an appeal of the proceedings to the commission is based only on the record of the local hearing, and, in a judicial appeal of the commissioner’s decision, the court must review the evidence pursuant to the substantial evidence rule. *Id.* §§ 21.255(a) (subpoena power of examiner), 21.301(b) (appeal based only on hearing record), 21.307(e) (substantial evidence rule for judicial review). Therefore, we conclude that litigation in the form of a hearing under chapter 21 of the Education Code was pending when the district received the request for information. *See* Open Records Decision Nos. 588 (1991) (concluding that contested case under Administrative Procedure Act qualifies as litigation under statutory predecessor to section 552.103), 301 (1982) (litigation includes a contested case before administrative agency). We also find that the information at issue relates to the pending litigation. Therefore, section 552.103 is generally applicable to the information at issue.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, we note that the opposing party has seen some of the information at issue. Thus, the information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, to the extent the evaluations are the type contemplated in section 21.352, the requestor has a right of access to his client’s evaluations under section 21.352(c). However, if the requestor does not have a right of access under section 21.352(c), then the evaluations are excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code. The district must withhold the information we have marked under section 552.101 in conjunction with sections 261.101 and 261.201 of the Family Code. We have marked the information that the district must withhold under section 552.101 of the Government Code in conjunction with the FMLA and with common-law privacy. With the exception of information that has either been obtained from or provided to the opposing party, the remaining responsive information may be withheld pursuant to section 552.103 of

the Government Code. As our ruling is dispositive, we do not address your remaining claims.⁵

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); *Texas 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

⁵We note that some of the information marked for release contains or consists of confidential information that is not subject to release to the general public. See Gov't Code § 552.352. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the district receives a future request for this information from an individual other than the requestor, who is the authorized representative of the person whose information is at issue, or from the individual herself, the district should again seek our decision.

complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General 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. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/eb

Ref: ID# 271680

Enc. Submitted documents

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