



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

May 10, 2007

Mr. Christopher M. Jones  
Senior Counsel  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494

OR2007-05672

Dear Mr. Jones:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 278138.

The Texas Education Agency (the "agency") received a request for (1) statistical information concerning all sexual misconduct complaints filed against certified educators since 2000, and (2) all information relating to a named individual.<sup>1</sup> The agency has not submitted information responsive to category 1 of the request. Therefore, we assume the requested statistical information concerning all sexual misconduct complaints filed against certified educators since 2000 has been released to the extent it existed as of the date the request was received. See Gov't Code §§ 552.301, .302. You claim that the submitted information is excepted under section 552.111 of the Government Code. We have considered your arguments and reviewed the submitted information.<sup>2</sup>

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<sup>1</sup>The requested records are held by the agency because, effective September 1, 2005, all administrative functions, staff, and resources of the State Board for Educator Certification ("SBEC") were transferred to the agency.

<sup>2</sup>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.

Section 552.111 of the Government Code exempts 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 exception 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 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. *Id.*; 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:

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; ORD 677 at 7.

The work product doctrine is applicable to litigation files in criminal and civil litigation. *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994) (citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)). In *Curry*, the Texas Supreme Court held that a request for a district attorney’s “entire file” was “too broad” and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held that “the decision as to what to include in [the file] necessarily reveals the attorney’s thought processes concerning the prosecution or

defense of the case.” 873 S.W.2d at 380.<sup>3</sup> Accordingly, if a requestor seeks an attorney’s 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. 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).

You inform us that SBEC enforces standards of conduct for certified educators in Texas public schools under chapter 21 of the Texas Education Code. *See* Educ. Code §§ 21.031(a), 21.041(b). You further explain that SBEC litigates enforcement proceedings under the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code. *See Id.* § 21.041(b)(7); 19 T.A.C. § 249.46 *et seq.* You represent to this office that the present request for information encompasses SBEC’s entire litigation file with regard to an investigation of the named individual at issue. You explain that the file was created by attorneys, legal staff, and other representatives of SBEC 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). Lastly, you inform us that SBEC’s file containing information compiled in conducting its investigation comprises its litigation file. Based on your representation that this request for information encompasses SBEC’s litigation file in its entirety and your demonstration that the submitted information was prepared in anticipation of litigation, we conclude that the agency may withhold the submitted information 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).

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<sup>3</sup>We note, however, that the court in *National Union* also concluded that a specific document is not automatically considered to be privileged simply because it is part of an attorney’s file. 863 S.W.2d 458, 461 (Tex. 1993). The court held that an opposing party may request specific documents or categories of documents that are relevant to the case without implicating the attorney work product privilege. *Id.*; Open Records Decision No. 647 at 5 (1996).

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 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,



Amanda Crawford  
Assistant Attorney General  
Open Records Division

AEC/sdk

Ref: ID# 278138

Enc. Submitted documents

c: Mr. F.A. "Bro" Krift  
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(w/o enclosures)