



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 10, 2008

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701

OR2008-12465

Dear Mr. Meitler:

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# 321375.

The Texas Education Agency (the "agency") received a request for any information pertaining to a specified school from June 1, 2007 through June 15, 2008.¹ You state that you are releasing some information to the requestor. You state that the agency is redacting some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).² You claim that portions of the requested information are excepted from disclosure under section 552.103 of the Government Code and privileged under Rule 192.5

¹You inform this office that this requestor previously requested the same information from June 1, 2007 through April 1, 2008. You state, and we agree, that the only responsive information at issue in the present request is from April 2, 2008 through June 15, 2008.

²We note that our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made; therefore, we will not address the applicability of FERPA to any of the submitted information.

of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted representative samples of information.³

You inform us that the requested information contains a completed investigation that is subject to section 552.022(a)(1) of the Government Code. This section provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is expressly confidential under “other law” or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). The Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In-re City of Georgetown*, S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your argument under rule 192.5 of the Texas Rules of Civil Procedure regarding the completed investigation.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. For the purposes 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. 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

³We assume that the representative samples of records submitted to this office are 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 those submitted to this office.

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).

Furthermore, if a requestor seeks a governmental body's entire litigation file and the governmental body seeks to withhold the entire file, the governmental body may assert that the file is excepted from disclosure in its entirety because such a request implicates the core work product aspect of the privilege. See ORD 677 at 5-6. Thus, in such a situation, if the governmental body demonstrates that the file was created in anticipation of litigation, this office will presume that the entire file is within the scope of the privilege. 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); see also *Curry v. Walker*, 873 S.W.2d 379, 380 (Tex. 1994) (holding 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").

In this instance, you inform us that the agency 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 agency litigates enforcement proceedings under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, and rules adopted by the agency under subchapter B of chapter 21 of the Education Code. See *id.* § 21.047(b)(7); 19 T.A.C. § 249.46 et seq. You represent to this office that the requested information encompasses the agency's entire litigation file with regard to its investigation of the named educator at issue. You explain that the file was created by attorneys and other representatives of the agency in anticipation of litigation. Cf. Open Records Decision No. 588 (1991) (contested case under APA constitutes litigation for purposes of statutory predecessor to Gov't Code § 552.103). Based on your representation that the requested information encompasses the agency's entire case file and that this information was prepared in anticipation of litigation, we conclude that the agency may withhold the completed investigation you have marked as attorney work product under rule 192.5 of the Texas Rules of Civil Procedure.

We now turn to your argument regarding the remaining information at issue. Section 552.103 of the Government Code provides:

- (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 agency has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The agency must meet both prongs of this test for information to be excepted under 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). 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." *Id.* In the context of anticipated litigation by a governmental body, the concrete evidence must at least reflect that litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result").

You inform this office that remaining information at issue relates to a pending investigation being conducted by the agency under chapter 21 of the Education Code, as discussed above. You state, and we agree, that because this matter could be referred to the State Office of Administrative Hearings, which is governed by the APA, the agency anticipated litigation when the present request for information was received. See ORD 588. Further, we find that the investigation relates to the anticipated litigation. Accordingly, the remaining information at issue is subject to section 552.103 of the Government Code.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of

section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, the agency may withhold the information you have marked under rule 192.5 of the Texas Rules of Civil Procedure. The agency may also withhold the information you have marked under section 552.103 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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,

A handwritten signature in black ink that reads "Reg Hargrove". The signature is written in a cursive style with a long, sweeping underline that extends to the right.

Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 321375

Enc. Submitted documents

c: Mr. John Dodd
Honors Academy
4300 MacArthur Avenue Suite 160
Dallas, Texas 75209
(w/o enclosures)