



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 17, 2008

Mr. Miguel A. Saldaña
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
103 East Price Road, Suite A
Brownsville, Texas 78521

OR2008-14263

Dear Mr. Saldaña:

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# 325689.

The Brownsville Independent School District (the "district"), which you represent, received a request for a copy of a specified study regarding the district's psychology services department. You state the district has redacted information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You claim the remaining submitted information is excepted from disclosure under section 552.111 of the Government Code and Rule 192.3 of the Texas Rules of Civil Procedure.² We have considered your arguments and reviewed the submitted information.

Initially, we note the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body." Gov't Code § 552.022(a)(1). Thus, because the information at issue consists of a completed report, it must be released, unless the information is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. *Id.* Although you raise section 552.111 of the Government Code, this exception is

¹We note our office is prohibited from reviewing these 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 records.

²Although you raise section 552.101 of the Government Code in conjunction with Texas Rules of Civil Procedure 192.3, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

discretionary and may be waived. Open Records Decision No. 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.111 is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the submitted information under this exception.

The Texas Supreme Court has held, however, 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). Accordingly, we will consider your arguments under Texas Rule of Civil Procedure 192.3.

The consulting expert privilege, found in Rule 192.3(e) of the Texas Rules of Civil Procedure, provides that a party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. TEX. R. CIV. P. 192.3(e). A “consulting expert” is defined as “an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.” *Id.* 192.7.

You inform us the district contracted with SBS Group, as experts in the areas of special education and psychological reports, to investigate and assess the quality of the district’s special education services. You also inform us at the time the district solicited the report, the district was the subject of approximately 11 due process hearings alleging deficiencies within the special education psychological reports. You have submitted an affidavit from the district’s Administrator for Special Education Service, in which this administrator states he authorized the SBS study to be conducted in order to better defend the ongoing and pending due process hearings. You state the submitted information consists of the expert consultant’s report to the district. You also state this expert was never designated as a testifying expert, and no testifying expert has reviewed the report. Based on your representations, the administrator’s representation, and our review, we find the submitted information is privileged under Rule 192.3(e). We therefore conclude the district may withhold the submitted report pursuant to Rule 192.3(e) of the Texas Rules of Civil Procedure.

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,



Katherine M. Kroll
Assistant Attorney General
Open Records Division

KMK/eeg

Ref: ID# 325689

Enc. Submitted documents

c: Ms. Julie D. Leahy
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(w/o enclosures)