



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 2, 2009

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2009-01335

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# 332450 (TEA PIR# 10326).

The Texas Education Agency (the "agency") received a request for all information pertaining to a specified complaint. 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).¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102(b), 552.130, 552.136, and 552.137 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure. We have also considered comments submitted by the requestor and the attorney for a named individual and Lovejoy Independent School District (collectively, the "district"). *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.²

¹We 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.

²We 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.

Initially, we note the requestor specifically excludes from her request the e-mails responsive to this request. Thus, these e-mails are not responsive to the instant request. Our ruling does not address this non-responsive information, and the agency need not release it in response to the request.

Next, you inform this office that most of the submitted information was the subject of a previous open records letter ruling, Open Records Letter No. 2008-13067 (2008). In Open Records Letter No. 2008-13067, we ruled, except for certain information subject to sections 552.101, 552.130, and 552.137 of the Government Code, the submitted information must be released. You inform us, however, because the requestor knows the identity of the individuals involved, the facts and circumstances on which the prior ruling was based have changed, and thus, the agency can no longer rely on this ruling as a previous determination. You now seek to withhold the entirety of the submitted information, including the information that was previously addressed by this office. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See id.* § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the agency may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. You seek to withhold the entirety of the submitted information, including the information that was previously released under Open Records Letter No. 2008-13067, under Texas Rules of Civil Procedure Rule 192.5. Rule 192.5 does not prohibit the release of information or make information confidential. *See* Open Records Decisions No. 677 at 10 (2002) (Rule 192.5 is not compelling reason to withhold information under section 552.302). Further, in comments received by this office, the district claims the information is excepted from disclosure under the common-law informer's privilege and sections 552.103, 552.107, and 552.116. These sections also do not prohibit the release of information or make information confidential. *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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive sections 552.107), 549 at 6 (1990) (governmental body may waive common-law informer's privilege). Therefore, because the agency has released portions of the submitted information to members of the public in response to Open Records Letter No. 2008-13067, the agency may not now withhold such information under the work product privilege or the claimed exceptions that do not prohibit the release of information or make information confidential.

You also claim sections 552.101, 552.102(b), 552.130, 552.136, and 552.137 and the district claims sections 552.101, 552.102, and 552.135 for the information previously ruled upon by this office. These sections make information confidential by law. Accordingly, we will

address the agency's and the district's arguments under sections 552.101, 552.102, 552.130, 552.135, 552.136, and 552.137 for the information that was previously ruled upon in Open Records Letter No. 2008-13067. Additionally, we will address all of the claimed exceptions for the information that was not subject to the previous ruling.

The district contends the entirety of the submitted information is excepted under section 552.101 in conjunction with section 21.355 of the Family Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses other statutes that make information confidential such as section 21.355 of the Education Code, which provides, "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. In addition, the court has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because "it reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). The district claims the submitted information may contain evaluative and assessment information. However, the information at issue consists of documents created or gathered by the agency in its investigation. The agency does not evaluate a teacher for the purposes of section 21.355. Thus, the district has failed to demonstrate how any of the agency's investigative documents consist of evaluations for section 21.355 purposes. The district also appears to argue the submitted information contains evaluative documents prepared by the district. Upon review, we find no portion of the submitted information consists of the district's evaluative documents. Furthermore, we note the district is prohibited from releasing teacher and administrative evaluations to the agency. See Attorney General Opinion GA-0055 (2003) at 3-4 (agency not entitled to access teacher appraisals made confidential by section 21.355 of the Education Code where section 21.353 of the Education Code expressly authorizes limited release of appraisals to other school districts in connection with teachers' employment applications). Accordingly, no portion of the submitted information may be withheld under section 552.101 in conjunction with section 21.355.

The district also asserts that all of the submitted information is subject to section 552.135. This section provides in relevant part:

- (a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.
- (b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135(a), (b). However, by its terms, section 552.135 defines an informer as a student or employee of the district. *See id.* § 552.135(a). Additionally, individuals who provide information in the course of an investigation but do not make the initial report are not informants for the purpose of section 552.135. The informer in this instance is a member of the public, and not an employee or student of the district. We therefore find the district has failed to demonstrate how the reporting party is an informant for the purposes of section 552.135(a). Consequently, no portion of the submitted information may be withheld under section 552.135.

Next, both the agency and the district claim the entirety of the submitted information is excepted from disclosure under section 552.101 in conjunction with common-law privacy. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of this test must be established. *Id.* at 681-82. 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 found that certain personal financial decisions not relating to a financial transaction between an individual and a governmental body are generally intimate and embarrassing. *See Open Records Decision No. 545* (1990). After reviewing the district's and the agency's arguments we find neither has demonstrated that the entirety of the information must be withheld to protect the privacy of the individual. However, after reviewing the information that was previously ruled upon, we agree portions of these documents contain highly intimate or embarrassing information that is not of legitimate concern to the public. Further, we find portions of this information are inextricably intertwined with some of the information that was previously ruled upon. Therefore, the information we have marked in the previously ruled upon information are protected by common-law privacy and must be withheld under section 552.101 in conjunction with common-law privacy. The remaining information that was previously ruled upon, however, is not intimate or embarrassing or is of legitimate interest to the public and may not be withheld under section 552.101 in conjunction with common-law privacy.

You claim a portion of the previously ruled upon information contains criminal history record information ("CHRI"). Section 552.101 also encompasses chapter 411 of the Government Code. 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 Texas

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. In 2007, the Legislature enacted section 411.0901 of the Government Code, which specifically provides the agency with a right of access to obtain CHRI maintained by DPS on certain school employees or applicants for employment. *See Gov’t Code* § 411.0901. Furthermore, CHRI obtained from the DPS pursuant to chapter 411 is confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). We find that a portion of the information previously ruled upon is CHRI generated by TCIC or NCIC. Accordingly, the agency must withhold the information you have marked pursuant to section 552.101 in conjunction with chapter 411 of the Government Code.

Section 552.130 provides that information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. *Id.* § 552.130(a)(1), (2). Therefore, the agency must withhold the Texas driver’s license numbers you have marked under section 552.130.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).³ *See id.* § 552.137(a)-(c). We note that section 552.137 does not apply to work e-mail addresses of an officer or employee of a governmental body. The submitted personal e-mail addresses are not of a type specifically excluded by section 552.137(c). You inform us that the members of the public have not affirmatively consented to the release of these personal e-mail addresses. Therefore, the agency must withhold the marked personal e-mail addresses under section 552.137 of the Government Code. The remaining e-mail addresses are those of government employees and may not be withheld under section 552.137.

We will now address the remaining submitted arguments for the information that has not been previously ruled upon by this office. You inform us that this information is part of 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. *Id.* § 552.022(a)(1). Although, the district claims

³We note that the agency is releasing the requestor’s e-mail address pursuant to the requestor’s right of access to her own information under section 552.023 of the Government Code. *See Gov’t Code* § 552.023. Further, because the requestor has a special right of access to this information in this instance, the agency must again seek a decision from this office if it receives another request for the same information from another requestor..

that the information is excepted under the common-law informer's privilege and sections 552.103, 552.107, and 552.116, these exceptions are discretionary exceptions and may be waived. *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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (governmental body may waive sections 552.107), 549 at 6 (1990) (governmental body may waive common-law informer's privilege). As such, these sections are not other laws for the purposes of section 552.022 and the information at issue may not be withheld under the common-law informer's privilege or sections 552.103, 552.107, and 552.116. The Texas Supreme Court, however, 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). The attorney-client privilege is also found at Texas Rule of Evidence 503. We will therefore consider the district's argument under rule 503 of the Texas Rules of Evidence for the information that is subject to section 552.022. We will also consider the agency's arguments under rule 192.5 of the Texas Rules of Civil Procedure and sections 552.101, 552.102(b), 552.130, and 552.136 of the Government Code regarding the completed investigation as these exceptions are other laws for the purposes of section 552.022.

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* ORD 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 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).

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 explain the information was created by attorneys and other representatives of the agency in anticipation of litigation "because litigation is the ultimate resolution of all such investigations that are not settled or dismissed." *Cf.* Open Records Decision No. 588 (1991) (contested case under APA constitutes litigation for purposes of statutory predecessor to Gov't Code § 552.103). You inform us the information was created by attorneys and legal and other staff of the agency in anticipation of litigation. Having considered your representations and reviewed the information at issue, we find that the memorandum we have marked was created by an attorney's representative in anticipation of litigation. Accordingly, the memorandum may be withheld under rule 192.5. The remaining information consists of educator transcripts, personnel information, and communications regarding an open records request. You have not demonstrated how these documents reflect the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. Therefore, they may not be withheld under rule 192.5.

The district argues that the remaining information contains communications which are correspondence between the district and counsel for the district. Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) 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).

We note the information at issue consists of personnel documents, educator transcripts, and communication from the Attorney General regarding a previous open records request. The district has not demonstrated how these documents constitute or document attorney-client communications for the purposes of rule 503. Furthermore, the district has not demonstrated that it is a client or co-party sharing a common interest with the agency in order to claim the attorney-client privilege for this information. Accordingly, none of the information at issue may be withheld under the attorney-client privilege.

The agency claims that marked portions of the remaining information are subject to common-law privacy. The doctrine of common-law privacy is subject to the two pronged test discussed above. This office has found that medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We note that a public employee's scope of privacy is narrow with regards to personnel information. *See* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). After reviewing the information at issue, we have marked the medical information that is both highly intimate

and not of legitimate public interest. The agency must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

You assert that section 552.102 is applicable to the educator transcripts in the remaining information. Section 552.102(b) excepts from disclosure all information from transcripts maintained in the personnel file of a professional public school employee other than the employee's name, the courses taken, and the degree obtained. Gov't Code § 552.102(b); Open Records Decision No. 526 (1989). You inform us that the transcripts were maintained in the educator's personnel file and were provided to the agency pursuant to chapter 249 of title 19 of the Texas Administrative Code. See 19 T.A.C. § 249.14 (agency may obtain investigative information regarding alleged misconduct of an educator). Thus, with the exception of the employee's name, the courses taken, and the degree obtained, the agency must withhold the transcripts we have marked pursuant to section 552.102(b).

Section 552.130 provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Therefore, the agency must withhold the Texas driver's license number you have marked under section 552.130.

Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b). Accordingly, the agency must withhold the bank account number that you have marked and the bank routing number we have marked under section 552.136.

In summary, in the information which was the subject of Open Records Letter No. 2008-13067, the agency must withhold (1) the information we have marked under section 552.101 in conjunction with common-law privacy, (2) the CHRI under section 552.101 in conjunction with chapter 411, (3) driver's license information under section 552.130, and (4) the marked e-mail addresses under section 552.137. In the information that was not addressed in the previous ruling, the agency must withhold (1) the information we have marked under section 552.101 in conjunction with common-law privacy, (2) the driver's license number under section 552.130, (3) the bank account and routing numbers under section 552.136, and (4) except for the employee's name, the courses taken, and the degree obtained, the transcripts under section 552.102(b). The marked memorandum may be withheld under rule 192.5 of the Texas Rules of Civil Procedure. The remaining information must be released.⁴

⁴We note you have redacted the social security numbers in the submitted information. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/eeg

Ref: ID# 332450

Enc. Submitted documents

c: Requestor
(w/o enclosures)