



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 31, 2011

Mr. Robert Russo
Walsh, Anderson, Brown, Gallegos and Green, PC
P.O. Box 460606
San Antonio, Texas 78246

OR2011-01571

Dear Mr. Russo:

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# 407500.

The Northside Independent School District (the "district"), which you represent, received a request for the tape and transcript of, and work product prepared during, a specified meeting. You indicate you have released some of the requested information. You indicate the district has no information responsive to the request for the transcript.¹ You state you have redacted student-identifying information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² You claim the submitted information is excepted from disclosure under

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

sections 552.103 and 552.111 of the Government Code, as well as privileged under rule 192.5 of the Texas Rules of Civil Procedure.³ We have considered your arguments and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he 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). You state the submitted information pertains to an investigation that has been completed by the district. Thus, the submitted information is subject to section 552.022(a)(1) and must be released unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. *See id.* § 552.022(a)(1). You claim sections 552.103 and 552.111 of the Government Code for the submitted information. Sections 552.103 and 552.111 are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 677 at 10-11 (2002) (attorney work-product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.111 are not other laws that make information confidential for the purposes of section 552.022(a)(1). Therefore, the district may not withhold any of the submitted information under section 552.103 or section 552.111 of the Government Code. You also seek to withhold the submitted information under rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held 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). We will therefore consider your assertion of the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure.

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

³Although you also raise section 552.101 of the Government Code in conjunction with rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

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 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 the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney 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 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).

You claim the submitted information consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. You contend the district reasonably anticipated litigation at the time the information was created because an individual had filed a charge of discrimination with the Equal Opportunity Employment Commission (the "EEOC"). *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982) (pending complaint before the EEOC indicates a substantial likelihood of potential litigation). You state the submitted investigation was created in anticipation of defending the district in the EEOC claim. You further state the submitted information contains the district's attorney's legal analysis and mental impressions of the claims pertaining to the anticipated litigation, as well as an assessment of the district's best course of action with respect to its defense in litigation. Based on your arguments and our review of the submitted information, we find you have demonstrated the information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative created in anticipation of litigation. Thus, we conclude you have demonstrated the submitted information constitutes core attorney work product. We therefore conclude the district may withhold the submitted information under Texas Rule of Civil Procedure 192.5.

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, toll free at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/tf

Ref: ID# 407500

Enc. Submitted documents

c: Requestor
(w/o enclosures)