



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 25, 2011

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

OR2011-04222

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# 412775 (TEA PIR# 14535).

The Texas Education Agency (the "agency") received a request for a specified investigation of a named educator.<sup>1</sup> You state the agency has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.<sup>2</sup> You claim the requested information is protected from disclosure by Texas Rule of Civil

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<sup>1</sup>You inform us the agency also received a subpoena for this information from the requestor. Section 552.0055 of the Government Code provides "[a] subpoena duces tecum or a request for discovery that is issued in compliance with a statute or rule of civil procedure or criminal procedure is not considered to be a request for information under [the Act]." Gov't Code § 552.0055. Accordingly, this decision addresses only the request for information the agency received and not the agency's compliance with the subpoena.

<sup>2</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental 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 that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Procedure 192.5. We have considered your argument and reviewed the submitted representative sample of information.<sup>3</sup>

You state the submitted information consists 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. Gov't Code § 552.022(a)(1). The Texas Supreme Court has 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 for the submitted information.

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 the information implicates the core work 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 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

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<sup>3</sup>We assume 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.

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).

Additionally, if a requestor seeks a governmental body's entire litigation file the governmental body may assert that the file is excepted from disclosure 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. See 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").

You inform us the agency regulates and oversees all aspects of the certification, continuing education, and enforcement of standards of conduct for certified educators in Texas public schools under the authority of chapter 21 of the Education Code. See Educ. Code §§ 21.031(a), .041. You further explain 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.* § 21.041(b)(7); 19 T.A.C. § 249.3 *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. You explain the file was created by attorneys, staff, 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 section 552.103). Based on your representations, we conclude the agency may withhold the submitted information as attorney core work product under rule 192.5 of the Texas Rules of Civil Procedure.

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](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,

A handwritten signature in black ink, appearing to read 'Bob Davis', with a large, stylized flourish at the end.

Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/tf

Ref: ID# 412775

Enc. Submitted documents

c: Requestor  
(w/o enclosures)