



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 10, 2012

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

OR2012-06956

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# 453669.

The Texas Education Agency ("TEA") received a request for documents regarding any complaints or reprimands pertaining to the requestor's educator certificate.¹ You state some information will be released to the requestor. You inform us TEA has 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 remainder of the submitted information is privileged under Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the

¹You state, and provide documentation showing, TEA sought and received clarification of the request. See Gov't Code § 552.222(b) (stating if information requested is unclear or large amount has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); see also *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

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 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 the DOE's letter to this office is posted on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

submitted information. We have also considered comments received from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

As you acknowledge, the submitted information is a completed investigation subject to 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," unless the information is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). The Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" that makes information confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Therefore, we will address your claim for the submitted information under Texas Rule of Civil Procedure 192.5.

Rule 192.5 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 core attorney 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 or for trial, 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 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).

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 attorney work product privilege. *See* ORD 677 at 5-6. In such an instance, if the governmental body demonstrates the file was created in anticipation of litigation or for trial, this office will presume 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 explain TEA "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 [c]hapter 21 of the Education Code." *See* Educ. Code §§ 21.031(a), .041. You state TEA litigates enforcement proceedings under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, and rules adopted by TEA 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 note the requestor seeks access to "any and all information related to the certification of a named educator." You state the information responsive to the request consists of TEA's entire case file pertaining to an investigation of alleged educator misconduct. You explain the file was compiled in the course of conducting the investigation and created by attorneys, legal staff, and other representatives of TEA in anticipation of the litigation that results in any case that is not settled or dismissed. *Cf.* Open Records Decision No. 588 (1991) (contested case under APA constituted litigation for purposes of statutory predecessor to Gov't Code § 552.103). Based on your representations, we conclude TEA may withhold the submitted information in its entirety as core attorney work product under Texas Rule of Civil Procedure 192.5.

Mr. W. Montgomery Meitler - Page 4

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/bhf

Ref: ID# 453669

Enc. Submitted documents

c: Requestor
(w/o enclosures)