



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 15, 2006

Mr. Lorenzo Nieto
Assistant Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2006-04991

Dear Mr. Nieto:

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# 248977.

The State Board for Educator Certification ("SBEC"), which you represent, received a request for a specific investigative file. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code and protected under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information. We have also considered comments submitted on behalf of the requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you inform us that the requested information consists of a completed investigation, which you note is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that

the 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, or, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the information submitted in Exhibit B consists of a completed investigation made of, for, or by SBEC. A completed investigation must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. You contend that Exhibit B is protected by the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure and rule 503 of the Texas Rules of Evidence, as well as under section 552.101 of the Government Code. The Texas Supreme Court 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*, 53 S.W.3d 328, 337 (Tex. 2001). Additionally, section 552.101 is “other law” for purposes of section 552.022. Therefore, we will address your arguments under rule 192.5, rule 503, and section 552.101.

For the purpose of section 552.022, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. 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 an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *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 prong of the work product test requires the governmental body to show that the documents at issue contain the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Furthermore, 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 privilege. See Open Records Decision No. 677 at 5-6 (2002). 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. 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").

In this instance, the requestor seeks all information pertaining to the investigation of a named educator. You inform us that SBEC enforces standards of conduct for certified educators in Texas public schools, including enforcement of an educators' code of ethics, under chapter 21 of the Texas Education Code. See Educ. Code §§ 21.031(a), 21.041(b)(8). You further explain that SBEC litigates enforcement proceedings under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, and rules adopted by SBEC under subchapter B of chapter 21 of the Education Code. See *Id.* § 21.041(b)(7); 19 T.A.C. § 249.46 *et seq.* You represent to this office that the present request for information encompasses SBEC's entire litigation file with regard to an investigation of the named educator. You explain that the file was created by attorneys, internal investigators, and other representatives of SBEC 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). Lastly, you inform us that SBEC's file containing information compiled in conducting its investigation comprises its litigation file. Based on your representation that this request for information encompasses SBEC's litigation file in its entirety and your demonstration that Exhibit B was prepared in anticipation of litigation, we conclude that SBEC may withhold Exhibit B as attorney work product under rule 192.5.

We turn next to the remaining information, which you have submitted as Exhibit C. You state that Exhibit C consists of "an actual order of disciplinary action that was issued against the identified educator by SBEC" and that "[o]rders of disciplinary action are considered by SBEC to be public information not excepted from disclosure." However, you note that Exhibit C "contains the social security number of the identified educator." Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act.¹ Therefore, SBEC must withhold the social security number contained in the submitted information under section 552.147.²

¹The Office of the Attorney General will raise a mandatory exception like section 552.147 on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

²We note that 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.

In summary, SBEC may withhold Exhibit B as attorney work product under rule 192.5 of the Texas Rules of Civil Procedure. Prior to releasing Exhibit C, SBEC must redact the submitted social security number under section 552.147 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments.

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 appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal 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 appeal 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,

A handwritten signature in black ink that reads "L. Joseph James". The signature is written in a cursive style with a long, sweeping underline.

L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/sdk

Ref: ID# 248977

Enc. Submitted documents

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