



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 19, 2006

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

OR2006-07798

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# 254481.

The Texas Education Agency (the "agency") received a request for information relating to a named individual. You state that some of the requested information has been released. You claim, however, that the remaining requested information is excepted under section 552.130 of the Government Code and privileged under rule 192.5 of the Texas Rules of Civil Procedure and rule 503 of the Texas Rules of Evidence.¹ We have considered your arguments and reviewed the submitted representative sample of information.²

¹Although you raise section 552.101 of the Government Code in conjunction rules 503 and 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

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, you state that the submitted 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 submitted information consists of a completed investigation made of, for, or by the State Board for Educator Certification ("SBEC").³ 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." Section 552.111 is a discretionary exception to disclosure that a governmental body may waive. *See id.* § 552.007; Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, section 552.111 is not "other law" that makes information expressly confidential for purposes of section 552.022. Accordingly, the agency may not withhold any of the submitted information under section 552.111. However, 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). Therefore, we will consider your arguments under rules 192.5 and 503. We will also consider your claim under section 552.130 of the Government Code, as that exception to disclosure is also "other law" for purposes of section 552.022.

As your claim under rule 192.5 of the Texas Rules of Civil Procedure is potentially the broadest, we will address it first. For purposes 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. 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.*

³The requested records are held by the agency because, effective September 1, 2005, all administrative functions, staff, and resources of the SBEC were transferred to the agency.

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. 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, you state that the requestor seeks the entire case file maintained by SBEC regarding the investigation of the named individual, who you state is seeking a Texas Educator Certificate. You inform us that SBEC enforces standards of conduct for certified educators in Texas public schools under chapter 21 of the Texas Education Code. *See Educ. Code* §§ 21.031(a), 21.041(b). You further explain that SBEC litigates enforcement proceedings under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government 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 individual at issue. You explain that the file was created by attorneys, legal staff, 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 the submitted information was prepared in anticipation of litigation, we conclude that the agency may withhold the submitted information as attorney work product under rule 192.5.⁴

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.

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 254481

Enc. Submitted documents

c: Ms. Hollis Lowery-Moore
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(w/o enclosures)