



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 1, 2006

Mr. Michael Garbarino
Public Information Administrator/Confidentiality Officer
Texas Education Agency
1701 North Congress Ave.
Austin, Texas 78701-1494

OR2006-08499

Dear Mr. Garbarino:

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# 255472.

The Texas Education Agency (the "agency") received a request for any information regarding current or part investigations concerning three named driving schools. You state that you have or will release the requested information concerning two of the named driving schools. You also state that the agency will withhold the student-identifying information under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), in accordance with Open Records Decision No. 634 (1995).¹ You claim that the submitted information regarding the third named driving school is excepted from disclosure under sections 552.111, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section encompasses the attorney work product privilege found in

¹This office concluded in Open Records Decision No. 634 (1995) that (1) an educational agency or institution may withhold from the public information that is protected by FERPA and excepted from disclosure under sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions

rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied 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 [created or obtained the information] for the purpose of preparing for such litigation. *Nat'l Tank Co. 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; ORD 677 at 7.

If a requestor seeks access to an entire litigation file, and a governmental body seeks to withhold the entire file and demonstrates that the file was created in anticipation of litigation, we will presume that the entire file is excepted from disclosure under the attorney work product aspect of section 552.111. *See* Open Records Decision No. 647 at 5 (1996) (citing *National Union Fire Insurance Co. v Valdez*, 863 S.W.2d 458, 461 (Tex. 1993) (organization of attorney's litigation file necessarily reflects attorney's thought processes)).

You assert that the information that is responsive to the remaining portion of the request encompasses the agency's entire litigation file. You inform us that the agency enforces standards of conduct for driver education in Texas under chapter 1001 of the Education Code. *See* Educ. Code §§ 1001.455, 1001.461. You explain that if the agency denies an application, or suspends or revokes the license of a driving school, the driving school can request a hearing. *See id.* §§ 1001.459, 1001.460. In this instance, you state that the agency has revoked the named school's license and the school has requested a hearing pursuant to section 1001.459 of the Education Code. You indicate that the submitted information was created by the agency in anticipation of that litigation. *See id.* §§ 1001.460 (describing the

elements of the hearing); 1001.461 (stating that judicial review is based on the hearing record); *see also* Open Records Decision No. 588 (1991) (discussing factors used by the attorney general in determining whether an administrative proceeding not subject to the Administrative Procedure Act may be considered litigation). Further, you state that the agency's file containing information compiled during its investigation comprises its litigation file. Based on your representations, we conclude that the agency may withhold the submitted information as attorney work product under section 552.111 of the Government Code.²

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).

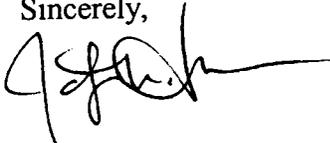
Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

²Because our ruling is dispositive, we need not address your remaining arguments.

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,



Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/ir

Ref: ID# 255472

Enc. Submitted documents

c: Ms. Jennifer Johns
1802 Victoria Court
Sugar Land Texas 77478
(w/o enclosures)