



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 31, 2008

Mr. Fernando Saenz
Law Office of Fernando Saenz
For the Weslaco Independent School District
200 East Pike Boulevard
Weslaco, Texas 78596

OR2008-01469

Dear Mr. Saenz:

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# 301080.

The Weslaco Independent School District (the "district"), which you represent, received a request for (1) all records pertaining to the investigation and personnel file of the requestor, (2) all records pertaining to four named individuals, and (3) all records pertaining to a named former student. You state that you will release some of the information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.102, 552.107, 552.108, 552.111, and 552.117 of the Government Code. You also claim that some of the submitted information is privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), 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.² Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503, this office has concluded that section 552.101 does not encompass discovery privileges. See Open Records Decision No. 676 at 1-3 (2002), 575 at 2 (1990).

²A copy of this letter may be found on the Office of the Attorney General's website, available at http://www.oag.state.tx.us/opinopen/og_resources.

submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. See 34 C.F.R. § 99.3 (defining “personally identifiable information”). You submitted a redacted copy of the information and state you have withheld information that is protected under FERPA. Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.³ We will, however, address the applicability of the remaining claimed exceptions to the submitted information.

Section 552.022(a) of the Government Code provides 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, for, except as provided by Section 552.108[.]

Gov’t Code § 552.022(a)(1). You acknowledge that a portion of the submitted records are an investigation conducted by the district. You state that “information generated as a result of the district’s investigation has been shared with the district’s law enforcement unit.” In addition, the requestor states that on November 1, 2007, the district released information that the investigation was completed and had been turned over to other agencies. The fact that this information may be incorporated into another governmental entity’s investigation does not negate the fact that the district conducted and concluded its own investigation of this incident. Accordingly, we find that the submitted documents numbered AG-000004 through AG-000057 are part of a completed investigation for purposes of section 552.022(a)(1). The district must release the submitted information unless it is expressly confidential under other law or is excepted under section 552.108. You claim that these documents are excepted under sections 552.107, 552.108, and 552.111 of the Government Code. You also claim that the submitted documents numbered AG-000055 through AG-000057 are privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. However, sections 552.107 and 552.111 are discretionary exceptions to disclosure that protect the governmental body’s interests and may be waived. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov’t Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such,

³In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

sections 552.107 and 552.111 are not other laws that make information confidential for the purposes of section 552.022. Therefore, the district may not withhold the submitted documents numbered AG-000004 through AG-000057 under section 552.107 or 552.111. Because information subject to section 552.022(a)(1) may be withheld as provided by section 552.108, we will address this assertion for this information. Furthermore, we note that the Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for the documents numbered AG-000055 through AG-000057.

We first address your argument under section 552.108 of the Government Code for the information subject to 552.022. Section 552.108 states that information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from required public disclosure "if release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. Open Records Decision No. 474 at 4-5 (1987). Where a non-law enforcement agency is in the custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides the attorney general with a demonstration that the information relates to the pending case and a representation from the law enforcement entity that it wishes to withhold the information. In this instance, you state that this information relates to an "on-going investigation by law enforcement." However, you have not provided this office with a representation from a law enforcement entity stating that it wishes to withhold this information under section 552.108(a)(1). Consequently, we find that you have not adequately demonstrated how or why section 552.108(a)(1) is applicable to any of the information at issue, and none of it may be withheld on that basis.

Next, we address your claim that documents AG-000055 through AG-000057 constitute attorney work product. Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For the purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent that 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 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).

You explain that this information was prepared by counsel retained by the district and reveals the mental impressions, opinions, and conclusions of counsel. You also state that the district believes that a substantial chance of litigation will ensue. Because the district has demonstrated that this information was created by its counsel in anticipation of litigation and reveals the attorney's mental impressions, opinions, and conclusions, we conclude that the district may withhold documents AG-000055 through AG-000057 under rule 192.5 of the Texas Rules of Civil Procedure.⁴

Next, you assert that documents numbered AG-000066 through AG-000069 are subject to section 552.102 of the Government Code. Section 552.102(a) of the Government Code exempts from disclosure information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102. In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Accordingly, we will address your privacy claims under sections 552.101 and 552.102 together.

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing

⁴As our ruling is dispositive of this information, we need not address your claim under Texas Rule of Evidence 503 for the same information.

facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. You contend that these documents “constitute highly embarrassing facts, the publication of which would be highly objectionable to a reasonable person.” We note, however, that common-law privacy does not protect information about a public employee’s alleged misconduct on the job or complaints made about a public employee’s job performance. *See generally* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). We find that the information at issue relates to allegations and an investigation of inappropriate conduct of a district employee and is of legitimate public concern. Therefore, none of this information is confidential under the doctrine of common law right to privacy, and it may not be withheld under either section 552.101 or section 552.102.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. You state, and provide supporting documentation showing, that two of the employees at issue elected to keep their personal information confidential before the district received the request for information; therefore, the district must withhold the information that you have marked and that we have marked under section 552.117(a)(1) Government Code.⁵ The district must also withhold the information that we have marked in the remaining submitted documents under section 552.117 for those employees who did make timely elections to keep their personal information confidential.⁶

⁵ We note that addresses have been redacted from some of the documents submitted for review. In the future, the district should refrain from unauthorized redaction of responsive information that it submits to this office for the purpose of requesting a ruling under the Act. *See* Gov’t Code §§ 552.301(e)(1)(D), .302.

⁶ We note that the requestor has a right of access to her own section 552.117(a)(1) information pursuant to section 552.023 of the Government Code. Section 552.023(a) provides that “[a] person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests.” Gov’t Code § 552.023(a).

We note that some of the remaining submitted information may be subject to section 552.137 of the Government Code.⁷ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). Therefore, unless the individual whose e-mail address is at issue consented to release of her e-mail address, the district must withhold the information we have marked under section 552.137 of the Government Code. Because section 552.137 protects personal privacy, the district may not withhold the requestor’s e-mail address under this exception. See Gov’t Code § 552.023(a).

In summary, the district may withhold documents AG-000055 through AG-000057 under rule 192.5 of the Texas Rules of Civil Procedure. The district must withhold the personal information that you have marked and that we have marked under section 552.117(a)(1), if the employees at issue timely elected to keep their personal information confidential. The district must withhold the information we have marked under section 552.137 of the Government Code. The remaining information must be released to the requestor. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of “education records” that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

⁷The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 challenge 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,



Henisha D. Anderson
Assistant Attorney General
Open Records Division

HDA/mcf

Ref: ID# 301080

Enc. Submitted documents

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(w/o enclosures)