



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

December 3, 2008

Ms. Karla Schultz  
Walsh, Brown Schulze & Aldridge, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR2008-16478

Dear Ms. Schultz:

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# 329136.

The Belton Independent School District (the "district"), which you represent, received a request for information pertaining to the notice of non-discrimination posted on public communications as well as documents between the Texas Education Agency (the "agency") and the district or a named employee regarding the requestor's complaints. You state you do not have a portion of the requested information.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

Initially, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted,

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the city. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

personally identifiable information contained in education records for the purposes of our review in the open records ruling process under the Act.<sup>2</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not 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”). Portions of the documents you have submitted to this office appear to be unredacted education records. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue, other than to note parents have a right of access to their own child’s education records and FERPA prevails over inconsistent provisions of state law.<sup>3</sup> *See Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F.Supp. 381, 382 (E.D. Tex. 1995); 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov’t Code § 552.103). We also note the DOE has also informed this office that a parent’s right of access under FERPA to information about that parent’s child does not prevail over an educational institution’s right to assert the attorney work product privilege. Determinations under FERPA must be made by the educational authority in possession of the education record. Because we are unable to make a decision under FERPA, we will address your claimed arguments for the submitted information.

Next, we note the submitted documents include minutes of public meetings. The minutes of a governmental body’s public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov’t Code § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying upon request). Accordingly, the submitted minutes of public meetings, which we have marked, must be released in accordance with the Open Meetings Act.

Next, we note a portion of the submitted information is subject to section 552.022(a)(1) of the Government Code, which 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:

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<sup>2</sup>A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>3</sup>In 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.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

*Id.* § 552.022(a)(1). The submitted information contains a completed evaluation made by the district. A completed evaluation 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. Sections 552.103 and 552.111 of the Government Code are discretionary exceptions to public disclosure that protect a 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.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (governmental body may waive section 552.111). As such, sections 552.103 and 552.111 do not qualify as other laws that make information confidential for purposes of section 552.022. Therefore, the district may not withhold the completed evaluation, which we have marked, under section 552.103 or section 552.111. We note the attorney work product privilege is also found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held “[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 whether the district may withhold the completed evaluation under Texas Rule of Civil Procedure 192.5.

For purposes of section 552.022 of the Government Code, information may be withheld 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 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 when the governmental body received the request for information 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 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 may be withheld 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).

You state the district is a party to pending litigation and the requested information “constitute[s] material prepared or mental impressions developed, or communication made between parties pursuant to the pending litigation with the [r]equestor.” We note the information at issue consists of an evaluation completed by the district of its “Gifted and Talented Program,” which the district conducted in its ordinary course of business. In Open Records Decision No. 677, our office held information created in a governmental body’s ordinary course of business may be considered to have been prepared in anticipation of litigation, and thus constitutes attorney work product, if the governmental body explains to this office the primary motivating purpose for the routine practice that gave rise to the information. ORD 677 at 8; *see also Brotherton*, 851 S.W.2d at 206. You have not explained that the district’s primary motivating purpose for the completed evaluation is anticipation of litigation. Thus, we conclude you have not demonstrated the completed evaluation consists of core work product for purposes of Texas Rule of Civil Procedure 192.5. As no other arguments against disclosure of the completed evaluation are raised, it must be released.

Next, we address your claim under section 552.103 of the Government Code for the information that is not subject to section 552.022. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state and provide documentation showing that prior to the district's receipt of this request, a lawsuit styled *Jordan v. Belton Indep. Sch. Dist., et. al.*, Civil Action No. A08CA121-LY, was filed and is currently pending in the United States District Court for the Western District of Texas, Austin Division. Therefore, we conclude the district was a party to pending litigation when the district received the present request. You also state the lawsuit pertains to the district's dual credit program. Upon review of the submitted information and documentation, we also conclude a portion of the information at issue is related to the pending litigation for the purposes of section 552.103. Therefore, this information, which we have marked, is generally subject to section 552.103 of the Government Code. The remaining information, however, pertains to the requestor's complaint about the hiring procedures of the district. You have not demonstrated how this information is related to the pending litigation. Thus, the district may not withhold the remaining information under section 552.103.

We note once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. See Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the opposing party has seen some of the information that is subject to section 552.103. Thus, the information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a). Accordingly, the district may only withhold the marked information that the opposing party to the litigation has not seen or had access to under section 552.103 of the Government Code. We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we will address your remaining arguments against disclosure for the information that the opposing party to the litigation has seen or had access to and the information that does not relate to the pending litigation. 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 exception encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process

and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You indicate the remaining information at issue consists of advice, recommendations, and opinions of the district's policymaking processes. We note the remaining information consists of complaints filed with the agency by the requestor, written affidavits and a brief responding to the complaints, administrative documents setting forth the employment requirements of the district, and a teaching certificate of an educator. Accordingly, this information consists of facts and written observations of facts and events, rather than advice, opinion, or recommendations that implicate the district's policymaking processes. We therefore conclude the district may not withhold any of the remaining information on the basis of the deliberative process privilege under section 552.111 of the Government Code.

We now address your claim under the work product privilege for the information that is not related to *Jordan*; the information that the opposing party to the litigation has seen; and the information you determine to be education records, and thus, may not be withheld under section 552.103 because FERPA's parental right of access prevails. Section 552.111 also encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.5; *City of Garland*, 22 S.W.3d at 360; Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

(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 governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 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. *See id.*; ORD 677 at 6-8. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning Texas Rule of Civil Procedure 192.5.

You state the information is related to litigation that is "very real, and it is, therefore, 'more than merely an abstract possibility or unwarranted fear.'" We note the information at issue was created or obtained to respond to complaints filed with the agency. These complaints were filed prior to the pending litigation, and one of the complaints is not even related to the litigation. Thus, the district failed to demonstrate that the unrelated complaint was prepared in anticipation of any litigation. As for the other complaint, you have not explained that the district anticipated the pending litigation when it was responding to the complaints with the agency. Thus, you have not demonstrated the information at issue constitutes attorney work product.

Lastly, the district puzzlingly argues it may withhold its information under the work product privilege because if such information were in the agency's possession, the agency may withhold it as work product. The district cites to two previous decisions from this office which concluded because the requests for information encompass the agency's entire litigation files, the agency may withhold the requested information as attorney work product. *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). The work product privilege must be asserted by each party who does not wish to waive the privilege. In the prior decisions, the agency asserted and demonstrated the applicability of the privilege, and thus, we concluded the privilege applies. If the district seeks the protection of the privilege, it must assert its own privilege. Whether the district may withhold its information as work product depends on its own arguments, not whether the agency may withhold similar information under the privilege. Here, the district failed to establish the applicability of the privilege to the information that is not related to *Jordan*, the information that the opposing party to the

litigation has seen, or the information the district determines to be education records. Thus, the district may not withhold such information under section 552.111.

In summary, to the extent the district determines the information we have marked does not constitute education records, the district may withhold the information the opposing party to the litigation has not seen or had access to under section 552.103. The remaining information must be released.

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). If the governmental body does not file suit over 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 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,



Melanie J. Villars  
Assistant Attorney General  
Open Records Division

MJV/eeg

Ref: ID# 329136

Enc. Submitted documents

c: Requestor  
(w/o enclosures)