



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 27, 2011

Ms. Rhonda Crass  
Henslee Schwartz LLP  
306 West 7<sup>th</sup> Street, Suite 1045  
Fort Worth, Texas 76102

OR2011-01435

Dear Ms. Crass:

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# 407464.

The Northwest Independent School District (the "district"), which you represent, received two requests from two requestors for (1) the personnel file of a named individual, as well as all information resulting in that individual being moved to a newly created position within the district; and (2) the same named individual's last performance evaluation, as well as all parents' complaints against him. You state some information will be released. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with section 552.111 of the Government Code, section 552.101 does not encompass other exceptions in the Act.

No. 643 (1996). We have determined that for the purposes of section 21.355, the word "teacher" means a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4.

You contend the information in Exhibit 2 consists of a confidential evaluation of the named individual who was employed as a teacher at the time of the evaluation. You do not inform us, however, whether the employee held a teaching certificate or permit under chapter 21 of the Education Code at the time of the evaluation. *See* ORD 643 at 4. Accordingly, we must rule conditionally. Thus, we conclude the district must withhold the information in Exhibit 2 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent the employee concerned held a teaching certificate or permit under chapter 21 of the Education Code and was engaged in the process of teaching when the marked information was created. But to the extent the employee either did not hold a teaching certificate or permit under chapter 21 or was not engaged in teaching when the information was created, we conclude the information in Exhibit 2 is not confidential under section 21.355 and may not be withheld on that basis under section 552.101.

Next, you claim Exhibit 3 is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 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." Gov't Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in 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 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:

- (a) 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 b) 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.

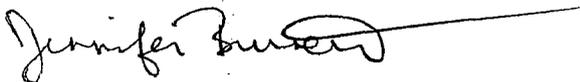
You state the information in Exhibit 3 consists of notes related to the named individual's employment performance created by a district employee at the request of the district's attorney in anticipation of litigation. Based on your representations and our review, we agree the information in Exhibit 3 is protected as attorney work product. Accordingly, the district may withhold the information in Exhibit 3 under the work product privilege of section 552.111 of the Government Code.

In summary, the district must withhold the information in Exhibit 2 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent the employee concerned held a teaching certificate or permit under chapter 21 of the Education Code and was engaged in the process of teaching when the information was created. The district may withhold the information in Exhibit 3 under the work product privilege of section 552.111 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/vb

Ref: ID# 407464

Enc. Submitted documents

c: Requestor  
(w/o enclosures)