



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 15, 2011

Mr. Deron Robinson
Henslee Schwartz LLP
306 West 7th Street, Suite 1045
Fort Worth, Texas 76102

OR2011-02322

Dear Mr. Robinson:

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# 409156.

The Mineral Wells Independent School District (the "district"), which you represent, received a request for a former employee's personnel file and any complaints or investigations involving the former employee. You state some of the requested information either has been or will be released, subject to any redactions required by the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.111, and 552.122 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5.² We have considered your arguments and reviewed the information you submitted.³

¹We note that 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, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. A copy of the DOE's letter to this office is posted on the Attorney General's website at: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

²Although you claim the attorney work product privilege under rule 192.5 in conjunction with section 552.101 of the Government Code, we note section 552.101 does not encompass discovery privileges. See Open Records Decision No. 676 at 1-3 (2002). The relevant exception under which to assert the attorney work product privilege is section 552.111 of the Government Code.

³This letter ruling assumes the submitted sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

You also state some of the documents submitted as Exhibits B and D are “personal in nature and not documents [the district] considers public information because [they are] not maintained as such by the . . . district.” Although you do not claim an exception to or privilege against disclosure of the information in question, you seek permission to withhold the information. We note the Act is applicable to “public information,” which is defined as consisting of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov’t Code § 552.002(a). Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). In this instance, we find the information in Exhibits B and D is related to the transaction of the district’s official business. We therefore conclude the information in Exhibits B and D is subject to the Act and must be released, unless it falls within the scope of an exception to disclosure. *See* Gov’t Code §§ 552.002, .006, .021.

We next note Exhibits B and C are subject to section 552.022 of the Government Code. Section 552.022(a) provides for required public disclosure of “a completed report, audit, evaluation or investigation made of, for, or by a governmental body,” unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. *Id.* § 552.022(a)(1). In this instance, Exhibit B is a completed investigation made of, for, or by the district, and Exhibit C is a completed evaluation made of, for, or by the district. The district does not claim section 552.108. Although the district does seek to withhold Exhibit B under section 552.111 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under Gov’t Code § 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov’t Code § 552.111 subject to waiver). As such, section 552.111 is not other law that makes information confidential for purposes of section 552.022(a)(1). Therefore, the district may not withhold any of the information in Exhibit B under section 552.111 of the Government Code. We note sections 552.101 and 552.102 of the Government Code, which the district also claims, are confidentiality provisions for purposes of section 552.022(a)(1). Additionally, the Texas Supreme Court has held 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). The attorney work product privilege, which the district claims under section 552.111, also is found at Texas Rule of Civil Procedure 192.5. Accordingly, we will consider the district’s claims under sections 552.101 and 552.102 and rule 192.5 for Exhibits B and C. We also will consider the district’s claim under section 552.122 of the Government Code for Exhibit D.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022(a)(1), information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. 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 at 427.

You contend Exhibit B constitutes attorney work product prepared by an official of the district at the request of an attorney for the district. You state the information was created “in the anticipation of possible litigation involved the [named former employee].” Having considered your arguments and reviewed the information at issue, we find you have not sufficiently demonstrated Exhibit B consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative created in anticipation of litigation or for trial. We therefore conclude the district may not withhold any of the information in Exhibit B under Texas Rule of Civil Procedure 192.5.

Section 552.101 of the Government Code exempts 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 other statutes make confidential. Section 21.355 of the Education Code 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 No. 643 (1996). We have determined that for 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. Additionally, a court has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because “it reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *See North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You contend Exhibits B and C are confidential under section 21.355. You state the former employee to whom the information at issue pertains was serving as a certified educator, holding a permit under subchapter B of chapter 21 of the Education Code, and was engaged in teaching at the time of her evaluations. Based on your representations and our review of the information at issue, we find all the information in Exhibit C and the information we have marked in Exhibit B are confidential under section 21.355 of the Education Code. Therefore, the district must withhold Exhibit C and the marked information in Exhibit B on that basis under section 552.101 of the Government Code. We note the remaining information in Exhibit B consists of a letter from the district to the teacher and records of the transmission of the letter. We find the remaining information does not evaluate a teacher, for purposes of section 21.355, and may not be withheld on that basis under section 552.101.

Section 552.101 of the Government Code also encompasses section 21.048 of the Education Code, which is applicable to information relating to teacher certification examinations. Section 21.048(c-1) states:

The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

- (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
- (2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). We note the information submitted as Exhibit D consists of reports of the results of Texas Examinations of Educator Standards ("TEExES") examinations administered to the former employee. Subsections 21.048(c-1)(1) and (2) do not appear to be applicable in this instance. We therefore conclude the district must withhold the results of the examinations, which we have marked, under section 552.101 of the Government Code in conjunction with section 21.048 of the Education Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

You contend the remaining information in Exhibit B is protected by common-law privacy. We note the submitted information pertains to a former employee of the district and her performance as such. As this office has explained on many occasions, the public generally has a legitimate interest in information relating to public employees and public employment. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private). Having considered your arguments and reviewed the information at issue, we conclude the district may not withhold any of the remaining information in Exhibit B under section 552.101 of the Government Code in conjunction with common-law privacy.

You also claim the remaining information in Exhibit B is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts 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(a). On review, we conclude none of the remaining information in Exhibit B is excepted under section 552.102(a) of the Government Code. Accordingly, none of the information in question may be withheld on that basis.

You claim the remaining information in Exhibit D is excepted from disclosure under section 552.122 of the Government Code. Section 552.122(b) excepts from disclosure "a test item developed by a licensing agency or governmental body[.]" *Id.* § 552.122(b). In

Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8. As previously noted, Exhibit D consists of reports of results of TExES examinations. You have not demonstrated any of the remaining information in Exhibit D constitutes a test item for purposes of section 552.122(b). We therefore conclude the district may not withhold any of the remaining information in Exhibit D under section 552.122 of the Government Code.

Lastly, we note section 552.117 of the Government Code may be applicable to some of the remaining information in Exhibits B and D.⁴ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests confidentiality for those types of information under section 552.024 of the Government Code. *See* Gov't Code §§ 552.024, .117. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who requested confidentiality for the information under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of an employee who did not timely request confidentiality under section 552.024. We conclude the district must withhold the information we have marked under section 552.117(a)(1) to the extent the former employee timely requested confidentiality for the marked information under section 552.024.⁵

In summary, the district must withhold (1) Exhibit C and the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; (2) the information we have marked in Exhibit D under section 552.101 in conjunction with section 21.048 of the Education Code; and (3) the

⁴This office will raise section 552.117 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

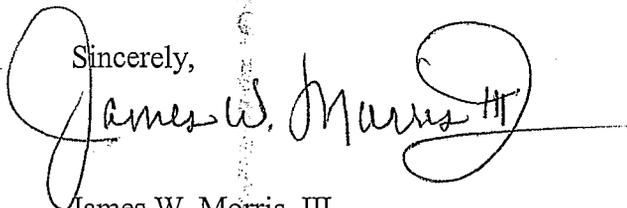
⁵In the event the former employee's social security number is not excepted from disclosure under section 552.117(a)(1) of the Government Code, we note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

information we have marked in Exhibits B and D under section 552.117(a)(1) of the Government Code to the extent the former employee timely requested confidentiality for the marked information under section 552.024 of the Government Code. The district must release the rest of the submitted information.

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, 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,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 409156

Enc: Submitted documents

c: Requestor
(w/o enclosures)