



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

August 14, 2012

Ms. Lena Engel  
Counsel for Harris County Department of Education  
Rogers, Morris & Grover, LLP  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2012-12775

Dear Ms. Engel:

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# 462117.

The Harris County Department of Education (the "department"), which you represent, received a request for information pertaining to a specified investigation. You state the department has redacted some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103

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<sup>1</sup>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. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

and 552.111 of the Government Code.<sup>2</sup> We have considered the claimed exceptions and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note the copy of the requestor's request for information submitted with the responsive documents and labeled Exhibit J is not responsive to the instant request. The department need not release nonresponsive information in response to this request, and this ruling will not address that information.

We next note the submitted information consists of a completed investigation subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(1). Although you raise sections 552.103 and 552.111 of the Government Code for this information, these are discretionary exceptions to disclosure that may be waived and do not make information confidential under the Act. *See id.* § 552.007; *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 10-11 (2002) (work-product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 473 (1987) (section 552.103 may be waived). As such, sections 552.103 and 552.111 do not make information confidential for the purposes of section 552.022(a)(1), and the submitted information may not be withheld on those bases. However, you also raise sections 552.101 and 552.102 of the Government Code, and we note a portion of the information is subject to section 552.137 of the Government Code.<sup>4</sup> Because these sections make information confidential under the Act, we will consider their applicability. Further, 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). We will therefore consider your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5.

Rule 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product

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<sup>2</sup>Based on your markings, we understand you to raise sections 552.101 and 552.102.

<sup>3</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 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 the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue and (2) the party resisting discovery believed in good faith there was a substantial chance 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 the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney 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 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 state the submitted information was compiled by a department employee in the course of investigating a claim of discrimination. You state the employee at issue was the "sole investigator" and "sole fact-finder." While you assert the information was created in anticipation of litigation, you do not assert this official is an attorney or an attorney's representative. We note the information at issue is generally factual. Further, portions of the information consist of communications with, or notes concerning meetings with, parties you have not established are privileged. Therefore, we find none of the submitted information consists of the "mental impressions, opinions, conclusions, or legal theories" of an attorney or an attorney's representative. Thus, the submitted information does not consist of core attorney work product for purposes of Texas Rule of Civil Procedure 192.5, and none of it may be withheld on that basis.

We next note that you state you have redacted information pursuant to statutes other than FERPA.<sup>5</sup> We understand you to have redacted some information under section 552.117(a)(1)

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<sup>5</sup>You state you have redacted information under "state and federal law, including, but not limited to [FERPA.]"

of the Government Code as permitted by section 552.024 of the Government Code.<sup>6</sup> However, section 552.117 protects personal privacy. The requestor in this instance is the authorized representative of the employee whose information you have marked and has a right of access under section 552.023 of the Government Code to his client's private information. *See* Gov't Code § 552.023(a) (person or a person's authorized representative has special right of access, beyond the right of general public, to information held by a governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Thus, the department may not withhold any of the information you have marked under section 552.117. Further, you have redacted additional information which you do not assert, nor does our review of the records indicate, you have been authorized to withhold without seeking a ruling from this office. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must request a ruling from this office, unless the governmental body is statutorily authorized to withhold the information without asking for a ruling or the information is subject to a previous determination issued by this office. Gov't Code § 552.301(a), (e)(1)(D). Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of some of the redacted information; thus, we will address whether that information must be released under the Act.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses the common-law right to privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *Id.* at 681-82. Common-law privacy protects the 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). However, this office has stated in numerous opinions the work

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<sup>6</sup>Section 552.024(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the home address, home telephone number, social security number, and family member information of a current or former employee who properly elected to keep this information confidential. *See* Gov't Code § 552.024(c); *see id.* § 552.024(c-1) (requestor may appeal governmental body's decision to withhold information under section 552.024(c) to attorney general), .024(c-2) (governmental body withholding information pursuant to section 552.024(c) must provide certain notice to requestor).

behavior and performance of a public employee and the conditions for his or her continued employment are generally matters of legitimate public interest not protected by the common-law right of privacy. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 438 at 4 (1986) (public has legitimate interest in details of accusation of misconduct against city supervisor), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). Similarly, the public has a legitimate interest in knowing the reasons for the dismissal of public employees and the circumstances surrounding their termination. Open Records Decision No. 444 at 6 (1986); *see* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). You have marked employee evaluations of the requestor's client and the identities of current and former employees involved in the investigation. Upon review, we find there is a legitimate public interest in this information. Therefore, none of the submitted information may be withheld under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.102(a) of the Government Code 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). The Texas Supreme Court has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). You have marked a birth date and an age. We note section 552.102 protects personal privacy. As noted, the requestor is the authorized representative of the individual whose birth date you have marked and has a right of access to his client's information. *See* Gov't Code § 552.023(a); ORD 481 at 4. Therefore, the department may not withhold the birth date you have redacted from this requestor. We further conclude that an employee's age is not confidential under section 552.102 and may not be withheld on that basis.

We cannot discern the nature of the remaining redacted information. Thus, the department has failed to comply with section 552.301 with respect to that information, and such information is presumed public under section 552.302. *See* Gov't Code §§ 552.301(e)(1)(D), .302. Accordingly, to the extent the remaining redacted information is not subject to FERPA, we conclude the department must release the remaining redacted information to the requestor. If you believe the redacted information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

We note the remaining information contains e-mail addresses subject to section 552.137 of the Government Code. 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 id.* § 552.137(a)-(c). The e-mail addresses we have marked are not of a type specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137, unless their owners affirmatively consent to disclosure.<sup>7</sup>

In summary, the department must withhold the e-mail addresses we marked under section 552.137 of the Government Code unless their owners affirmatively consent to disclosure. With the exception of information the department determines is subject to FERPA, the department must release the remaining information to the requestor.<sup>8</sup>

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,



Misty Haberer Barham  
Assistant Attorney General  
Open Records Division

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<sup>7</sup>We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>8</sup>As noted, the requestor in this instance has a special right of access to some of the information being released. Accordingly, if the department should receive another request for this information from a different requestor, the department must again request an opinion from this office.

**Ms. Lena Engel - Page 7**

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**Enc. Submitted documents**

**c: Requestor  
(w/o enclosures)**