



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 4, 2013

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2013-00204

Dear Mr. Meitler:

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# 476495 (TEA PIR# 18566).

The Texas Education Agency ("TEA") received a request for "any and all records associated with disciplinary actions taken against [a named individual], including any investigative files." You state some of the requested information will be released. You also state TEA has redacted driver's license, license plate, and social security numbers and an e-mail address from the requested information pursuant to sections 552.130 and 552.147 of the Government Code and the previous determinations issued under sections 552.130(a)(2) and 552.137 of the Government Code in Open Records Decision No. 684 (2009).¹ You claim the rest of the

¹Section 552.130(c) of the Government Code authorizes a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of requesting a decision from this office. See Gov't Code § 552.130(c); see also *id.* § 552.130(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.130(c) to attorney general, and governmental body withholding information pursuant to section 552.130(c) must provide notice to requestor). Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without requesting a decision. Open Records Decision No. 684 authorizes all governmental bodies to withhold a Texas license plate number under section 552.130 of the Government Code and an e-mail address of a member of the public under section 552.137 of the Government Code without requesting a decision.

requested information is protected from disclosure by Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the information you submitted.²

As you acknowledge, the submitted information consists of a completed investigation conducted by TEA, so as to be subject to section 552.022 of the Government Code. Section 552.022(a)(1) 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 excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. Gov’t Code § 552.022(a)(1). The Texas Supreme Court has held the Texas Rules of Civil Procedure are “other law” for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Therefore, we will address your claim for the submitted information 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 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 core attorney 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 the information at issue was created in anticipation of litigation or for trial, 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

²This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes TEA 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)*.

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 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).

If a requestor seeks a governmental body's entire litigation file, and the governmental body seeks to withhold the entire file, the governmental body may assert that the file is excepted from disclosure in its entirety because such a request implicates the core work product aspect of the attorney work product privilege. *See* ORD 677 at 5-6. In such an instance, if the governmental body demonstrates the file was created in anticipation of litigation or for trial, this office will presume the entire file is within the scope of the privilege. *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); *see also* *Curry v. Walker*, 873 S.W.2d 379, 380 (Tex. 1994) (holding that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case").

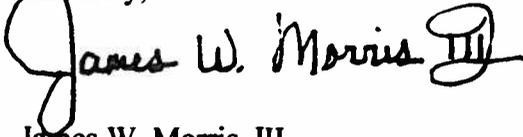
You explain TEA "regulates and oversees all aspects of the certification, continuing education, and enforcement of standards of conduct for certified educators in Texas public schools under the authority of [c]hapter 21 of the Education Code." *See* Educ. Code §§ 21.031(a), .041. You state TEA litigates enforcement proceedings under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, and rules adopted by TEA under subchapter B of chapter 21 of the Education Code. *See id.* § 21.041(b)(7); 19 T.A.C. § 249.3 *et seq.* You note the requestor seeks access to "any and all records associated with disciplinary actions taken against [the named individual.]" You state the information responsive to the request consists of TEA's entire case file pertaining to an investigation of alleged educator misconduct. You explain the file was compiled in the course of conducting the investigation and created by attorneys, legal staff, and other representatives of TEA in anticipation of litigation. *Cf.* Open Records Decision No. 588 (1991) (contested case under APA constituted litigation for purposes of statutory predecessor to Gov't Code § 552.103). Based on your representations, we conclude TEA may withhold the submitted information in its entirety as core attorney work product under Texas Rule of Civil Procedure 192.5.

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 initial "J" and a stylized "III" at the end.

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

JWM/bhf

Ref: ID# 476495

Enc: Submitted documents

c: Requestor
(w/o enclosures)