



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 13, 2016

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

OR2016-11035

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# 610831 (ORR# 26519).

The Texas Education Agency (the "agency") received a request for the complete file related to an investigation of a named individual. You state the agency has redacted student-identifying information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You state the agency will release some of the requested information. You claim the submitted information is privileged under rule 192.5 of the Texas Rules of Civil

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student 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 FERPA determinations must be made by the educational authority in possession of the education records. A copy of this letter may be found on the Office of the Attorney General's website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

Procedure. We have considered the submitted argument and reviewed the submitted representative sample of information.²

Initially, we note, and you acknowledge, the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

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

Gov't Code § 552.022(a)(1). The submitted information consists of a completed investigation that is subject to section 552.022(a)(1). The agency must release the completed investigation pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* 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 rule 192.5 of the Texas Rules of Civil Procedure.

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

²We 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.

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 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, orig. proceeding).

Further, 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) (organization of attorney’s litigation file necessarily reflects attorney’s thought process (citing *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993)); *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 the agency “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 the agency litigates enforcement proceedings under the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, and rules adopted by the agency under subchapter B of chapter 21 of the Education Code. *See id.* § 21.041(b)(7); 19 T.A.C. § 249.3. You note the requestor seeks the case file concerning a named educator. You state the information at issue consists of the entire investigation file of the agency’s investigation, and contains analysis pertaining to the certification of an educator. You also explain the information in the file was created by attorneys, legal staff, and other representatives of the agency in anticipation of the 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 the agency 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/bw

Ref: ID# 610831

Enc. Submitted documents

c: Requestor
(w/o enclosures)