



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 16, 2017

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

OR2017-13410

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# 662408 (TEA PIR# 29456).

The Texas Education Agency (the "agency") received a request for all records in a specified investigation. You state the agency will release some information. You state the agency has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim the requested information is privileged under rule 192.5 of the Texas Rules of Civil Procedure. We have considered your argument and reviewed the submitted representative sample of information.²

¹The 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: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

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.

Initially, the submitted information consists of a completed investigation 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 expressly 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 the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Accordingly, we will address your claim 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 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 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).

Furthermore, if a requestor seeks a governmental body’s entire litigation file, the governmental body may assert the file is excepted from disclosure in its entirety because such a request implicates the core work product aspect of the privilege. *See ORD 677 at 5-6*. Thus, in such a situation, if the governmental body demonstrates the file was created in

anticipation of litigation, 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 processes (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 "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 inform us 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 also explain 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 state the submitted information consists of the entire case file pertaining to the agency's investigation and analysis regarding the certification of an educator. You also state the file was created by attorneys, legal staff, and other agency representatives in anticipation of litigation. Cf. Open Record 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 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,



Kelly McWethy
Assistant Attorney General
Open Records Division

KSM/sb

Ref: ID# 662408

Enc. Submitted documents

c: Requestor
(w/o enclosures)