



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 26, 2019

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

OR2019-17463

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# 772352 (ORR Nos. 37755 & 37809).

The Texas Education Agency (the "TEA") received two requests from different requestors for information related to a named educator. The TEA states it is withholding student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ The TEA states it will redact dates of birth of members of the public pursuant to the previous determination issued in Open Records Letter No. 2016-04398 (2016).² The TEA also states it is withholding motor vehicle record information pursuant to section 552.130(c) of the Government Code

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/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

²Open Records Letter No. 2016-04398 authorized the TEA to withhold dates of birth of members of the public under section 552.101 of the Government Code in conjunction with common-law privacy without the necessity of requesting an attorney general's decision.

and social security numbers pursuant to section 552.147(b) of the Government Code.³ The TEA further states it is withholding certain information pursuant to Open Records Decision No. 684 (2009).⁴ The TEA states it is releasing some of the requested information. The TEA claims the submitted information is excepted from disclosure under section 552.101 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5. We have considered the submitted arguments and reviewed the submitted representative sample of information.⁵

Initially, the TEA states 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 TEA informs us the submitted information consists of a completed report and investigation that are subject to section 552.022(a)(1). The TEA acknowledges it must release the submitted information 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.* § 552.022(a)(1). The TEA seeks to withhold the information subject to section 552.022(a)(1) under sections 552.101 of the Government Code and rule 192.5 of the Texas Rules of Civil Procedure. As section 552.101

³Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See Gov't Code* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). 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. *See id.* § 552.147(b).

⁴Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information without the necessity of requesting an attorney general decision.

⁵We 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.

of the Government Code applies to confidential information, we will consider the TEA's argument under section 552.101 for the submitted information. 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). Accordingly, we will also consider the TEA's assertion of the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses section 21.062 of the Education Code, which provides, in part, the following:

(a) During an investigation by the [C]ommissioner [of Education (the "commissioner")] for an alleged incident of misconduct, the commissioner may issue a subpoena to compel:

...

(2) the production, for inspection or copying, of relevant evidence that is located in this state.

...

(d) All information and materials subpoenaed or compiled in connection with an investigation described by Subsection (a) are confidential and not subject to disclosure under [the Act].

Educ. Code § 21.062(a)(2), (d). The TEA states some of the submitted information, which it marked, relates to an investigation of an educator by the commissioner for an alleged incident of misconduct. The TEA further states the information at issue was submitted to the TEA in response to a subpoena issued by the commissioner. Based on these representations, we agree the TEA must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 21.062(d) of the Education Code.

Texas Rule of Civil Procedure 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 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) (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 "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").

The TEA claims the remaining information consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. The TEA explains at the time the information at issue was created, the TEA reasonably believed litigation would ensue because "litigation is the ultimate resolution of all such investigations that are not settled or dismissed." The TEA informs us the report at issue is part of an investigation by the TEA's attorneys, legal staff, and other attorney representatives at the direction of the TEA's attorney. Upon review, we find the TEA has demonstrated the information at issue constitutes core attorney work product. Accordingly, the TEA may withhold the remaining information under Texas Rule of Civil Procedure 192.5.

In summary, the TEA must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 21.062(d) of the Education Code. The TEA may withhold the remaining information 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/jxd

Ref: ID# 772352

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)