



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

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Ms. Tatiana Dennis
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OR2019-21073

Dear Ms. Dennis:

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# 778027.

The Ector County Independent School District (the "district"), which you represent, received a request for eleven categories of information pertaining to a specified individual. You state you have released some information. You state the district will withhold certain information pursuant to the Family Educational and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code and Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code and 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/sites/default/files/files/divisions/open-government/20060725-U-FERPA.pdf>. Open 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. See ORD 684.

Procedure. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the submitted information includes a police officer's body worn camera recordings. Body worn cameras are subject to chapter 1701 of the Occupations Code. Chapter 1701 provides the procedures a requestor must follow when seeking a body worn camera recording. Section 1701.661(a) provides:

A member of the public is required to provide the following information when submitting a written request to a law enforcement agency for information recorded by a body worn camera:

- (1) the date and approximate time of the recording;
- (2) the specific location where the recording occurred; and
- (3) the name of one or more persons known to be a subject of the recording.

Occ. Code § 1701.661(a). In this instance, the requestor does not give the requisite information pursuant to section 1701.661(a). As the requestor did not properly request the body worn camera recordings at issue pursuant to chapter 1701, our ruling does not reach this information and it need not be released.² However, pursuant to section 1701.661(b), a "failure to provide all the information required by Subsection (a) to be part of a request for recorded information does not preclude the requestor from making a future request for the same recorded information." *Id.* § 1701.661(b). We note the remaining video recordings consist of a surveillance camera video recordings. This information does not consist of body worn camera recordings. Therefore, the remaining information is not subject to chapter 1701 of the Occupations Code. Accordingly, we will address the district's arguments against disclosure of the remaining information.

Next, we note the submitted information includes completed criminal and internal affairs investigations 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 made confidential under the Act or "other law." Gov't Code § 552.022(a)(1). Although you seek to withhold this information under section 552.111 of the Government Code, this section is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product

²As we are able to make this determination, we need not address the argument against disclosure of this information.

privilege under section 552.111), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022 may not be withheld under section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure is “other law” that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We note the attorney work-product privilege is found at rule 192.5 of the Texas Rules of Civil Procedure. However, the Texas Rules of Civil Procedure are applicable only to “actions of a civil nature.” *See* TEX. R. CIV. P. 2. Thus, because the criminal investigation report pertains to a criminal case, rule 192.5 is not applicable to it, and the district may not withhold any portion of the completed criminal investigation report at issue on the basis of the attorney work-product privilege in Texas Rule of Civil Procedure 192.5. However, we will consider your assertion of the attorney work-product privilege under rule 192.5 for the completed internal affairs investigation at issue. Additionally, as information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider the district’s argument under section 552.108 for all of the information subject to section 552.022(a)(1).

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. Section 552.101 encompasses section 261.201(a) of the Family Code, which provides in relevant part:

(a) [T]he following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review, we find some of the remaining information was used or developed in an investigation of alleged or suspected child abuse or neglect. *See id.* §§ 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or has not had the disabilities of minority removed for general purposes), 261.201(1), (4) (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code). We note the district’s police department is an agency authorized to conduct investigations under chapter 261 of the Family Code. *See id.*

§ 261.103 (listing agencies that may conduct child abuse or neglect investigations). Accordingly, some of the information at issue is within the scope of section 261.201 of the Family Code. The district does not indicate its police department has adopted a rule that governs the release of this type of information. Therefore, we assume no such rule exists. Given that assumption, the district must withhold the information you indicated as well as the information we marked and indicated under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.³

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A); Open Records Decision No. 434 (1986). We note section 552.108 is generally not applicable to information that purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). You state the remaining responsive information pertain to a closed criminal case that did not result in a conviction or deferred adjudication. Based on your representations and our review, we conclude the information we have marked is subject to section 552.108(a)(2). However, we note the remaining information relates to a human resources investigation that is purely administrative in nature. As a result, we find you have failed to demonstrate the applicability of section 552.108(a)(2) to the remaining information at issue, and the district may not withhold any of the remaining information on that basis.

We note section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov't Code § 552.108(c). Section 552.108(c) refers to the basic information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Accordingly, with the exception of basic information, which must be released, the district may withhold the information we have marked under section 552.108(a)(2) of the Government 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 may be withheld under rule 192.5 only to the extent the information implicates the core work product aspect of the

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

work product 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 when the governmental body received the request for information, and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *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 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, 2017 (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 prong of the work product test requires the governmental body to show the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test may be withheld under rule 192.5, provided the information does not fall within the purview 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).

The district contends a portion of the remaining responsive information is protected by Texas Rule of Civil Procedure 192.5. Upon review, we find you have not demonstrated any of the information at issue consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative that were created for trial or in anticipation of trial. Therefore, the district may not withhold any of the remaining information under rule 192.5 of the Texas Rules of Civil Procedure.

In summary, because the requestor did not properly request the submitted body worn camera recordings pursuant to chapter 1701 of the Occupations Code, our ruling does not reach the body worn camera recordings at issue and the district is not required to release them in response to this request. The district must withhold the remaining information you indicated as well as the information we marked and indicated under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. With the exception of basic information, which must be released, the district may withhold the

information we have marked under section 552.108(a)(2) of the Government Code. The district must release the remaining information.

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,



Kimbell Kesling
Attorney
Open Records Division

KK/eb

Ref: ID# 778027

Enc. Submitted documents

c: Requestor
(w/o enclosures)