



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 1, 2020

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

OR2020-24763

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# 847150 (PIR# 43295).

The Texas Education Agency (the "TEA") received a request for information related to the requestor's certification. The TEA states it is releasing some of the requested information. The TEA states it has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).¹ The TEA claims the submitted information is privileged under Texas Rule of Civil Procedure 192.5. We have considered the exception the TEA claims and reviewed the submitted representative sample of information.²

¹ The 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 an adult student's 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 educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>

² We 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 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 submitted information is part of a completed investigation that is subject to section 552.022(a)(1). The TEA 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 TEA seeks to withhold the information under rule 192.5 of the Texas Rules of Civil Procedure. 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 address the TEA’s claim of the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the submitted information.

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.* 192.5; ORD 677 at 6-8. For this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

a) 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 b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORR 677 at 7.

Furthermore, if a requestor seeks a governmental body’s entire investigation file, the governmental body may assert the file is excepted from disclosure in its entirety because such a request implicates the work product aspect of the privilege. *See* ORR 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 submitted information consists of attorney work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. The TEA informs us the information at issue was created and compiled by attorneys, legal staff, and other TEA staff and representatives in anticipation of litigation. 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. Upon review, we find the TEA has demonstrated the information at issue constitutes attorney work product. We therefore conclude the TEA may withhold the submitted information under Texas Rule of Civil Procedure 192.5.

The TEA also asks this office to issue a previous determination that would permit it to withhold information pursuant to Texas Rule of Civil Procedure 192.5 without requesting a ruling from this office. Open Records Decision No. 673 (2001). We decline to issue such a previous determination at this time. Accordingly, 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Kelly McWethy
Assistant Attorney General
Open Records Division

KM/mo

Ref: ID# 847150

Enc. Submitted documents

c: Requestor
(w/o enclosures)