



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 2, 2016

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Mr. Richard A. Morris
Counsel for Austin Independent School District
Rogers Morris & Grover
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2016-26782

Dear Mr. Morris:

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 requests were assigned ID#s 636409 and 636414. We have combined these files and will consider the issues presented in this single ruling assigned ID# 636409.

The Austin Independent School District (the "district"), which you represent, received four requests from two different requestors for e-mail exchanges between several specified individuals during specified time periods.¹ You state you have no information responsive to portions of the requests.² You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of

¹We note the first requestor's request and the second requestor's first two requests for information were received on September 8, 2016. The second requestor's third request for information was received on September 13, 2016.

²The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

which is a representative sample.³ We have also received and considered comments from the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information is not responsive to one of the requests because it does not pertain to the requested e-mail exchanges. This ruling does not address the public availability of the non-responsive information, which we have marked, and the district need not release it in response to the request.

Next, you state some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-13550 (2016). In that ruling, we determined the district may withhold the information at issue under sections 552.103 and 552.107(1) of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the district may rely on Open Records Letter No. 2016-13550 as a previous determination and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we must address the requestors' claims the district failed to comply with the procedural obligations under the Act. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(d) of the Government Code, a governmental body must, within ten business days of receiving the request for information, provide the requestor with (1) a written statement the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general. *Id.* § 552.301(d). We note the district's ten-business-day deadlines for purposes of sections 552.301(b) and 552.301(d) were September 22, 2016 for the requests received on September 8, 2016 and September 27, 2016 for the request received on September 13, 2016. In correspondence to

³We 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.

this office, the second requestor informed us, and provided documentation showing, she did not receive copies of the requests for rulings from the district to this office in response to her three requests until October 24, 2016. Section 552.308 of the Government Code provides in pertinent part:

(a) When this subchapter requires a request, notice, or other document to be submitted or otherwise given to a person within a specified period . . . the requirement is met if the document is sent to the person by first class United States mail *properly addressed* with postage prepaid and:

- (1) it bears a post office cancellation mark indicating a time within that period; or
- (2) the person required to submit or otherwise give the document furnishes satisfactory proof that it was deposited in the mail within that period.

Id. § 552.308(a) (emphasis added). We note the district initially sent copies of the requests for rulings to the second requestor via an envelope postmarked on September 22, 2016. However, the envelope was improperly addressed and was eventually returned to the district. Upon the return of the improperly addressed envelope, the district again mailed copies of the requests for rulings to the second requestor in a properly addressed envelope which was postmarked on October 20, 2016. As noted above, however, the district was required to mail properly addressed copies of the ruling requests to the second requestor no later than September 22, 2016 for her first two requests and September 27, 2016 for her third request. Accordingly, we find the district has failed to meet the elements of timeliness established by section 552.308(a). Thus, we conclude the district failed to comply with section 552.301(d) of the Government Code regarding the second requestor's requests.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing the information is made confidential by another source of law or affects third-party interests. *See* ORD 630. We note the information responsive to the second requestor's requests is also responsive to the first requestor's request. Although the district asserts the information at issue in all four requests is excepted under sections 552.103 and 552.107 of the Government Code, these exceptions are discretionary and serve only to protect a governmental body's interests, and may be waived. As such, sections 552.103 and 552.107 do not constitute compelling reasons to withhold information

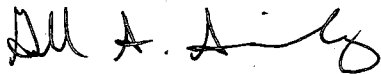
for purposes of section 552.302. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, in failing to comply with section 552.301 regarding the second requestor's requests, the district has waived its claims under sections 552.103 and 552.107 for the information at issue with respect to both requestors. *See* Gov't Code § 552.007 (prohibiting selective disclosure of information); Open Records Decision No. 463 at 1-2 (1987). Consequently, the district may not withhold any portion of the information at issue under section 552.103 or section 552.107 of the Government Code. As no other exceptions to disclosure have been raised, the district must release the information not subject to Open Records Letter No. 2016-13550 to both requestors.

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the district may rely on Open Records Letter No. 2016-13550 as a previous determination and withhold the identical information in accordance with that ruling. The district must release the information not subject to Open Records Letter No. 2016-13550 to both requestors.

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,



Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/eb

Ref: ID# 636409

Enc. Submitted documents

c: Requestor
(w/o enclosures)

AUG 14 2018

At 1:57 p M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-17-000031

AUSTIN INDEPENDENT SCHOOL DISTRICT, <i>Plaintiff,</i>	§	IN THE DISTRICT COURT OF
	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
KEN PAXTON, ATTORNEY GENERAL OF TEXAS, <i>Defendant.</i>	§	98th JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which Austin Independent School District (AISD) sought to withhold certain information. All matters in controversy between Plaintiff, AISD, and Defendant, Ken Paxton, Attorney General of Texas (Attorney General), have been resolved by settlement, a copy of which is attached hereto as Exhibit "A", and the parties agree to the entry and filing of an Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Texas Government Code section 552.325(c), the Attorney General sent a certified letter to each of the requestors, Ms. Sheryl Robinson and Ms. Patricia Jackson, on July 19, 2018, informing them of the setting of this matter on the uncontested docket on this date. The requestors were informed of the parties' agreement that AISD will withhold the information at issue. The requestors were also informed of their right to intervene in the suit to contest the withholding of this information. Verification of the certified mailing of this notification is attached to this motion.

Neither of the requestors have filed a motion to intervene.



After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

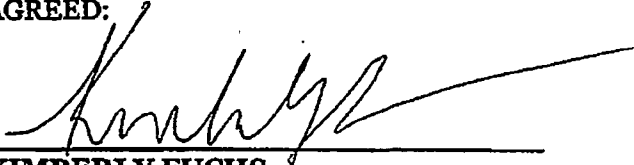
1. Pursuant to Texas Government Code section 552.107 and *Abbott v. City of Dallas*, 453 S.W.3d 580 (Tex. App.—Austin 2014), *aff'd by, Paxton v. City of Dallas*, 509 S.W.3d (Tex. Feb. 3, 2017), AISD may withhold the information at issue from both requestors;
2. All court cost and attorney fees are taxed against the parties incurring the same;
3. All relief not expressly granted is denied; and
4. This Agreed Final Judgment finally disposes of all claims that are the subject of this lawsuit between AISD and the Attorney General and is a final judgment.

SIGNED the 14th day of August, 2018.



PRESIDING JUDGE

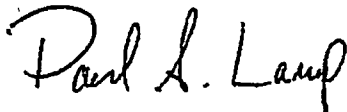
AGREED:



KIMBERLY FUCHS

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**ATTORNEYS FOR AUSTIN
INDEPENDENT SCHOOL DISTRICT**

A

CAUSE NO. D-1-GN-17-000031

AUSTIN INDEPENDENT SCHOOL DISTRICT, <i>Plaintiff,</i>	§	IN THE DISTRICT COURT OF
	§	
	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
KEN PAXTON, ATTORNEY GENERAL OF TEXAS, <i>Defendant.</i>	§	
	§	
	§	98th JUDICIAL DISTRICT

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made by and between Austin Independent School District (AISD) and Ken Paxton, Attorney General of Texas (the Attorney General). This Agreement is made on the terms set forth below.

Background

This is a Public Information Act (PIA) lawsuit, challenging Open Records Letter Ruling OR2016-26782, in which the Open Records Division of the Attorney General (ORD) required the release of the information at issue in this lawsuit because it determined AISD had failed to fully comply with Texas Government Code section 552.301. The Attorney General ruled that as a result of this deficiency, AISD was not permitted to withhold information to which it was claiming attorney-client privilege applied.

Before this lawsuit was filed, the Third Court of Appeals rendered its decision in *Abbott v. City of Dallas*, No. 03-13-00686-CV, 453 S.W.3d 580 (Tex. App.—Austin 2014), *pet. granted by, Paxton v. City of Dallas*, No. 15-0073 (Tex. Feb. 19, 2016). This decision held that the attorney-client privilege could be raised in the circumstances applicable here. The Texas Supreme Court affirmed the decision in *Paxton v. City of Dallas*, 509

S.W.3d (Tex. Feb. 3, 2017). Therefore, pursuant to the above-cited opinions, the parties wish to resolve this case without further litigation.

Texas Government Code section 552.325(c) allows the Attorney General to enter into settlement under which the information at issue in this lawsuit may be withheld.

Terms

For good and sufficient consideration, the receipt of which is acknowledged, the parties to this Agreement agree and stipulate that:

1. Pursuant to Texas Government Code section 552.107 and *Abbott v. City of Dallas*, 453 S.W.3d 580 (Tex. App.—Austin 2014), *aff'd by, Paxton v. City of Dallas*, 509 S.W.3d (Tex. Feb. 3, 2017), AISD may withhold the information at issue from both requestors.
2. The Attorney General agrees that he will also notify the requestors, as required by Texas Government Code section 552.325(c), of the proposed settlement and of their right to intervene to contest AISD's right to withhold the information.
3. A final judgment entered in this lawsuit after a requestor intervenes prevails over this Agreement to the extent of any conflict.
4. Each party to this Agreement will bear their own costs, including attorney fees relating to this litigation.
5. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement.
6. AISD warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully

understands it to be a compromise and settlement and release of all claims that AISD has against the Attorney General arising out of the matters described in this Agreement.

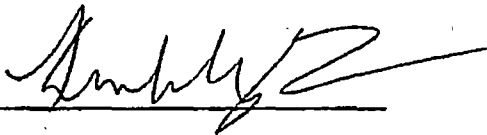
7. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against AISD arising out of the matters described in this Agreement.

8. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

AUSTIN INDEPENDENT SCHOOL
DISTRICT

KEN PAXTON, ATTORNEY GENERAL
OF TEXAS

By: 

By: 

Name: Dr. Paul Cruz

Name: Kimberly Fuchs

Title: Superintendent

Title: Assistant Attorney General,
Administrative Law Division

Date: July 18, 2018

Date: July 19, 2018