



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

June 6, 2017

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

Mr. Scott W. Thomas
Counsel for Arlington Independent School District
Eichelbaum Wardell Hansen Powell & Mehl, P.C.
5801 Tennyson Parkway, Suite 360
Plano, Texas 75024

OR2017-12312

Dear Mr. Thomas:

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# 660730.

The Arlington Independent School District (the "district"), which you represent, received a request for work orders and records pertaining to air quality during a specified time. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative sample of information.²

Initially, we note 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. 2017-12090 (2017). In that ruling, we determined the district must (1) withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law

¹Although you also raise section 552.101 of the Government Code, you have not provided any arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

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.

privacy; (2) withhold the information we marked under section 552.117(a)(1) of the Government Code if the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code; however, the marked cellular telephone number may be withheld only if a governmental body does not pay for the cellular telephone service; and (3) release the remaining information. 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 must rely on Open Records Letter No. 2017-12090 as a previous determination and withhold or release 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). To the extent the submitted information is not identical to the information responsive in Open Records Letter No. 2017-12090, we will address the submitted arguments against disclosure.

Section 552.103 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You claim the submitted information pertains to pending litigation involving the district. You state, and provide documentation showing, the district is a party to litigation concerning the information at issue. However, we note the submitted documentation reveals the lawsuit was filed after the date the district received the present request for information. Therefore, we find litigation was not pending on the date the district received this request. Accordingly, we find you have failed to demonstrate the district was involved in pending litigation relating to the information at issue at the time it received the present request for information. You also claim the submitted information pertains to anticipated litigation involving the district. You state, and provide documentation showing, an attorney filed a grievance with the district on behalf of his client prior to the date the district received the present request. However, you have not explained how the grievance process is considered to be litigation for the purposes of section 552.103. *See* Open Records Decision No. 588 (1991) (discussing factors used by attorney general in determining whether administrative proceeding not subject to Administrative Procedure Act may be considered to be litigation); *see also* Gov't Code § 552.301(e)(1) (requiring governmental body to explain applicability of raised exception). Further, you have not provided this office with evidence the requestor had taken any objective steps toward filing a lawsuit prior to the date the district received the request for information. *See* ORD 361. Thus, we find you have failed to establish the district reasonably anticipated litigation when it received the request for information. Accordingly, the district may not withhold any portion of the submitted information under section 552.103 of the Government Code.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."³ Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.147(a-1) of the Government Code provides, “[t]he social security number of an employee of a school district in the custody of the district is confidential.” Gov’t Code § 552.147(a-1). Thus, section 552.147(a-1) makes the social security numbers of school district employees confidential, without such employees being required to first make a confidentiality election under section 552.024 of the Government Code. *Id.* § 552.024(a-1) (school district may not require employee or former employee of district to choose whether to allow public access to employee’s or former employee’s social security number). Reading sections 552.024(a-1) and 552.147(a-1) together, we conclude section 552.147(a-1) makes confidential the social security numbers of both current and former school district employees. Accordingly, the district must withhold the social security number we marked under section 552.147(a-1) of the Government Code.

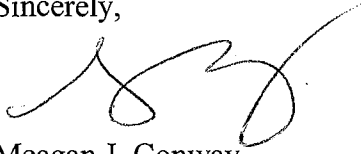
In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the district must rely on Open Records Letter No. 2017-12090 as a previous determination and withhold or release the identical information in accordance with that ruling. The district must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the social security number we marked under section 552.147(a-1) 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,

A handwritten signature in black ink, appearing to read 'Meagan J. Conway', written in a cursive style.

Meagan J. Conway
Assistant Attorney General
Open Records Division

MJC/sb

Ref: ID# 660730

Enc. Submitted documents

c: Requestor
(w/o enclosures)

DEC 20 2017

At 3:11 p M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-17-002723

ARLINGTON INDEPENDENT	§	IN THE DISTRICT COURT OF
SCHOOL DISTRICT,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	TRAVIS COUNTY, TEXAS
KEN PAXTON, ATTORNEY	§	
GENERAL OF TEXAS, and	§	
MEAGAN J. CONWAY, in her	§	
official capacity as Assistant	§	
Attorney General,	§	
<i>Defendants.</i>	§	200th JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

This is an open records lawsuit brought under the Texas Public Information Act (PIA), Texas Government Code chapter 552. All matters in controversy between Plaintiff Arlington Independent School District (the District) and Defendants Ken Paxton, Attorney General of Texas, and Meagan J. Conway, in her official capacity as Assistant Attorney General (collectively, "the Attorney General") have been resolved, and the Parties agree to the entry and filing of an agreed final judgment. *See* Exhibit A (Settlement Agreement).

Pursuant to Tex. Gov't Code § 552.325(d) the Court shall allow the requestor a reasonable period of time to intervene after the Attorney General attempts to notify the requestor of the proposed settlement. The Attorney General represents to the Court and the Court hereby takes judicial notice that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent notice by certified mail to each requestor's last known address on Oct. 3rd, 2017, providing reasonable notice of this setting and of each requestor's right to intervene in the suit. *See* Ex. B (proof of mailing). The requestors were informed of the proposed Settlement Agreement under which the District



may withhold the requested information as agreed upon by the Parties. The requestors were also informed of the right to intervene in this lawsuit to contest the withholding of the information. None of the requestors has informed the Attorney General of their intention to intervene and no plea in intervention has been filed.

After considering the agreement of the Parties and the law, the Court is of the opinion that entry of this Agreed Final Judgment is appropriate, disposing of all claims between the Parties in this suit.

THE COURT THEREFORE FINDS AND ORDERS THAT:

1. The District and the Attorney General have agreed that, in accordance with the PIA and under the facts presented, the information at issue in this suit is excepted from disclosure pursuant to Texas Government Code section 552.103 (hereinafter, the Excepted Information);

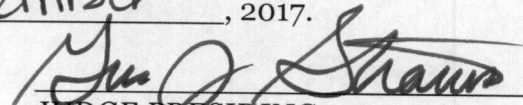
2. The District may withhold the Excepted Information described in Paragraph 1 of this order;

3. All court cost and attorney fees are taxed against the parties incurring the same;

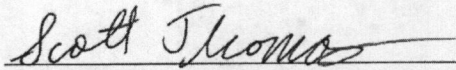
4. All relief not expressly granted is denied; and

5. This Agreed Final Judgment finally disposes of all claims between the District and the Attorney General in this cause and is a final judgment.

Signed this 20 day of December, 2017.

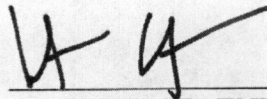

JUDGE PRESIDING

AGREED:



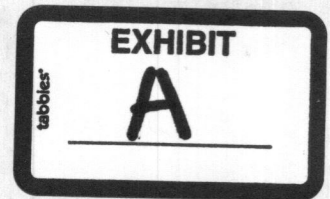
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ATTORNEY FOR DEFENDANTS



CAUSE NO. D-1-GN-17-002723

ARLINGTON INDEPENDENT	§	IN THE DISTRICT COURT OF
SCHOOL DISTRICT,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	
	§	TRAVIS COUNTY, TEXAS
KEN PAXTON, ATTORNEY	§	
GENERAL OF TEXAS, and	§	
MEAGAN J. CONWAY, in her	§	
official capacity as Assistant	§	
Attorney General,	§	
<i>Defendants.</i>	§	200th JUDICIAL DISTRICT

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made by and between Plaintiff Arlington Independent School District (the District) and Defendants Ken Paxton, Attorney General of Texas, and Meagan J. Conway, in her official capacity as Assistant Attorney General (collectively, “the Attorney General”). This Agreement is made on the terms set forth below.

BACKGROUND

The District received three written requests for information pursuant to the Texas Public Information Act (PIA). The requests sought numerous categories of information concerning a District property and several named individuals. Upon receiving each written request, the District sought an open records ruling from the Attorney General pursuant to Texas Government Code section 552.301. The Attorney General issued Open Records Letter Rulings OR2017-12090, OR2017-12312, and OR2017-13100 (the Letter Rulings) in response to the District’s requests. In each instance the rulings concluded, as is relevant to this lawsuit, that certain portions of the requested records were not excepted

from required disclosure and must be released to the requestors (the "Information at Issue").

The District disputed the Attorney General's determinations and filed suit to challenge the Letter Rulings pursuant to Texas Government Code section 552.324. Texas Government Code section 552.325(c) allows the Attorney General to enter into settlement under which the Information at Issue the may be withheld. The parties wish to resolve this matter without further litigation.

TERMS

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

1. The Information at Issue relates to litigation to which the District is a party and accordingly is excepted from disclosure pursuant to Tex. Gov't Code § 552.103.
2. The District may withhold the Information at Issue from the requestors.
3. The District and the Attorney General agree to the entry of an agreed final judgment, the form of which has been approved by each party's attorney. The agreed final judgment will be presented to the Court for approval, on the uncontested docket, with at least 21 days' prior notice to the requestors. This Agreement will be attached to the agreed final judgment as "Exhibit A."
4. Pursuant to Tex. Gov't Code Section 552.325(c), the Attorney General will notify the requestors of this Agreement and of each requestor's right to intervene to contest this Agreement and the Court's entry of any agreed final judgment in the case.
5. If any requestor intervenes to contest this Agreement, a final judgment entered in this lawsuit will prevail over the Agreement, to the extent of any conflict.
6. Each party to this Agreement will bear its own costs, including attorneys' fees relating to this litigation.
7. 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

be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to the Agreement.

8. The District 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 the District has against the Attorney General arising out of the matters described herein.
9. 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 the District arising out of the matters described in this Agreement.
10. 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.

ARLINGTON INDEPENDENT SCHOOL
DISTRICT

KEN PAXTON, ATTORNEY GENERAL OF
TEXAS, AND MEAGAN J. CONWAY, IN HER
OFFICIAL CAPACITY AS ASSISTANT
ATTORNEY GENERAL

By: 

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Date: 9/5/17

By: 

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Date: 9/26/17