



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

August 2, 2017

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

OR2017-17380

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# 669521.

The Arlington Independent School District (the "district"), which you represent, received a request for information pertaining to a specified grievance. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2017-12090 (2017), 2017-12312 (2017), and 2017-13100 (2017). We note the information that was at issue in Open Records Letter Nos. 2017-12090, 2017-12312, and 2017-13100 is currently the subject of pending litigation (the "pending litigation") between the district and the Office

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<sup>1</sup>Although you do not raise section 552.101 of the Government Code in your brief, we understand you to raise this exception based on your markings.

<sup>2</sup>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 that those records contain substantially different types of information than that submitted to this office.

of the Attorney General. See *Arlington Independent School District v. Ken Paxton, Attorney Gen. of Tex.*, No. D-1-GN-17-002723 (200th Dist. Ct., Travis County, Tex.). Accordingly, to the extent the submitted information is subject to the pending litigation, we will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public. To the extent the submitted information is not encompassed by the pending litigation, we will consider the submitted argument against disclosure.

Section 552.103 of the Government Code provides, in relevant 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). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of 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 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. See Open Records Decision No. 551 at 4 (1990).

You state, and provide documentation showing, prior to the district's receipt of the instant request, the district was a defendant in a lawsuit styled *Farr v. Arlington Independent School District*, Cause No. 236-291133-17, in the Judicial District Court of Tarrant County, Texas. Although, you inform us an order was entered by said court that granted the district's plea to the jurisdiction and dismissed the lawsuit as to the district, you also state the deadline for appeal has not yet passed as of the date the district received the instant request. Further, you explain, prior to the receipt of the instant request, the attorney for the plaintiff had expressed her intention to appeal the decision. Therefore, we agree litigation was pending on the date

the district received the present request for information. You also state the information at issue pertains to the substance of the lawsuit claims. Based on your representations and our review, we find the information at issue is related to the pending litigation. Therefore, to the extent the submitted information is not subject to the pending litigation between the district and the Office of the Attorney General, we conclude the district may withhold the information you marked under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects 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. However, we find you have not demonstrated any of the remaining information is highly intimate or embarrassing and not of legitimate concern to the public. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

In summary, to the extent the submitted information is subject to the pending litigation between the district and the Office of the Attorney General, we will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public. To the extent the submitted information is not subject to the pending litigation between the district and the Office of the Attorney General, we conclude the district may withhold the marked information under section 552.103 of the Government Code, and 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 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](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 "D. Michelle Case", with a stylized flourish at the end.

D. Michelle Case  
Attorney  
Open Records Division

DMC/sdk

Ref: ID# 669521

Enc. Marked documents

c: Requestor  
(w/o enclosures)