



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 18, 2017

Ms. Lindsey Aston
General Counsel
The Office of the Secretary of State
P.O. Box 12697
Austin, Texas 78711-2060

OR2017-21338

Dear Ms. Aston:

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# 676726.

The Office of the Secretary of State (the "secretary of state's office") received two requests from different requestors for all communications and records sent between the secretary of state's office and the United States Department of Justice or the Presidential Advisory Commission on Election Integrity in response to a specified request for voter information. The secretary of state's office states it has released some of the submitted information. The secretary of state's office claims some of the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions the secretary of state's office claims and reviewed the submitted information.

Section 552.103 of the Government Code provides in relevant part as follows:

- (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 has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is 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. *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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The secretary of state's office claims the information responsive to the second request is protected by section 552.103 of the Government Code. The secretary of state's office states, and provides documentation showing, a lawsuit styled *League of Women Voters of Texas v. Rolando Pablos, Secretary of State for the State of Texas*, Cause No. D-1-GN-17-003451, was pending against the secretary of state's office in the 98th District Court of Travis County, Texas, when the secretary of state's office received the second request for information. Therefore, we agree litigation was pending when the secretary of state's office received the second request. We also find the secretary of state's office has established the information responsive to the second request is related to the pending litigation for purposes of section 552.103(a). Therefore, the secretary of state's office may withhold the submitted information responsive to the second request under section 552.103(a) of the Government Code.

However, once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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. We note an individual's telephone number is generally not private information under common-law privacy. See Open Records Decision No. 554 at 3 (1990) (disclosure of person's name, address, or telephone number not invasion of privacy). Upon review, we find the secretary of state's office has not demonstrated any of the information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the secretary of state's office may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

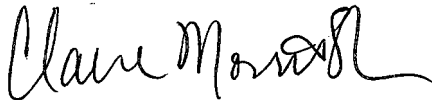
We also understand the secretary of state's office to assert a portion of the submitted information may be excepted from disclosure under section 552.101 of the Government Code in conjunction with the federal Freedom of Information Act ("FOIA"), chapter 552 of the United States Code. In Attorney General Opinion MW-95 (1979), this office determined FOIA does not apply to records held by an agency of the State of Texas or its political subdivisions. Furthermore, this office has stated in numerous opinions information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure under the Act merely because the same information is or would be confidential under one of FOIA's exemptions. See Open Records Decision Nos. 496 at 4 (1988), 124 at 1 (1976). However, if a federal agency shares its information with a Texas governmental agency, the Texas agency must withhold the information the federal agency determines to be confidential under federal law. See ORD 561 at 6-7; accord *United States v. Napper*, 887 F.2d 1528, 1530 (11th Cir. 1989) (finding documents FBI lent to city police department remained property of FBI and were subject to any restrictions on dissemination of FBI-placed documents). Upon review, we conclude the information at issue is contained in an e-mail that was not simply shared with the secretary of state's office by a federal employee, but rather is maintained by the secretary of state's office in relation to the official business of the secretary of state's office. See Gov't Code § 552.002(a)(1). Consequently, we conclude the information at issue may not be withheld under FOIA.

In summary, the secretary of state's office may withhold the submitted information responsive to the second request under section 552.103(a) of the Government Code. The secretary of state's office must release the remaining information to the first requestor.

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 "Claire Morris Sloan". The signature is fluid and cursive, with the first name "Claire" being the most prominent.

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/bw

Ref: ID# 676726

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)