



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 28, 2022

Ms. Desiree M. Duarte  
Counsel for the El Paso Independent School District  
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201 East Main Drive, Suite 1100  
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OR2022-08958

Dear Ms. Duarte:

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# 939003 (EPISD ORR Nos. W003573-010322, W003574-010322, and W003575-010322).

The El Paso Independent School District (the "district"), which you represent, received three requests from the same requestor for certain grievances and three specified categories of personnel records pertaining to the district's chief of police. You state the district does not have information responsive to portions of one of the requests.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.116, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of 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:

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<sup>1</sup> The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

(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 includes completed investigation reports that are subject to section 552.022(a)(1). The district must release the completed reports pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022(a)(1) under sections 552.103 and 552.116 of the Government Code. However, sections 552.103 and 552.116 are discretionary in nature and do not make information confidential under the Act. *See 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the district may not withhold the information subject to section 552.022(a)(1), which we have marked, under section 552.103 or section 552.116 of the Government Code. However, because sections 552.101, 552.117, and 552.137 of the Government Code make information confidential under the Act, we will consider the applicability of these exceptions to the information at issue.<sup>2</sup>

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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to the pending or anticipated

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<sup>2</sup> The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *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). *See* ORD 551 at 4.

This office has long held that for the purposes of section 552.103, “litigation” includes “contested cases” conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, “contested cases” conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute “litigation” for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (concerning hearing before Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* ORD 588.

You inform us, and the submitted documentation reflects, prior to the date the district received the instant requests for information, numerous district employees filed grievances with the district against a district employee. You explain that grievances filed with the district are “litigation” because the district follows administrative procedures in handling such disputes. You state the district’s grievance process is a multi-level hearing process wherein various hearing officers initially hear the grievance, and the district’s Board of Trustees ultimately hears the grievance. You explain that during these hearings the grievant is allowed to be represented by counsel, present evidence to the district, hear all adverse evidence, and cross-examine witnesses. You state the grievant must complete the district’s grievance process in order to exhaust their administrative remedies before they can appeal to either the Texas Commissioner of Education or a court of competent jurisdiction. Based on your representations and our review, we find you have demonstrated the district’s administrative procedure for disputes is conducted in a quasi-judicial forum and, thus, constitutes litigation for purposes of section 552.103. Thus, we determine the district was involved in pending litigation at the time it received the instant request. You also state the information at issue directly relates to the subject of this pending litigation. Based on your representations and our review, we find the information at issue is related to the pending litigation. Accordingly, section 552.103 of the Government Code is generally applicable to the information not subject to section 552.022 of the Government Code.

We note, however, the opposing parties have seen or had access to some of the information at issue. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open

Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the district may not withhold the information seen by the opposing party, which we have marked, under section 552.103 of the Government Code. However, the city may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.<sup>3</sup> We note the applicability of section 552.103 ends once the related litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.101 of the Government Code excepts from disclosure “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. This office has found information that either identifies or tends to identify a victim of sexual assault or other sex-related offense must be withheld under common-law privacy. See Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). This office has also concluded the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. See, e.g., Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee’s private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee’s job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee’s resignation ordinarily not private).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public’s interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held “the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.* Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, along with the statement of the accused. However, the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed

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<sup>3</sup> As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

statements must be withheld from disclosure. *See* ORDs 393, 339. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of victims and witnesses must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

You assert the remaining information is confidential under common-law privacy and the holding in *Ellen*. In *Ellen*, the court addressed the applicability of common-law privacy to information relating to an investigation of alleged sexual harassment in the workplace. We note most of the remaining information does not pertain to sexual harassment investigations in an employment context for the purposes of *Ellen*. Therefore, the district may not withhold this information under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. Nevertheless, we find one of the reports at issue pertains to a sexual harassment investigation and, thus, is subject to the ruling in *Ellen*. Upon review, we find the information at issue consists of an adequate summary of the investigation. The summary is not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summary identifying any victims and witnesses must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. Therefore, pursuant to section 552.101 in conjunction with common-law privacy and the holding in *Ellen*, the district must withhold the identifying information of the victim, which we have marked, within the adequate summary. However, you have failed to demonstrate any of the remaining information is subject to common-law privacy, and the district may not withhold it under section 552.101 on that basis.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a current or honorably retired peace officer, as well as information that reveals whether the current or honorably retired peace officer has family members, regardless of whether the current or honorably retired peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2); *see also id.* § 552.003(1-b)) (defining "honorably retired" for purposes of the Act). We note, for purposes of section 552.117, "family member" means a spouse, minor child, or adult child who resides in the person's home. *See id.* § 552.117(c). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the district must withhold the information we have marked under section 552.117(a)(2) of the Government Code. However, upon review, we find you have failed to demonstrate any of the remaining information is subject to section 552.117(a)(2), and the district may not withhold any of it on that basis.

We note the remaining information contains an e-mail address that is subject to section 552.137 of the Government Code. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address at issue is not

excluded by subsection (c). Therefore, the district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, with the exception of the information we have marked, the district may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The district must withhold the information we have marked within the adequate summary under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The district must withhold the information we have marked under section 552.117(a)(2) of the Government Code. The district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. 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 <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,

Gerald A. Arismendez  
Assistant Attorney General  
Open Records Division

GAA/mo

Ref: ID# 939003

Enc. Submitted documents

c: Requestor  
(w/o enclosures)