



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 12, 2022

Ms. Amanda M. Bigbee  
General Counsel  
Keller Independent School District  
305 Keller Parkway  
Keller, Texas 76248

OR2022-13717

Dear Ms. Bigbee:

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# 941657 (KISD ID: PIR0001992; TEA ID# 52308).

The Keller Independent School District (the "district") received a request for six categories of information pertaining to the district's library. The district states it has released some information to the requestor. The district claims the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.111, 552.116, and 552.136 of the Government Code. Additionally, the district states release of the submitted information may implicate the interests of the Texas Education Agency (the "TEA"). Accordingly, the district states it notified the TEA of the request for information and of the right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from the TEA. We have reviewed the submitted information and considered the submitted arguments.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses section 39.004 of the Education Code which provides, in part:

(e) Unless otherwise provided by law, all evidence collected by the [TEA] in connection with a special investigation, including witness statements and videos of agency interviews, are confidential and not subject to disclosure under [the Act], except that evidence described by this section may be disclosed:

- (1) to a person with a legitimate interest in the investigation; or
- (2) in connection with an administrative or other legal proceeding brought under this title.

Educ. Code § 39.004(e). The TEA states the information at issue was collected and prepared by the TEA's Division of Investigations in conjunction with a pending special investigation. The TEA also states the special investigation was authorized by section 39.003(a)(17) of the Education Code. *See id.* § 39.003 (listing circumstances in which the commissioner shall authorize investigations). Based on these representations and our review, we agree the information at issue constitutes evidence collected by the TEA in connection with a special investigation. Accordingly, the district must withhold Exhibit 8 under section 552.101 of the Government Code in conjunction with section 39.004(e) of the Education Code on behalf of the TEA.<sup>1</sup>

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). 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 (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

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<sup>1</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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”). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). 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 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).

The district states, and provides supporting documentation showing, prior to its receipt of the instant request, the district received a letter from an attorney alleging claims against the district. The district states the attorney alleges the district violated both the Texas Open Meetings Act and the attorney’s client’s Fourteenth Amendment due process rights. In the letter, the attorney demands the district preserve all documents and data pertaining to a certain book challenge committee. The attorney further states in the letter that he will pursue all civil remedies against the district if his client’s concerns are not addressed. Thus, the district states, on the date it received the request for information, the district reasonably anticipated litigation to which the district would be a party. Based on these representations and our review, we find the district reasonably anticipated litigation on the date the request was received. The district also represents, and we agree, the information at issue is related to the anticipated litigation for purposes of section 552.103. Accordingly, the district may withhold Exhibit 2 under section 552.103 of the Government Code.<sup>2</sup>

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 or anticipated 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).

In summary, the district must withhold Exhibit 8 under section 552.101 of the Government Code in conjunction with section 39.004(e) of the Education Code on behalf of the TEA. The district may withhold Exhibit 2 under section 552.103 of the Government Code.

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<sup>2</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this 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/be

Ref: ID# 941657

c: Requestor

1 Third Party