



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 29, 2022

Mr. S. Anthony Safi
Counsel for the El Paso Independent School District
Mounce, Green, Myers, Safi, Paxson & Galatzan, PC
P.O. Box 1977
El Paso, Texas 79999-1977

OR2022-36800

Dear Mr. Safi:

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# 987017 (EPISD ORR # W003936-082422)]

The El Paso Independent School District (the "district"), which you represent, received a request for communications between particular individuals pertaining to specified subjects during a stated time period.¹ You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.² We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we understand the requestor to contend the district failed to comply with section 552.301 of the Government Code in seeking a decision from this office. *See id.* § 552.301.

¹ The district states it sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² 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.

Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). Pursuant to section 552.301(d), the governmental body must provide the requestor, within ten business days after the date of its receipt of the request for information, a statement the governmental body has asked for a decision from the attorney general and a copy of the governmental body's written communication to the attorney general asking for a decision. *See id.* § 552.301(d). Further, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents *See id.* § 552.301(e). Section 552.301(e-1) provides a governmental body shall send a copy of its comments to the requestor not later than fifteen business days after receiving the written request and must redact any information disclosing the substance of the requested information from the copy of the comments provided to the requestor. *See id.* § 552.301(e-1).

The district states it received the clarified request for information on August 29, 2022. You state the district was closed on September 5, 2022. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the ten- and fifteen-business-day deadlines under sections 552.301(b) and 552.301(e) were September 13, 2022, and September 20, 2022, respectively. The envelopes in which the district provided the information required by sections 552.301(b) and 552.301(e) to this office are postmarked September 13, 2022, and September 20, 2022, respectively. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). We note the requestor was copied on each of these communications. We also note the requestor, in his correspondence to our office, has included copies of the information required by subsections 552.301(d) and 552.301(e-1), which he states he received from the district. Accordingly, we conclude the district complied with the procedural requirements mandated by section 552.301 of the Government Code. Thus, we will address the district's argument against disclosure of the submitted information.

Section 552.103 of the Government Code provides, in part, the following:

(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.

Id. § 552.103(a), (c). A 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 (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. *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.

This office has long held “litigation,” for purposes of section 552.103, includes “contested cases” conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336, 301 (1982). 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* Open Records Decision No. 588 (1991).

You state, and submit documentation demonstrating, prior to the district’s receipt of the instant request, a grievance was filed with the district against a district employee pursuant to district policy. You explain the grievance filed with the district is “litigation” in that the district follows administrative procedures in handling such disputes. You inform us the district’s grievance process is a multi-level hearing process wherein the district’s Board of Trustees hear the grievance. We understand the grievant is allowed to be represented by counsel and may present evidence during these administrative proceedings. Additionally, you inform us the grievant must complete the district’s grievance process before he or she can appeal to either the Texas Commissioner on Education or a court of competent jurisdiction. Based upon your representations and our review, we find the district’s administrative procedure for grievances, as described above, is conducted in a quasi-judicial forum and constitutes litigation for purposes of section 552.103. Thus, we determine the district was involved in pending litigation at the time it received the present request for information. Based upon these representations, we find you have demonstrated the district was a party to litigation that was pending or reasonably anticipated on the date the district received the request for information. We further agree the information at issue is related to the pending or anticipated litigation for purposes of section 552.103. Accordingly, the district may withhold the submitted information 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that

has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/pt

Ref: ID# 987017

Enc. Submitted documents

c: Requestor
(w/o enclosures)