



Jacob Woolston
Staff Attorney

October 12, 2021

**via First Class U.S. Mail and
CERTIFIED MAIL/RETURN RECEIPT REQUESTED
7018 3090 0000 4517 0784**

The Honorable Ken Paxton
Attorney General of Texas
Office of the Attorney General
300 W. 15th St., 11th Floor
Austin, Texas 78701

ATTN: Open Records Division

Re: RRISD / Request for Public Information Determination - TPIA 2022-131 – 15-day Letter

Dear Attorney General Paxton:

Round Rock Independent School District (“RRISD”) previously submitted, on October 5, 2021, a request for authorization to withhold certain information that the District believes is not subject to and/or is excepted from disclosure under the Public Information Act.

The District received a request for public information via email on September 21, 2021¹ from Robert Montoya for all communications received by any and all school board members on July 14, 2021. The 10th business day from the date of receipt of is October 5, 2021. The 15th business day from the date of receipt is October 12, 2021.

REQUEST FOR DECISION PURSUANT TO GOVERNMENT CODE §552.301

The information that requires a determination from your office is being submitted under this cover.² By copy of this letter, RRISD hereby provides notice to the Requestor that we have requested an opinion from your office on whether the requested information is public under the Public Information Act. This request is being submitted pursuant to Texas Government Code Section 552.301 and the identified exemptions herein.

Any information that we determine to be public information will be submitted to the Requestor upon receipt of any required payment.

¹ Exhibit 1: Public Information Request

² Exhibit 2: Documentation for review

EXEMPTION FROM DISCLOSURE PURSUANT TO GOVERNMENT CODE §552.101

A. Section 552.101: Confidential Information

Section 552.101 of the Government Code provides as follows:

Information is excepted from [required public disclosure] if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

This section makes clear that the Public Information Act does not mandate the disclosure of information that other law requires be kept confidential. Section 552.352(a) states: "A person commits an offense if the person distributes information considered confidential under the terms of this chapter." A violation under section 552.352 is a misdemeanor constituting official misconduct. In its discretion, a governmental body may release to the public information protected under the Act's exceptions to disclosure but not deemed confidential by law. On the other hand, a governmental body has no discretion to release information deemed confidential by law. Because the Act prohibits the release of confidential information and because its improper release constitutes a misdemeanor, the attorney general may raise section 552.101 on behalf of a governmental body, although the attorney general ordinarily will not raise other exceptions that a governmental body has failed to claim.

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. The types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Indus. Found. Id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). Your office has determined other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

This section also includes constitutional privacy, protecting two types of interests. The first is the interest in independence in making certain important decisions relating to the "zones of privacy" pertaining to marriage, procreation, contraception, family relationships, and child rearing and education the United States Supreme Court has recognized. *See Fado v. Coon*, 633 F.2d 1172 (5th Cir. 1981); Open Records Decision No. 455 at 3-7 (1987). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual's privacy interest against the public's interest in the information. *See id.* at 7. Constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 8 (*quoting Ramie*, 765 F.2d at 492).

The information marked confidential under §552.101 clearly falls within the doctrine of doctrine of common-law privacy and constitutional privacy and should be excepted from disclosure.

EXEMPTION FROM DISCLOSURE PURSUANT TO GOVERNMENT CODE §552.103

Section 552.103(a) of the Act, commonly referred to as the “litigation exception,” excepts from required public disclosure:

[I]nformation 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.

Section 552.103(a) was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery used in litigation. This exception enables a governmental body to protect its position in litigation “by forcing parties seeking information relating to that litigation to obtain it through discovery” procedures. Section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. As such, section 552.103 does not make information confidential for the purposes of section 552.022. Further, a governmental body waives section 552.103 by failing to comply with the procedural requirements of section 552.301.

1. Governmental Body’s Burden

For information to be excepted from public disclosure by section 552.103(a), (1) litigation involving the governmental body must be pending or reasonably anticipated and (2) the information must relate to that litigation. Therefore, a governmental body that seeks an attorney general decision has the burden of clearly establishing both prongs of this test.

For purposes of section 552.103(a), a contested case under the Administrative Procedure Act (APA), Government Code chapter 2001, constitutes “litigation.” Questions remain regarding whether administrative proceedings not subject to the APA may be considered litigation within the meaning of section 552.103(a). In determining whether an administrative proceeding should be considered litigation for the purpose of section 552.103, the attorney general will consider the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Section 552.103(a) requires concrete evidence that litigation is realistically contemplated; it must be more than conjecture. The mere chance of litigation is not sufficient to trigger section 552.103(a). The fact that a governmental body received a claim letter that it represents to the attorney general to be in compliance with the notice requirements of the Texas Tort Claims Act, Civil Practice and Remedies Code chapter 101, or applicable municipal ordinance, shows that litigation is reasonably anticipated. If a governmental body does not make this representation, the claim letter is a factor the attorney general will consider in determining from the totality of the circumstances presented whether the governmental body has established that litigation is reasonably anticipated.

In previous open records decisions, the attorney general had concluded that a governmental body could claim the litigation exception only if it established that withholding the information was necessary to protect the governmental body's strategy or position in litigation. However, Open Records Decision No. 551 (1990) significantly revised this test and concluded that the governmental body need only establish the relatedness of the information to the subject matter of the pending or anticipated litigation. Therefore, to meet its burden under section 552.103(a) in requesting an attorney general decision under the Act, the governmental body must identify the issues in the litigation and explain how the information relates to those issues. When the litigation is actually pending, the governmental body should also provide the attorney general a copy of the relevant pleadings.

2. Only Circumstances Existing at the Time of the Request

Subsection (c) of section 552.103 provides as follows:

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.

Consequently, in determining whether a governmental body has met its burden under section 552.103, the attorney general or a court can only consider the circumstances that existed on the date the governmental body received the request for information, not information about occurrences after the date of the request for information.

3. Temporal Nature of Section 552.103

Generally, when parties to litigation have inspected the records pursuant to court order, discovery, or through any other means, section 552.103(a) may no longer be invoked. In addition, once litigation is neither reasonably anticipated nor pending, section 552.103(a) is no longer applicable. Once a governmental body has disclosed information relating to litigation, the governmental body is ordinarily precluded from invoking section 552.103(a) to withhold the same information. This is not the case, however, when a governmental body has disclosed information to a co-defendant in litigation, where the governmental body believes in good faith that it has a constitutional obligation to disclose it.

4. Scope of Section 552.103

Section 552.103 applies to information that relates to pending or reasonably anticipated litigation, which is a very broad category of information. The protection of section 552.103 may overlap with that of other exceptions that encompass discovery privileges. However, the standard for proving that section 552.103 applies to information is the same regardless of whether the information is also subject to a discovery privilege.

For example, information excepted from disclosure under the litigation exception may also be subject to the work product privilege. However, the standard for proving that the litigation exception applies is wholly distinct from the standard for proving that the work product privilege applies. The work product privilege is incorporated into the Act by section 552.111 of the

Government Code, not section 552.103. If both section 552.103 and the work product privilege could apply to requested information, the governmental body has the discretion to choose to assert either or both of the exceptions. However, the governmental body must meet distinct burdens depending on the exception it is asserting. Under section 552.103, the governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Under the work product privilege, the governmental body must demonstrate that the requested information was created for trial or in anticipation of civil litigation by or for a party or a party's representative.

The Attorney General has stated that a pending EEOC complaint indicates litigation is reasonably anticipated, Exhibit #3. *See* Open Records Decision Nos. 386 (1983); 336 (1982). A portion of the information requested to be withheld specifically mentions a pending EEOC complaint and has not been previously released to the opposing party or the public. Therefore, the information should be withheld. *See* Open Records Decision Nos. 349, 320 (1982); Open Records Decision No. 436 (1986).

Conclusion

We respectfully request that this request for information be reviewed for a determination by your office to protect any and all information that is deemed excepted from disclosure under the Public Information Act.

If you have any questions or need additional information, please feel free to contact me at 512.464.5451.

Sincerely,



Jacob Woolston
Staff Attorney
Round Rock ISD

Enclosure(s)

cc: *Mr. Robert Montoya*
Via email: rmontoya@texasscorecard.com
w/o Enclosures