



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 10, 2016

Mr. John R. Adamo  
Associate General Counsel  
Texas Department of Family and Protective Services  
Department Mail Code E611  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2016-10566

Dear Mr. Adamo:

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# 609783 (DFPS ORR No. 02242016W9T).

The Texas Department of Family and Protective Services (the "department") received a request for e-mails between the requestor and four department employees for specified time periods. You state the department will withhold information pursuant to the previous determination issued in Open Records Letter No. 2003-5590 (2003).<sup>1</sup> You also state the department will redact information protected by section 552.117(a) of the Government Code pursuant to section 552.024 of the Government Code.<sup>2</sup> You claim the submitted information is exempted from disclosure under sections 552.101 and 552.103 of the Government Code.

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<sup>1</sup>Open Records Letter No. 2003-5590 is a previous determination authorizing the department to withhold, under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code, the records concerning an investigation of an allegation of abuse or neglect of a child and the records used or developed in providing services as a result of such an investigation, unless the department's rules permit the department to release requested records to a particular requestor.

<sup>2</sup>Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024.

We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Section 552.103(a), the “litigation exception,” excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The department has the burden of providing relevant facts and documents to show that 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, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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 department must meet both prongs of this test for information to be excepted under section 552.103(a).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has found a pending complaint with the Equal Employment Opportunity Commission (“EEOC”) indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

The department submitted information which establishes, prior to the department’s receipt of the request for information, the requestor, a former employee, filed a discrimination complaint with the EEOC against the department. The department states the EEOC issued a right-to-sue letter prior to the department’s receipt of the request for information and the submitted documentation reflects this letter was issued on October 28, 2015. However, we note the ninety-day period in which the complainant has a right to sue had expired when the department received the request. The department has not informed us the former employee filed such a suit within the ninety-day time limit. Additionally, the department has not informed us, and we are unable to determine, the ninety-day time period was ongoing on the date the department received the request. *See* Gov’t Code § 552.301 (e)(1)(A) (governmental body must provide comments explaining why exceptions raised should apply to information requested). Furthermore, the department has not demonstrated any party had taken concrete steps toward filing litigation when the department received the request for information. Thus, we conclude the department failed to demonstrate it reasonably anticipated litigation when it received the request for information. Therefore, the department may not withhold any portion of the requested information under section 552.103(a) of the Government Code.

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<sup>3</sup>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.

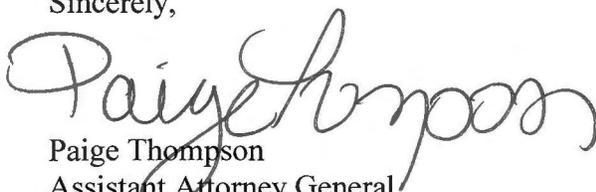
Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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 established. *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 also found common-law privacy generally protects the identifying information of child victims of abuse or neglect. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 261.201. Upon review, we find the information we marked satisfied the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find none of the remaining information is highly intimate or embarrassing information and of no legitimate public interest, and it may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department 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 [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Paige Thompson  
Assistant Attorney General  
Open Records Division

PT/dls

Ref: ID# 609783

Enc. Submitted documents

c: Requestor  
(w/o enclosures)