CAUSE NO. D-1-GN-16-001249

FOLLINS, CRAIG, *Plaintiff*,	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
KEN PAXTON, ATTORNEY GENERAL OF TEXAS, and ALAMO COMMUNITY COLLEGE DISTRICT, *Defendants*.	§	261st JUDICIAL DISTRICT

DEFENDANT ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant Ken Paxton, Attorney General of Texas (the Attorney General), files Defendant Attorney General's Motion for Summary Judgment, seeking a final judgment that declares the information at issue in this lawsuit to be subject to disclosure in accordance with three Attorney General open records letter rulings.

I. STATEMENT OF THE CASE

This is a lawsuit brought under the Texas Public Information Act (the PIA), ch. 552 of the Texas Government Code, in which Plaintiff Craig Follins (Plaintiff or Follins) challenges Attorney General Open Records Letter Rulings OR2016-04392, OR2016-06849, and OR2016-08233 (letter rulings), each of which was issued to Defendant Alamo Community College District (the District). *See* Tex. Gov't Code § 552.325. The District received three requests under the PIA for various records relating to Plaintiff, including a copy of a specified separation agreement and certain correspondence. Pl.'s Pet. ¶ 4.06. Plaintiff challenges the Attorney General's determination that a portion of the information responsive to the requests (the "information at issue") is not excepted from

required public disclosure under section 552.102 of the Government Code and must be released by the District. Pl.'s Pet. ¶¶ 6.01–.04; *see* Ex. A–C (letter rulings).

Because Plaintiff has failed to demonstrate the information at issue is excepted from required public disclosure, the Court should grant Defendant Attorney General's motion and order the information at issue be released to the requestors in accordance with the Attorney General's letter rulings.

II. GROUND

The information at issue is neither confidential under section 552.102 of the Government Code nor otherwise excepted from required public disclosure pursuant to any recognized privacy interest held by Plaintiff.

III. EXHIBITS IN SUPPORT

The Attorney General relies on the following exhibits:

Exhibit A – Attorney General Letter Ruling OR2016-04392;

Exhibit B – Attorney General Letter Ruling OR2016-06849;

Exhibit C – Attorney General Letter Ruling OR2016-08233;

Exhibit D – Information at issue (to be submitted for *in camera* review).

IV. STATEMENT OF FACTS

Between November of 2015 and January of 2016, the District received three open records requests for certain employment records pertaining to Follins, the former president of the District's Northeast Lakeview College. Specifically, the requested records concern Follins' employment separation agreement with the District. In each instance the District declined to release the requested information and instead sought an open records ruling from the Attorney General, asserting the requested information was excepted from required disclosure. In each instance the District also notified Follins of

the request for information and of his opportunity to submit to the Attorney General comments regarding why the requested information should be withheld or released. *See* Tex. Gov't Code § 552.304. Following each request, Follins submitted comments to the Attorney General arguing the requested records should not be released because the records were subject to a confidentiality agreement or otherwise allegedly implicated Follins' privacy rights.

The Attorney General issued the letter rulings in response to the District's requests, resulting in the following determinations:

OR2016-04392 None of the information for which the District or Follins sought protection is excepted from required disclosure under section 552.101 of the Government Code in conjunction with common-law privacy or under section 552.102(a) of the Government Code. Ex. A.

OR2016-06849 None of the information for which the District and Follins sought protection is excepted from required disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Ex. B. The Attorney General further noted a governmental body cannot by agreement protect information otherwise subject to required disclosure under the PIA. *Id*. However, the Attorney General marked portions of the requested records as confidential under section 552.117 of the Government Code, assuming the employee in question had previously elected to keep such categories of information confidential. *Id*.

OR2016-08233 The District must release any previously requested information in accordance with letter ruling OR2016-06849. Ex. C. The District may withhold a portion of the requested records subject to the attorney-client privilege under section 552.107 of the Government Code, and must withhold certain e-mail addresses marked by the Attorney General under section 552.137 of the Government Code. *Id*.

Accordingly, each letter ruling held that portions of the requested information for which Follins sought protection were not excepted from required disclosure and must be released by the District to the requestors. Follins filed suit to challenge the Attorney General's determinations. *See* Tex. Gov't Code § 552.325.

V. SUMMARY JUDGMENT

A. Standard of Review

Summary judgment is required if the moving party, through affidavits, pleadings, discovery responses, and other records, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a; *see City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); *Bachler v. Rosenthal*, 798 S.W.2d 646, 648 (Tex. App.—Austin 1990, writ denied). A defendant seeking summary judgment must negate as a matter of law at least one element of each of the plaintiff's theories of recovery, or plead and prove as a matter of law each element of an affirmative defense. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). If the defendant establishes its right to summary judgment, the plaintiff must then raise a fact issue to avoid dismissal. *Id*.

In deciding whether there is a disputed material fact issue, evidence favorable to the non-movant will be taken as true. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548–49 (Tex. 1985). When both parties have filed motions for summary judgment, "each party bears the burden of establishing that it is entitled to judgment as a matter of law." *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 322 (Tex. App.—Austin 2002, no pet.).

The purpose of rule 166a is to provide a procedure for disposing of a case when no genuine issues of fact exist, and only questions of law are involved. *Totman v. Control Data Corp.*, 707 S.W.2d 739, 742 (Tex. App.—Fort Worth 1986, no writ). One of the functions of summary judgment is also "to eliminate patently unmeritorious claims and

defenses." *Jaso v. Travis Cnty. Juvenile Bd.*, 6 S.W.3d 324, 328 (Tex. App.—Austin 1999, no pet.) (following *Swilley v. Hughes*, 488 S.W.2d 64, 68 (Tex. 1972)). Matters of statutory construction are generally legal issues. *Dallas Morning News*, 22 S.W.3d at 357.

Whether information is subject to the PIA and whether an exception to disclosure applies to the information are questions of law. *Id.*; *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 163 (Tex. App.—Austin 2001, no pet.). "The questions for each category of information . . . are: Is the information public under [the PIA]? If so, has the constitution, a statute, or a judicial decision expressly declared it confidential? These are questions of law." *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 674 (Tex. 1995). Under the PIA, it is the plaintiff's burden to prove that an exception to public disclosure applies to the information at issue. *See City of Fort Worth v. Cornyn*, 86 S.W.3d at 323; *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157.

A defendant may "move with or without supporting affidavits for a summary judgment in his favor as to all or any part" of a claim against him. Tex. R. Civ. P. 166a(b). A defendant is entitled to summary judgment if he conclusively negates at least one of the essential elements of a plaintiff's cause of action. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). "Summary judgments must stand on their own merits, and the nonmovant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right." *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d at 678. Rule 166a expressly requires that issues to defeat the motion must be set out in writing to the court. Tex. R. Civ. P. 166a(c). While pleadings do not constitute summary judgment evidence, they may constitute judicial admissions and can be used against a party when appropriate. *Trunkline LNG Co. v. Trane Thermal Co.*, 722 S.W.2d 722, 724 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). "A court cannot grant

summary judgment on grounds that were not presented." *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 204 (Tex. 2002). "Granting a summary judgment on a claim not addressed in the summary judgment motion . . . is, as a general rule, reversible error." *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) (citing *Chessher v. Sw. Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983) (per curiam)).

B. The Public Information Act

The PIA places the public's interest in obtaining public information above the interest of a governmental body or interested party in denying access to the information:

> Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees.

Tex. Gov't Code § 552.001(a). By the PIA's design, virtually all information held by a governmental body is presumed to be open and subject to required disclosure unless an express exception to disclosure applies. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648, 663 (Tex. App.—Austin 2006, no pet.). A governmental body or other interested party seeking to prevent the disclosure of requested information bears the burden of establishing the applicability of an established exception to required public disclosure. *See Thomas v. Cornyn*, 71 S.W.3d 473, 480–81 (Tex. App.—Austin 2002, no pet.); *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157. As noted above, whether information is subject to the PIA and whether an exception to disclosure applies are questions of law. *Dallas Morning News*, 22 S.W.3d at 357; *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 163; *A & T Consultants*, 904 S.W.2d at 674. "[T]he burden to produce the disputed information, and to preserve it of record for the appeal, lies with the

governmental body seeking to assert an exception to the [PIA]." *Dominguez v. Gilbert*, 48 S.W.3d 789, 795 (Tex. App.—Austin 2001, no pet.).

The question in an open records case is always the same, regardless of the cause of action: is the information subject to an exception to disclosure? *City of Fort Worth v. Cornyn*, 86 S.W.3d at 323; *see also Dominguez*, 48 S.W.3d at 793. The PIA is to be "liberally construed in *favor* of granting a request for information." Tex. Gov't Code § 552.001(b) (emphasis added); *see Dallas Morning News*, 22 S.W.3d at 356; *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157. "The practical effect of a statutory directive for liberal construction of an act is that close judgment calls are to be resolved in favor of the stated purpose of the legislation." *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 552 (Tex. App.—Austin 1983, writ ref'd n.r.e.). "Exceptions to the disclosure requirement of the PIA are narrowly construed." *Tex. State Bd. of Chiropractic Exam'rs v. Abbott*, 391 S.W.3d 343, 347 (Tex. App.—Austin 2013, no pet.) (citing *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157). "The Open Records Act's core provision provides that the public is entitled to information 'collected, assembled, or maintained by a governmental body.'" *Holmes v. Morales*, 924 S.W.2d 920, 922 (Tex. 1996) (referring to section 552.021). The PIA does not authorize withholding or limiting the availability of public information except as expressly provided. Tex. Gov't Code § 552.006.

"[T]he Legislature has imposed on the [Attorney General] the duty to provide written opinions to government entities that seek to withhold information requested under the Act." *Doe v. Tarrant Cnty. Dist. Attorney's Office*, 269 S.W.3d 147, 152 (Tex. App.—Fort Worth 2008, no pet.). Although not binding, courts give due consideration to Attorney General decisions, especially in cases involving the PIA. *Rainbow Grp. Ltd. v. Tex. Emp't Comm'n*, 897 S.W.2d 946, 949 (Tex. App.—Austin 1995, writ denied); *accord*

Arlington Indep. Sch. Dist., 37 S.W.3d at 159; *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.) (Attorney General's construction of the Act has great weight). The Texas Supreme Court has concluded an agency's interpretation of a statute it is charged with enforcing is entitled to "serious consideration," so long as the construction is reasonable and does not conflict with the statute's language. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011). Attorney General decisions have been afforded even greater weight when the Legislature has had opportunity to address the Attorney General's construction of the Act but has declined to do so. *City of Fort Worth v. Cornyn*, 86 S.W.3d at 328–29.

VI. ARGUMENT

THE INFORMATION AT ISSUE IS NEITHER CONFIDENTIAL UNDER SECTION 552.102 OF THE GOVERNMENT CODE NOR OTHERWISE EXCEPTED FROM REQUIRED PUBLIC DISCLOSURE PURSUANT TO ANY RECOGNIZED PRIVACY INTEREST HELD BY PLAINTIFF.

Follins claims the information at issue is excepted from disclosure under section 552.102 of the Government Code. Pl.'s Pet. ¶¶ 6.01–.04. Follins further generally alleges the information at issue should be withheld pursuant to his alleged privacy interests. *Id*. But the information at issue does not fall into a recognized category of protected information and Plaintiff has not otherwise met his burden of demonstrating the applicability of any express exception to required disclosure of information requested under the PIA. Accordingly, the Court should grant the Attorney General's motion.

A. The information at issue is not confidential under section 552.102 of the Government Code because its release would not constitute a clearly unwarranted invasion of personal privacy.

Section 552.102 makes confidential certain information in a public employee's personnel file, and reads in relevant part as follows:

> CONFIDENTIALITY OF CERTAIN PERSONNEL INFORMATION. (a) Information is excepted from the requirements of [the PIA] if it is information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter. The exception to public disclosure created by this subsection is in addition to any exception created by Section 552.024. Public access to personnel information covered by Section 552.024 is denied to the extent provided by that section.

Tex. Gov't Code § 552.102(a).[1] The Texas Supreme Court has held applicability of section 552.102(a) is determined by applying a balancing test that weighs an individual's privacy interest against preservation of the public's right to government information. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 341–44 (Tex. 2010) (citing *Dep't of Air Force v. Rose*, 425 U.S. 352 (1976)). Once an employee's interest in the protection of personal information is determined to be "nontrivial," that privacy interest must be weighed against the public's interest in accessing the information; that is, the court should determine whether release of the information would shed light on official government actions. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d at 346–48 (holding public employees have nontrivial privacy interest in dates of birth and release of such information would shed little light on government actions).

[1] Section 552.024 concerns the release of a public employee's address and telephone number and is not at issue here.

Follins has failed to demonstrate he has a nontrivial privacy interest in the information at issue, which consists of a public employee's negotiated separation agreement with a public employer and correspondence relating to that agreement and to the public employee's job performance. Ex. D (information at issue). The Texas Supreme Court has thus far found section 552.102 to apply only to a public employee's date of birth. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d at 346. To the extent section 552.102 protects other types of information within a public employee's personnel file, however, Follins has not demonstrated he holds a "nontrivial privacy interest" in the information at issue. *Id*. (quoting *U.S. Dept. of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 501 (1994)). In *Texas Comptroller*, the Court noted that concerns over the threat of identity theft "have led courts to conclude that birth dates implicate substantial privacy interests." 354 S.W.3d at 345. The Court concluded "personal information about employees that does not shed light on their official actions would not further the purpose of the [PIA]." *Id*. at 346. But Follins has made no such showing here.

Moreover, any minimal privacy interest Follins might claim in this information is outweighed by the public's interest in the information. The records involve the expenditure of District funds, "shed light" on the District's official actions, and relate to the official acts of public employees. *Id*.; *see also* Tex. Gov't Code § 552.001(a) (public entitled "to complete information about the affairs of government and the official acts of public officials and employees"). Consequently the Court should reject Plaintiff's claim and order the information at issue be released in accordance with the Attorney General's letter rulings.

B. The information at issue is not protected by the doctrine of common-law privacy because it does not consist of information that is highly intimate or embarrassing and not of legitimate public interest.

To the extent Plaintiff's petition is understood to raise the doctrine of common-law privacy, such claim must also fail. Though common-law privacy offers broader protection than has been recognized under section 552.102, Follins has not demonstrated the information at issue meets any established application of this exception.

Section 552.101 of the Government Code[2] encompasses the doctrine of common-law privacy, which makes confidential information (1) that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) that is of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id*. at 681–82. Common-law privacy generally encompasses the specific types of information held to be intimate or embarrassing in the *Industrial Foundation* opinion, including 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. *Id*. at 683. The Attorney General has additionally found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Tex. Att'y Gen. ORD-470 (1987) (illness from severe emotional and job-related stress); Tex. Att'y Gen. ORD-455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

[2] "Information is excepted from the requirements of [the PIA] if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Tex. Gov't Code § 552.101.

But determinations under common-law privacy must be made on a case-by-case basis. *See Indus. Found.*, 540 S.W.2d at 685 (whether matter is of legitimate interest to public can be considered only in context of each particular case); Tex. Att'y Gen. ORD-373 at 4 (1983). And the Attorney General has routinely found that information pertaining to the work conduct and job performance of public employees is of legitimate public interest and therefore is generally not protected from disclosure under common-law privacy. *See* Tex. Att'y Gen. ORD-470 (1987) (public employee's job performance does not generally constitute employee's private affairs); Tex. Att'y Gen. ORD-455 (1987) (public employee's job performance or abilities generally not protected by privacy); Tex. Att'y Gen. ORD-444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee); Tex. Att'y Gen. ORD-423 at 2 (1984) (scope of public employee privacy is narrow).

Follins has failed to demonstrate any part of the information at issue falls under a recognized category of highly intimate or embarrassing information and further is information that is not of legitimate public interest. As noted above, the information at issue relates to a prominent public employee's negotiated separation agreement with a public employer. Ex. D. While Follins may find these records "embarrassing," none of the information at issue is of a type of information previously recognized as highly intimate or embarrassing by judicial decision or prior Attorney General opinion. And the public plainly has a legitimate interest in the job performance and dismissal or resignation agreement between a public employee and employer. The Court should reject Plaintiff's claim and order the information at issue be released in accordance with the letter ruling.

C. Follins and the District were not free to enter into a "confidential" agreement for purposes of denying public access under the PIA.

Finally, the Attorney General notes the separation agreement at issue is labeled "confidential." Ex. D. But information is not confidential under the PIA simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found.*, 540 S.W.2d at 677. In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the PIA. Tex. Gov't Code § 552.006 ("This chapter does not authorize the withholding of public information or limit the availability of public information to the public, except as expressly provided by this chapter."); s*ee* Tex. Att'y Gen. Op. JM-672 (1987); Tex. Att'y Gen. ORD-541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the PIA] cannot be compromised simply by its decision to enter into a contract."). The Court should reject any argument premised on the suggestion that Follins and the District agreed to keep the information at issue confidential.

CONCLUSION AND PRAYER

For these reasons stated above, the Attorney General prays that the Court enter a final judgment granting Defendant Attorney General's Motion for Summary Judgment. Defendant further prays for such other and further relief, both general and special, at law and in equity, to which he may be justly entitled.

Respectfully submitted,

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Attorney General of Texas

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First Assistant Attorney General

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ATTORNEYS FOR DEFENDANT KEN PAXTON,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Summary Judgment of Defendant Ken Paxton, Attorney General of Texas, has been served, on August 24, 2016, on the following attorneys-in-charge, by the electronic transmission and/or e-mail:

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EXHIBIT A

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 24, 2016

Ms. Roxella Cavazos
Associate General Counsel
District Office of Legal Services
Alamo Community College District
201 West Sheridan, Building C-8
San Antonio, Texas 78204

OR2016-04392

Dear Ms. Cavazos:

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# 599418.

The Alamo Community College District (the "district") received a request for information pertaining to the termination of a named individual.[1] You state some of the requested information does not exist.[2] You claim the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. You also state you have notified the individual to whom the requested information relates pursuant to section 552.304 of the Government Code. *See* Gov't Code § 552.304 (interested party may

[1]You state the district 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 when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

[2]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 dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

submit comments stating why information should or should not be released). We have received comments from the individual at issue. We have considered the submitted arguments and reviewed the submitted information.

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. We note, however, the public generally has a legitimate interest in information relating to public employment and public employees. *See* 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 (public employee's job performance does not generally constitute employee's private affairs), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find none of the submitted information at issue 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.

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). We understand the district and the individual to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. As previously mentioned, common-law privacy 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.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert*'s interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find no portion of the submitted information is subject to section 552.102(a) of the Government Code. Accordingly, the district may not withhold any

of the submitted information on that basis. As no other exceptions to disclosure have been raised, the district must release the submitted 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, 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 Lay

Paige Lay
Assistant Attorney General
Open Records Division

PL/dls

Ref: ID# 599418

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

EXHIBIT B

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 28, 2016

Ms. Roxella Cavazos
Associate General Counsel
Alamo Community College District
201 West Sheridan, Building C-8
San Antonio, Texas 78204-1429

OR2016-06849

Dear Ms. Cavazos:

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# 603230.

The Alamo Community College District (the "district") received a request for a specified separation agreement. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also state you have notified a third party to whom the requested information relates pursuant to section 552.304 of the Government Code. *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 third party. We have also received comments from the requestor. We have considered the submitted arguments and reviewed the submitted information.

The district and the third party argue the submitted information is confidential pursuant to an agreement between the district and the third party. We note information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality

by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

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.*, 540 S.W.2d at 685. 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. We note, however, the public generally has a legitimate interest in information relating to public employment and public employees. *See* 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 (public employee's job performance does not generally constitute employee's private affairs), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find none of the submitted 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.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code.[1] Gov't Code § 552.117(a). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individual whose information is at issue timely requested confidentiality under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, if the individual at issue did not timely request confidentiality under section 552.024, then the district may not withhold the marked information under

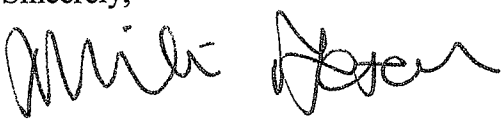
[1]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.117(a)(1). As no other exceptions to disclosure have been raised, the remaining information must be released.

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, 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,



Mili Gosar
Assistant Attorney General
Open Records Division

MG/akg

Ref: ID# 603230

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)

EXHIBIT C

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 13, 2016

Ms. Roxella Cavazos
Associate General Counsel
District Office of Legal Services
Alamo Community College District
201 West Sheridan, Building C-8
San Antonio, Texas 78204-1429

OR2016-08233

Dear Ms. Cavazos:

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# 605694.

The Alamo Community College District (the "district") received a request for a specified separation agreement and communications related to a previous request for information.[1] You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.[2] You also state you have notified the individual to whom portions of the

[1]You state the district sought and received clarification of portions 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]Although you also raise section 552.101of the Government Code in conjunction with Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct and Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, we note section 552.107 of the Government Code is the proper exception to claim for attorney-client privileged information not subject to section 552.022 of the Government Code.

requested information relate pursuant to section 552.304 of the Government Code. *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 individual at issue. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state Exhibit 3 was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-06849 (2016). In that ruling, we determined some of the information at issue may be withheld under section 552.117(a)(1) of the Government Code if the individual at issue timely elected confidentiality, and, the remaining information must be released. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, we conclude the district may rely on Open Records Letter No. 2016-06849 as a previous determination and withhold or release Exhibit 3 in accordance with that ruling.[3] *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we address your argument under section 552.107 of the Government Code for Exhibit 4. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed

[3]As our ruling is dispositive, we need not address your arguments against disclosure of this information.

to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You claim Exhibit 4 is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications involving the district's attorneys and outside counsel and district employees. You inform us the communications were made for the purpose of facilitating the rendition of professional legal services to the district and do not indicate the district has waived the confidentiality of the information at issue. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit 4. Thus, the district may generally withhold Exhibit 4 under section 552.107(1) of the Government Code. We note, however, some of the e-mail strings include e-mails or an attachment received from non-privileged parties. Furthermore, if the e-mails and attachment received from the non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails and attachment, which we have marked, are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold these non-privileged e-mails and attachment under section 552.107(1) of the Government Code.

We note the non-privileged e-mails contain an e-mail address that is subject to section 552.137 of the Government Code.[4] 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* Gov't Code § 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.

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[4]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).

In summary, the district may rely on Open Records Letter No. 2016-06849 as a previous determination and withhold or release Exhibit 3 in accordance with that ruling. The district may generally withhold Exhibit 4 under section 552.107(1) of the Government Code. However, if the marked non-privileged e-mails and attachment are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold these non-privileged e-mails and attachment under section 552.107(1) of the Government Code. In releasing the non-privileged e-mails and attachment, 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.

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, 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,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/dls

Ref: ID# 605694

Enc. Submitted documents

c: Requestor
(w/o enclosures)

EXHIBIT D

INFORMATION AT ISSUE

(TO BE SUBMITTED TO THE COURT FOR *IN CAMERA* REVIEW.)