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November 12, 2020

Office of the Attorney General  
Open Records Division  
209 W. 14th Street  
Austin, Texas 78701

RE: Collin County Community College: Public Information Act Request,  
October 29, 2020  
(Collin College Reference # CC0012)

Dear Attorney General:

We respectfully request a decision under the Public Information Act (“the Act”), Chapter 552 of the Texas Government Code, concerning information requested by Kristopher Nelson (the “Requestor”) received by Collin County Community College District (“Collin College” or “the College”) on October 29, 2020 (the “Request” – attached as **Exhibit A**).

This letter is timely made within ten (10) business days after Collin College received the Request in accordance with Section 552.301 of the Act.

### **THE REQUEST**

Requestor seeks in relevant part the following information:

- “2. All public information already in electronic form, including e-mails, regarding complaints or concerns about the speech or writings of Collin College faculty or staff, including contract staff and adjunct faculty, and dated after October 1, 2020.
3. All public information already in electronic form, including e-mails, regarding potential limitations or restrictions on the speech or writings of Collin College faculty or staff, including contract staff and adjunct faculty, and dated after October 1, 2020.
4. All public information already in electronic form, including e-mails, regarding potential or actual violations of policies or procedures regarding the speech or writings of Collin College faculty or staff, including contract staff and adjunct faculty, and dated after October 1, 2020.”

Collin College requests that information responsive to the current Request be withheld subject to Texas Government Code Section 552.103, Section 552.107, and Texas Rule of Evidence 503. As part of this letter, we are submitting to your office representative samples that we are seeking to protect (attached as **Exhibits B-C**). Collin College reserves the right to submit any additional documents within the time period prescribed by Section 552.301(e).

Support for the attached information is discussed below under the following headings: (1) Information Related to Anticipated Litigation under Section 552.103; and (2) Responsive Information Protected by the Attorney-Client Privilege under Section 552.107.

### **EXCEPTIONS FROM DISCLOSURE**

Collin College requests that information and documents responsive to the Request be withheld from disclosure based upon the following exceptions provided for in the Texas Government Code:

#### **1. Information Related to Anticipated Litigation under Section 552.103**

Responsive information includes information that relates to litigation that was reasonably anticipated at the time of the Request. Subsection (c) of Section 552.103 provides that “[i]nformation relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure . . . only if the litigation is pending or reasonably anticipated on the date that the requestor applies . . . for public information . . . .”

Section 552.103(a) was specifically intended to prevent parties from improperly circumventing the rules of discovery by using the Public Information Act. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); Attorney General Opinion JM-1048 380 at 4 (1989). The exception allows a governmental body to protect its position in litigation “by forcing parties seeking information relating to that litigation to obtain it through discovery procedures.” *See Open Records Decision No. 551 at 3 (1990)*.

The test for this exception requires a showing that, as of the date that the request for information was received by the governmental body: (1) litigation involving the governmental body is pending or reasonably anticipated, and (2) the information relates to the litigation. *See Open Records Decision No. 677 at 2–3 (2002)*.

Therefore, 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. *See Section 552.103(c)*. 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. *See Open Records Decision No. 551 at 5 (1990)*.

Because Section 552.103 applies to information that relates to pending or reasonably anticipated litigation, Texas courts have accepted that this includes a very broad category of information. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 483 (Tex. App.—Austin 1997, orig. proceeding). Similarly, the Attorney General has found that the protection of Section 552.103 may overlap with that of other exceptions that encompass discovery privileges. *See* Open Records Decision No. 677 at 2 (2002). 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 – there must be a showing that the requested information relates to pending or reasonably anticipated litigation. *See id.*

The Attorney General previously considered a case where a City asserted Section 552.103 in response for information from a Requestor who was previously employed with the City. TEX. ATT'Y GEN. OP. OR2019-16457 (2019). The Requestor's attorney submitted a demand letter to the City threatening to file a charge of discrimination with the Texas Workforce Commission and with the United States Equal Employment Opportunity Commission ("EEOC") on behalf of the Requestor if his demands were not met. *See id.* at \*2. The Attorney General found that "based on [the City's] representations, our review of the submitted documents, and the totality of circumstances, we find you have demonstrated the city reasonably anticipated litigation when it received the request for information." *See id.* Therefore, the City could withhold the submitted information under Section 552.103(a) of the Government Code. *See id.* The Attorney General has similarly found that a governmental body could withhold information under Section 552.103(a) where an attorney submitted a demand letter to the governmental body. *See* TEX. ATT'Y GEN. OP. OR2020-04492 (2020) (finding that school district reasonably anticipated litigation after receiving demand letters threatening to file suit for discrimination); TEX. ATT'Y GEN. OP. OR2017-28142 (2017) (finding that housing authority reasonably anticipated litigation after Requestor's attorney submitted demand letter). The Attorney General's office recently also held that Collin College was not obligated to provide information excepted from disclosure under Section 552.103 of the Act. *See* TEX. ATT'Y GEN. OP. OR2020-22137 (2020).

The Request seeks information related to a matter involving a current employee of Collin College. The Request seeks information about complaints, restrictions, or violations involving speech or writings of Collin College employees which occurred after October 1, 2020. The information responsive to the Request pertains to one employee of the College, in particular. As a matter of background, the employee at issue posted comments to social media in early October. The comments resulted in media coverage and complaints sent to the College shortly thereafter. Approximately three days later, the employee indicated on social media that she was already represented by attorneys and included references to representation by a professional union paid by professional insurance. *See* Social Media Posts attached as **Exhibit D**. Thereafter, when the College sought a meeting with the employee regarding her use of the college email systems to respond to some commentators on her social media posts, the employee instructed the College that she wished to have her attorney present. *See* Email from Employee attached as **Exhibit E**. An attorney with an organization that represents the employee's interests then submitted a demand letter to Collin College seeking specific relief for the employee. *See* Letter from

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Attorney, attached as **Exhibit F**. In that letter, the attorney asked Collin College to “reassure [employee] that no formal consequences will result from her protected expression.” *See id.* at \*1. In addition, the attorney made three specific formal demands with respect to the employee on the final page of the letter. *See id.* at \*9. [REDACTED]

[REDACTED] (These communications are included in the Representative Sample, attached as **Exhibit B**, discussed below).

[REDACTED] *. See Representative Sample, attached as Exhibits B-C.* [REDACTED]

[REDACTED], it seeks to withhold all responsive communications under Section 552.103.

Under the two-prong test of Section 552.103, the information requested is clearly subject to the litigation exception. Under the first prong, litigation is reasonably anticipated in this matter. As a primary concern, an attorney issued a demand letter to Collin College which included three specific issues relating to this incident. Based on the attorney’s demand letter submitted to the College seeking specific relief on behalf of the employee, the employee’s indication that she was represented by attorneys and/or a professional union on social media, and the employee’s request that her attorney be present at a meeting requested by the College, litigation is reasonably anticipated by the College in this matter.

Under the second prong, [REDACTED]

[REDACTED] they would be relevant to any potential litigation regarding these comments. Requestor should not be able to circumvent traditional rules of discovery to request litigation-related materials under the PIA, which are protected by the litigation exception. Therefore, because these documents relate directly to the anticipated litigation, they should be withheld under Section 552.103.

## **2. Responsive Information Protected by the Attorney-Client Privilege under Section 552.107**

Portions of the responsive information contain confidential information protected under the attorney-client privilege under Section 552.107 of the Texas Public Information Act. The standard for demonstrating the attorney-client privilege under the Act is the same as the standard used in discovery under Texas Rule of Evidence 503. Rule 503 encompasses the attorney-client privilege and provides in part:

- (1) A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
  - (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
  - (B) between the lawyer and the lawyer's representative;
  - (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
  - (D) between representatives of the client or between the client and a representative of the client; or
  - (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). Thus, a communication is "confidential" for purposes of the Texas Rules of Evidence if it is "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." TEX. R. EVID. 503(a)(5).

[REDACTED] vice. *See* Representative Sample, marked as **Exhibit C**. [REDACTED], and should therefore be withheld under Section 552.107.

In summary, we submit these arguments in support of our request for an Attorney General's decision. Thank you for your consideration in this matter. Please do not hesitate to contact me at 214-651-2033 with questions or concerns.

Sincerely,

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A handwritten signature in black ink, appearing to read "Pete Thompson", with a stylized, cursive script.

Pete Thompson

CC: Requestor (via email)(without enclosures)

Enclosures