



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 28, 2003

Mr. Lou Bright
General Counsel
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711-3127

OR2003-2840

Dear Mr. Bright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180191.

The Texas Alcoholic Beverage Commission (the "commission") received a request for four categories of information related to a specified investigation, including the policies and training information of the restaurant under investigation. You state that you have released a portion of the requested information. However, you claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code and Rule 192.5 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

In regard to the submitted policies and training information of the restaurant under investigation, section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by other statutes. Section 5.48 of the Alcoholic Beverage Code provides as follows:

- (a) "Private records," as used in this section, means all records of a permittee, licensee, or other person other than the name, proposed location, and type of permit or license sought in an application for an original or renewal permit

¹We assume that 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). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

or license, or in a periodic report relating to the importation, distribution, or sale of alcoholic beverages required by the commission to be regularly filed by a permit or licensee.

(b) The private records of a permittee, licensee, or other person that are required or obtained by the commission or its agents, in connection with an investigation or otherwise, are privileged unless introduced in evidence in a hearing before the commission or before a court in this state or the United States.

The term "privileged" in this statute has been construed to mean "confidential" for purposes of the Public Information Act (the "Act"). Attorney General Opinion JM-1235 at 2 (1990); Open Records Decision Nos. 186 (1978), 62 (1974). Thus, section 5.48 makes confidential any records required or obtained by the commission, with the exception of "the name, proposed location, and type of permit or license sought in an application for an original or renewal permit or license" and "a periodic report relating to the importation, distribution, or sale of alcoholic beverages required by the commission to be regularly filed by a permittee or licensee." Alco. Bev. Code § 5.48. In this case, the policies and training documents at issue consist of "private records" obtained by the commission. You state that these documents have never been introduced into evidence at any judicial proceeding. Consequently, we agree that the submitted policies and training information of the restaurant under investigation are made confidential by section 5.48 of the Alcoholic Beverage Code, and they must be withheld under section 552.101 of the Government Code.

In regard to the remaining information in Attachment D, section 552.103 of the Government Code provides as follows:

(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.

A governmental body 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 on the date the governmental body received the request for information, 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, no pet.); *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).

You state that "criminal charges are pending with the Office of the Dallas County Criminal District Attorney." We note, however, that the commission is not a party to this pending litigation. See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the attorney representing the governmental body that is a party to the litigation that he or she wants the submitted information withheld from disclosure under section 552.103. You have submitted a letter from the Dallas County District Attorney's Office, stating that the district attorney's office is involved in the pending cases. The letter states that, except for the requested policies and training documents of the restaurant under investigation, the "premature public release of [the commission's] investigation information would interfere with this office's criminal investigation and pending prosecutions." We find that you have established that litigation was pending when the commission received this request for information. Furthermore, we agree that the remaining information in Attachment D relates to the pending litigation for purposes of section 552.103. Therefore, you may withhold the this information pursuant to 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 party in the pending litigation is not excepted from disclosure under section 552.103(a), and 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).

You state that you have provided the information in Attachment C to the requestor with certain redactions. Section 56.001 of the Occupations Code provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 56.001. You indicate and the documents reflect that the social security number you have highlighted belongs to an applicant for or holder of a license issued by the

commission. Accordingly, we agree that this social security number falls under section 56.001 of the Occupations Code, as encompassed by section 552.101, and therefore must be withheld.

Additionally, we note that the remaining social security numbers may be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in the responsive information are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the commission should ensure that no such information was obtained or is maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990.

You also raise section 552.130 of the Government Code. Section 552.130 prohibits the release of information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, the commission must withhold the Texas driver's license information you have highlighted pursuant to section 552.130 of the Government Code.

Finally, you argue that the California driver's license number you have highlighted is excepted from public disclosure under section 552.101 in conjunction with the Federal Driver's Privacy Protection Act (the "FDPP Act"). *See* 18 U.S.C. § 2721 *et seq.* Section 2721 of the FDPP Act prohibits the release of "personal information" about any person obtained in connection with a motor vehicle record by a "State department of motor vehicles," except under certain circumstances. "Personal information" is defined as including an individual's social security number, driver identification number, name, address, and telephone number. *See* 18 U.S.C. § 2725(3), (4).

An authorized recipient of personal information may resell or redisclose the information only for a permissible use as provided by section 2721(b). *See* 18 U.S.C. § 2721(c); *see also* 18 U.S.C. § 2721(b). However, you do not inform this office, nor does the information on its face reflect, that the number at issue is personal information obtained in connection with a motor vehicle record by a state department of motor vehicles as contemplated by the federal statute. Accordingly, we determine that the commission may not withhold the California driver's license number pursuant to section 552.101 of the Government Code in conjunction with the FDPP Act, and it must be released.

In summary, we conclude that you must withhold Attachment D under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code and under section 552.103 of the Government Code. In regard to Attachment C, we conclude that: 1) you must withhold the social security number you highlighted under section 552.101 of the Government Code in conjunction with section 56.001 of the Occupations Code; 2) the remaining social security numbers may be confidential under federal law; 3) you must withhold the section 552.130 information you have highlighted; and 4) you must release the California driver's license number you have highlighted. As we are able to make this determination, we need not address your remaining arguments.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 180191

Enc: Submitted documents

c: Mr. Jason Trahan
The Dallas Morning News
508 Young Street
Dallas, Texas 75265
(w/o enclosures)