



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 19, 2015

Mr. Matthew Cherry
Public Information Coordinator
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711-3127

OR2015-17296

Dear Mr. Cherry:

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# 574311.

The Texas Alcoholic Beverage Commission (the "commission") received a request for all communications generated by a named commission employee during a specified time period, as well as all telephone records originated or received by the named commission employee. You state the commission will release some of the information but claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample information.¹ We have also considered comments submitted by the requestor and the Office of the Attorney General (the "OAG"). *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released).

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). 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.

Initially, we must address the requestor's claim the commission failed to comply with the procedural obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). Further, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). You state the commission received the present request for information on April 16, 2015. You inform us the commission provided the requestor with a cost estimate pursuant to section 552.2615 of the Government Code and a request for deposit for payment of those charges on May 5, 2015. *See id.* §§ 552.2615(a), .263(a) (compliance with section 552.2615 necessary to require a deposit or bond for payment). You further inform us the commission received a deposit for payment of the anticipated costs on May 14, 2015; as such, you assert the date of receipt of the instant request should be May 14, 2015. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that the governmental body receives deposit or bond). However, upon review of a copy of the cost estimate, we find it does not comply with the requirements of section 552.2615(a) of the Government Code because it includes unallowable charges for labor or personnel costs. *See id.* §§ 552.2615(a), .271(b) (regarding inspection of public information in paper record if copy not requested). Thus, the commission's ten-business-day deadline and fifteen-business-day deadline were, respectively, May 1, 2015, and May 8, 2015.² However, the request for a ruling was sent on May 29, 2015, and the submission of the information required by section 552.301(e) was sent on June 5, 2015. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the commission failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released, unless a governmental body demonstrates

²We understand the commission was closed on April 21, 2015 in observance of San Jacinto Day. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under Act.

a compelling reason to withhold the information to overcome this presumption. See Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Although you assert the submitted information is excepted from disclosure under sections 552.103, 552.106, 552.107, and 552.111 of the Government Code, these are all discretionary exceptions to disclosure and may be waived. See Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475–76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10–11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions, governmental body may waive section 552.111). Therefore, in failing to comply with the requirements of section 552.301, the commission has waived its claims under these discretionary exceptions. However, the interests under sections 552.103 and 552.107 of the Government Code of a governmental body other than the one that failed to comply with section 552.301 can provide a compelling reason for non-disclosure under section 552.302. See Open Records Decision Nos. 676 at 12 (claim of attorney-client privilege under section 552.107 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 469 (1987) (university may withhold information under Gov't Code § 552.103 predecessor to protect district attorney's interest in anticipated criminal litigation). Because the OAG objects to the release of some of the submitted information, we will consider whether the commission may withhold the information at issue under sections 552.103 and 552.107 of the Government Code on behalf of the OAG. Further, you also claim section 552.101 of the Government Code. As these exceptions can also provide compelling reasons to overcome the presumption of openness under section 552.302, we also will consider their applicability to 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. 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 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 permittee 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.

Alco. Bev. Code § 5.48. The term “privileged” in this statute has been construed to mean “confidential” for purposes of 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.

Attachment A consists of application records for commission licenses or permits. You state none of the information in Attachment A has been introduced as evidence in a hearing before the commission or before a court in Texas or the United States. Based on your representations and our review, we agree Attachment A constitutes private records under section 5.48 of the Alcoholic Beverage Code. Accordingly, with the exception of the name, proposed location, and type of permit sought in the relevant applications, which must be released, the commission must withhold Attachment A in its entirety under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code.

Section 552.103 provides in part 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.

Gov’t Code § 552.103(a), (c). 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 showing that (1) litigation is pending

or reasonably anticipated on the date the governmental body received the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. We note contested cases conducted under the Administration Procedure Act (the “APA”), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the State Office of Administrative Hearings (the “SOAH”) is considered litigation for the purposes of the APA. *See id.*

The OAG informs us, and submits documentation showing, it is representing the commission in seven pending cases in both state and federal court, and that each of the cases was pending on the date the commission received the instant request. The OAG further informs us, and submits documentation showing, that the commission is involved in at least one hundred administrative cases, and explains that the OAG will represent the commission in any of the administrative cases that result in a contested case before SOAH. The OAG states some of the information at issue relates to the pending lawsuits and administrative cases. Based on the OAG’s representations and our review, we agree that litigation was pending or reasonably anticipated on the date the commission received the request. We further find that the information in Attachments B, C, and D relates to the pending and anticipated litigation. Therefore, the commission may withhold Attachments B, C, and D under section 552.103(a) of the Government Code.³

We note, generally, 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the 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. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, with the exception of the name, proposed location, and type of permit sought in the relevant applications which must be released, the commission must withhold Attachment A in its entirety under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code. The commission may withhold Attachments B, C, and D under section 552.103 of the Government Code. The commission must release the remaining information.

³As our ruling is dispositive, we need not address the OAG’s remaining argument against disclosure of this 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,

A handwritten signature in black ink that reads "Ramsey Abarca". The signature is written in a cursive, flowing style.

Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/dls

Ref: ID# 574311

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Lauren Downey
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
(w/o enclosures)