



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 2, 2015

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

OR2015-25171

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# 590215.

The Texas Alcoholic Beverage Commission (the "commission") received a request for (1) all bills pertaining to any cellular telephone utilized by a named individual during a specified time frame; and (2) all written documentation relating to a named individual during a specified time frame. You assert a portion of the requested information is not subject to the Act. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, you assert some of the requested information does not consist of public information that is subject to disclosure under the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) reads as follows:

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.

(a) In this chapter, “public information” means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Section 552.002(a-1) also provides the following:

Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer’s or employee’s official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

Id. § 552.002(a-1). Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Moreover, section 552.001 of the Act provides that 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. *See* Gov’t Code § 552.001(a).

We further note that the characterization of information as “public information” under the Act is not dependent on whether the requested records are in the possession of an individual or whether a governmental body has a particular policy or procedure that establishes a governmental body’s access to the information. *See* Open Records Decision No. 635 at 3-4

(1995) (finding that information does not fall outside definition of “public information” in Act merely because individual member of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees’ homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, if the information at issue is related to the commission’s business, the mere fact it is not in the commission’s possession does not remove the information from the scope of the Act. *See* ORD 635 at 6-8 (stating that information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act).

You argue the bills pertaining to the named individual’s cellular telephone are outside the scope of the Act. You state the commission does not provide the named individual with a cellular telephone, but rather she utilizes a personal cellular telephone. You further state public funds are not used to pay for the named individual’s personal cellular telephone service. However, we reiterate that information is within the scope of the Act if it relates to the official business of a governmental body and is maintained by a public official or employee of the governmental body. *See* Gov’t Code § 552.002(a). Thus, to the extent the named individual’s personal cellular telephone bills relate to the official business of the commission, they are subject to the Act, and as you have not claimed exceptions to disclosure for this information, it must be released. *See id.* §§ 552.301 (a), .302. However, to the extent the named individual’s personal cellular telephone bills do not relate to the official business of the commission, they are not subject to the Act and need not be released.

Next, we note some of the requested information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2015-17296 (2015) and 2015-24025 (2015). In Open Records Letter No. 2015-17296, we determined (1) 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 some of the information at issue under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code; (2) the commission may withhold some of information at issue under section 552.103 of the Government Code; and (3) the remaining information must be released. In Open Records Letter No. 2015-24025, we determined (1) 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 some of the information at issue under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code; (2) the commission may withhold some of the information at issue under section 552.103 of the Government Code; (3) the commission may withhold the information you marked under section 552.108(a)(1) of the Government Code; and (4) the remaining information must be released. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, to the extent the requested information is identical to the information previously submitted and ruled on by this office, we conclude the commission must continue to rely on Open Records Letter Nos. 2015-17296 and 2015-24025 as previous determinations

and withhold or release the information in accordance with those rulings. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). To the extent the requested information is not subject to Open Records Letter No. 2015-17296 or 2015-24025, we will address your arguments against release of the 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 information made confidential by other statutes, such as section 5.48 of the Alcoholic Beverage Code, which 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.

You state Exhibit B consists of records pertaining to an original, renewal, or supplemental application for a license or permit submitted by a permittee to the commission. You state none of the information at issue 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 Exhibit B 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 Exhibit B under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code.

Section 552.103 of the Government Code provides in relevant 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). The governmental body has the burden of providing relevant facts and documents to show 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. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

You state the Office of the Attorney General is currently representing the commission in seven pending cases in state and federal court. You further state all of the cases were pending when the commission received the request for information. Therefore, we agree litigation was pending when the commission received the request. We also find you have established Exhibits C and D are related to the pending litigation for purposes of section 552.103(a). Therefore, the commission may withhold Exhibits C and D under section 552.103(a) of the Government Code.²

However, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, to the extent the named individual's personal cellular telephone bills relate to the official business of the commission, they are subject to the Act and must be released. However, to the extent the named individual's personal cellular telephone bills do not relate

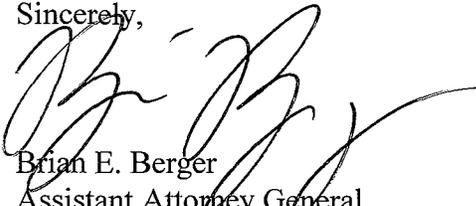
²As our ruling is dispositive, we do not address your other argument to withhold this information.

to the official business of the commission, they are not subject to the Act and need not be released. To the extent the requested information is identical to the information previously submitted and ruled on by this office in Open Records Letter No. 2015-17296 or 2015-24025, the commission must withhold or release the identical information in accordance with those rulings. 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 Exhibit B under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code. The commission may withhold Exhibits C and D under section 552.103(a) of the Government Code.

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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 590215

Enc. Submitted documents

c: Requestor
(w/o enclosures)