



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 6, 2016

Ms. Sarah Wolfe  
Attorney  
Texas Alcoholic Beverage Commission  
P.O. Box 13127  
Austin, Texas 78711-3127

OR2016-07764

Dear Ms. Wolfe:

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# 604736.

The Texas Alcoholic Beverage Commission (the "commission") received a request for (1) documents and communications related to legislative activity during a specified period of time; and (2) correspondence between members of the commission's Licensing Division, licensees or permittees in the wholesaler or manufacturer tier, employees of such licensees or permittees, trade associations, and registered lobbyists.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107,

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<sup>1</sup>We note the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (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 over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

and 552.111 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-12668 (2015). In Open Records Letter No. 2015-12668, we determined (1) as the commission did not submit any information responsive to two specific portions of the request for information, the commission must release any information responsive to these portions of the request to the extent it existed on the date the commission received the request; and (2) 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 the submitted information under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code. We note the requestor seeks, in part, the same information that the requestor in the previous ruling sought that was ordered released, to the extent it existed. You have now submitted information for our review that is responsive to those portions of the previous request. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the commission may not now withhold the submitted information previously ordered released in Open Records Letter No. 2015-12668 unless its release is expressly prohibited by law or the information is confidential under law. Although the commission raises sections 552.103, 552.106, 552.107, and 552.111 of the Government Code for some of the information at issue, these sections do not prohibit the release of information or make information confidential. *See 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 Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) and Texas Rule of Evidence 503 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions

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<sup>2</sup>Although you also raise section 552.101 of the Government Code in conjunction with 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). Further, although you raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege in this instance is section 552.107 of the Government Code. *See* ORD No. 676 at 1-2.

<sup>3</sup>We 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.

generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Thus, the submitted information previously ordered released in Open Records Letter No. 2015-12668 may not now be withheld under section 552.103, section 552.106, section 552.107, or section 552.111. However, as you raise section 552.101 of the Government Code for some of the information previously ordered released in Open Records Letter No. 2015-12668, and section 552.101 can make information confidential, we will consider your argument under section 552.101 for this information. For the information previously ordered released for which you do not raise section 552.101, we conclude the commission must continue to rely on Open Records Letter No. 2015-12668 as a previous determination and release this information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). Additionally, we will address the commission's arguments against release of the submitted information not encompassed by Open Records Letter No. 2015-12668.

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 the information at issue 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 552.106(a) of the Government Code protects a “draft or working paper involved in the preparation of proposed legislation[.]” Gov’t Code § 552.106. Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body, and therefore, section 552.106 does not except from disclosure purely factual information. *See id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *See id.* A proposed budget constitutes a recommendation by its very nature and may be withheld under section 552.106. *See id.*; *see also Hooten v. Enriquez*, 863 S.W. 2d 522 (Tex. App.—El Paso 1993, no writ) (commissioner’s court performs legislative function when it creates the budget for county’s offices and departments).

You state the remaining information in Exhibit E consists of communications between commission employees and staff members of legislators pertaining to drafts of proposed and filed legislation related to the commission. You explain, in the communications, commission employees analyzed drafts of legislation, proposed new language to legislation, or analyzed factual information to support proposed legislation. Upon review, we find the commission has demonstrated the information at issue constitutes policy judgments, recommendations, and proposals regarding proposed and filed legislation related to the commission. Accordingly, the commission may withhold the remaining information in Exhibit E, which we have marked, under section 552.106 of the Government Code.<sup>4</sup>

Section 552.107(1) of the Government Code 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

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 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 that 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 state the remaining information in Exhibit C consists of communications between attorneys for the commission and commission employees that were made for the purpose of providing legal services to the commission. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the remaining information in Exhibit C consists of privileged attorney-client communications the commission may generally withhold under section 552.107. We note, however, the otherwise privileged e-mail string at issue includes an e-mail sent to a non-privileged party. Furthermore, if the e-mail sent to the non-privileged party is removed from the otherwise privileged e-mail string in which it appears and stands alone, it is responsive to the request for information. Therefore, if the non-privileged e-mail, which we have marked, is maintained by the commission separate and apart from the otherwise privileged e-mail string in which it appears, then the commission may not withhold this non-privileged e-mail under section 552.107 of the Government Code.

In summary, the commission must continue to rely on Open Records Letter No. 2015-12668 as a previous determination and release the information we have indicated in accordance with that ruling. 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 the remaining information in Exhibit E, which we have marked, under section 552.106 of the Government Code. The commission may generally withhold the remaining information in Exhibit C under section 552.107 of the Government Code; however, the commission may not withhold the marked non-privileged e-mail if it is maintained by the commission separate and apart from the otherwise privileged e-mail string in which it appears. The commission must release the remaining 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](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,



Joseph Keeney  
Assistant Attorney General  
Open Records Division

JDK/dls

Ref: ID# 604736

Enc. Submitted documents

c: Requestor  
(w/o enclosures)