



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 21, 2016

Ms. Mary Salluce
Public Information Coordinator
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711

OR2016-14062

Dear Ms. Salluce:

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# 614675 (TABC Ref. No. 1459803412).

The Texas Alcoholic Beverage Commission (the "commission") received a request for all documents and communications relating to specified litigation involving the commission. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5.¹ You state you will release some information. We have considered your arguments and reviewed the submitted representative sample of

¹Although 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). We note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* Open Records Decision No. 676 at 6 (2000).

information.² We have also received and considered comments from the requestor and a third party. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(17) information that is also contained in a public court record; [and]

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(1), (17), (18). The submitted information includes a completed report that is subject to section 552.022(a)(1). The commission must release the completed report pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also contains court-filed documents that are subject to section 552.022(a)(17) and a settlement agreement subject to section 552.022(a)(18). The commission must release this information pursuant to sections 552.022(a)(17) and 552.022(a)(18), unless it is made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022 under sections 552.103 and 552.111 of the Government Code. However, sections 552.103 and 552.111 are discretionary exceptions and do not make information confidential under the Act. *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); *see also* Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information

²We assume 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.

at issue may not be withheld under section 552.103 or section 552.111. However, because section 552.101 of the Government Code makes information confidential under the Act, we will consider the applicability of section 552.101 for the information at issue. You also seek to withhold portions of the information subject to section 552.022 under rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertions of the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the information subject to section 552.022. We will also consider the applicability of sections 552.101, 552.103, 552.107, and 552.111 to the remaining information not subject to section 552.022 of the Government Code.

Section 552.103 of the Government Code provides, in relevant part:

(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 section 552.103(a) applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

You inform us, and have provided documentation demonstrating, the commission is a party to six pending cases. Based on your representations and our review, we find that, in each of these six cases, the litigation to which the commission is a party was pending on the date the commission received the request. You state, and we agree, the information in Exhibits B and D not subject to section 552.022 is related to the pending litigation. Therefore, the

commission may generally withhold the information we marked under section 552.103 of the Government Code.

We note, however, it appears the opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the commission may withhold under section 552.103 only those portions of the information we have marked in Exhibits B and D the opposing party to the litigation has not seen or had access to. We note the applicability of section 552.103 ends once the litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). To the extent the opposing party has seen or had access to the marked information, we will address the applicability of other exceptions to disclosure of this information. We will also address the submitted arguments against disclosure of the remaining 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 seek to withhold the information in Exhibit C and the remaining information in Exhibits B and D under section 552.101 in conjunction with section 5.48. You state Exhibit C consists of records provided by permittees to the commission. You inform us, to the commission’s knowledge, none of the information at issue in Exhibit C has been introduced as evidence in a hearing before the commission or before a court in Texas or the United States. You make no such representations regarding the information at issue in Exhibits B and D. Based on your representations and our review, we agree portions of the information at issue constitute 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 are not confidential, the commission must withhold the information we marked in Exhibit C under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code.³ However, we find you have failed to demonstrate any of the remaining information in Exhibits B, C, and D consists of information made confidential under section 5.48 of the Alcoholic Beverage Code. Accordingly, the commission may not withhold any of the remaining information in Exhibits B, C, and D under section 552.101 of the Government Code on that basis.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. Gov’t Code § 552.107(1). The elements of the privilege under section 552.107(1) are the same as those discussed above in rule 503. 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. ORD No. 676 at 6-7. 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 portions of the remaining information not subject to section 552.022 consist of communications between commission attorneys, their representatives, and commission employees in their capacities as clients. You explain these communications were made in furtherance of the rendition of professional legal services for the commission. You state these communications were intended to be confidential and the commission has not waived the confidentiality of the information. Based on your representations and our review, we find some of the remaining information consists of privileged attorney-client communications. Accordingly, the commission may generally withhold the information we marked in Exhibit D under section 552.107(1) of the Government Code. However, we find you have failed to

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

demonstrate the remaining information at issue consists of communications between privileged parties or communications made for the purpose of facilitating the rendition of professional legal services to the commission. Therefore, the commission may not withhold any of the remaining information under section 552.107(1).

Texas Rule of Civil Procedure 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 426 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You argue portions of Exhibit E consist of privileged attorney work product. You do not inform us any of the exceptions in rule 192.5 apply. However, we find you have not demonstrated the information at issue consists of mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney's representative developed in anticipation of litigation or for trial. We therefore conclude information at issue is not core work product and the commission may not withhold the information under Texas Rule of Civil Procedure 192.5.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” See Gov’t Code § 552.111. This section encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); ORD 677 at 4-8. Rule 192.5 defines work product as:

(1) [M]aterial prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5.

You argue the remaining portions of Exhibit E not subject to section 552.111 consist of privileged attorney work product excepted under section 552.111 of the Government Code. Upon review, we find some of the information at issue was prepared in anticipation of litigation for purposes of section 552.111. Accordingly, the commission may withhold the information we marked in Exhibit E under section 552.111 of the Government Code and the attorney work product privilege. However, you have failed to demonstrate any of the remaining information in Exhibit E consists of attorney work product under section 552.111 of the Government Code. Therefore, none of the remaining information in Exhibit E may be withheld under section 552.111 on that basis.

In summary, the commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 5.48 of the Texas Alcoholic Beverage Code. The commission may withhold the information we marked under sections 552.103, 552.107, and 552.111 of the Government Code. The remaining information must be released.

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, appearing to read "Ian Lancaster". The signature is fluid and cursive, with a large initial "I" and a long, sweeping tail.

Ian Lancaster
Assistant Attorney General
Open Records Division

IML/akg

Ref: ID# 614675

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)