



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 7, 2016

Ms. Lauren Downey
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2016-15430

Dear Ms. Downey:

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# 617385 (PIR No. 16-43854).

The Office of the Attorney General (the "OAG") received a request for information pertaining to seven specified litigation cases. The OAG states it will release some information. The OAG claims some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. Additionally, the OAG states release of some of the submitted information may implicate the proprietary interests of Live Oak Brewing Co., LLC ("Live Oak") and Mark Anthony Brewing, Inc. ("MAB"). Accordingly, the OAG states it notified these third parties of the request for information and of their rights to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received arguments on behalf of MAB. We have considered the submitted arguments and reviewed the submitted information, portions of which consist of representative samples.¹ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting

¹We 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.

interested third party to submit to attorney general reasons why requested information should or should not be released).

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Live Oak explaining why the submitted information should not be released. Therefore, we have no basis to conclude Live Oak has protected proprietary interests in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the OAG may not withhold the submitted information on the basis of any proprietary interest Live Oak may have in the information.

The requestor argues the OAG failed to comply with section 552.301(b) of the Government Code. Pursuant to section 552.301(b) of the Government Code, 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. Gov't Code § 552.301(b). The OAG received the request for information on April 1, 2016. However, the OAG explains it sent the requestor an estimate of charges related to the request pursuant to section 552.2615 of the Government Code. *See id.* § 552.2615. The OAG also informs us the estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). The OAG states it received the deposit on April 18, 2016. The OAG further states it observed a skeleton crew day on April 21, 2016. This office does not count holidays, including skeleton crew days observed by a governmental body, as business days for the purpose of calculating a governmental body's deadline under the Act. Accordingly, the OAG's ten-business-day deadline was May 3, 2016. The OAG's initial request for a decision to this office was timely submitted and shows it was copied to the requestor. *See id.* § 552.308(a) (prescribing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). The requestor acknowledges the OAG timely submitted its initial briefing but asserts the OAG's invoking of all exceptions to the Act does not comply with the requirement to "state the exceptions that apply" under section 552.301(b). We note pursuant to section 552.301(b), a governmental body need only ask for a decision from this office and *state* the exceptions that apply within ten business days. *Id.* § 552.301(b) (emphasis added). Thus, we find the OAG complied with the procedural requirements mandated by section 552.301(b) of the Government Code. Accordingly, we will address the OAG's arguments against disclosure of the submitted information.

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.

Id. § 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).

The OAG states Exhibit B relates to six pending cases in which the OAG is representing the Texas Alcoholic Beverage Commission (“TABC”), the OAG’s client agency. The OAG informs us six of the requested cases were in various stages of pending litigation at the time the OAG received the request. However, the requestor asserts section 552.103 is not applicable because some of the cases are no longer pending or are only “continuing to a limited extent[.]” Whether litigation was pending at the time of the request is a question of fact. This office cannot resolve questions of fact in the open records process but, instead, must rely on the representations of the governmental body requesting our opinion. *See generally* Open Records Decision Nos. 554 (1990), 552 (1990). Therefore, based on the OAG’s representation, we conclude the OAG has established litigation was pending when the OAG received the request. Further, the OAG states, and we agree, Exhibit B relates to the pending litigations. Accordingly, the OAG may withhold Exhibit B under section 552.103(a) of the Government Code.²

However, once the information has been obtained by all parties to the pending 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

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.101 of the Government Code exempts 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 [TABC] 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 [TABC] or its agents, in connection with an investigation or otherwise, are privileged unless introduced in evidence in a hearing before [TABC] 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 TABC, 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 TABC to be regularly filed by a permittee or licensee.” Alco. Bev. Code § 5.48.

The OAG states Exhibit D consists of private records provided by permittees to TABC during the course of an investigation. The OAG states TABC provided this information to the OAG during the course of the OAG’s representation of TABC in litigation. The OAG states none of the information at issue has been introduced as evidence in a hearing before TABC or before a court in Texas or the United States. Based on these representations and our review, we agree Exhibit D 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 application, which must be released, the OAG must withhold Exhibit D under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). 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 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 to only communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). 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).

The OAG states the remaining information at issue consists of a communication between OAG attorneys and TABC attorneys discussing one of the requested cases. The OAG asserts this communication was made for the purpose of providing professional legal services to TABC. Additionally, the OAG states the communication was not intended to be disclosed and it has not been disclosed to non-privileged parties. Based on the OAG’s representations and our review, we find the information the OAG marked consists of a privileged attorney-client communication the OAG may withhold under section 552.107(1) of the Government Code.

Section 552.107(2) of the Government Code provides information is excepted from disclosure if “a court by order has prohibited disclosure of the information.” Gov’t Code § 552.107(2). The OAG argues some of the remaining information must be withheld under section 552.107(2). The OAG submitted a copy of a court Confidentiality and Protective Order (the “protective order”) signed on October 1, 2015, by a judge in the United States District Court for the Western District of Texas, Austin Division, in the case styled *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission*, Civil Action No. 1:15-cv-00134-RP. The protective order encompasses certain information that is designated “Classified Information” by certain persons. Paragraph 7(a) of the protective order provides “Classified

Information shall not be disclosed or made available by the receiving party to persons other than Qualified Persons except as necessary to comply with applicable law[.]” The Act is one such law that requires the information to be released, subject to the Act’s exceptions to disclosure. Thus, we conclude the OAG has not demonstrated the protective order makes the information at issue confidential for purposes of section 552.107(2). Therefore, we find the OAG may not withhold any of the information at issue under section 552.107(2) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” *See id.* § 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); Open Records Decision No. 677 at 4-8 (2002). 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. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat’l Tank Co. 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; ORD 677 at 7.

The OAG asserts the information at issue is attorney work product protected under section 552.111. The OAG states the information at issue includes notes written by an OAG attorney to prepare for oral arguments in one of the requested cases. The OAG asserts the

attorney notes constitute the mental impressions, opinions, conclusions, and legal theories of the attorney. Based on the OAG's representations and our review, we conclude the OAG may withhold the information it marked under the work product privilege encompassed by section 552.111 of the Government Code.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Id.* at 841. MAB states it has competitors. In addition, MAB asserts release of its information at issue would give an unfair advantage to MAB's competitors if it is publicly released. After review of the information at issue and consideration of MAB's arguments, we find MAB has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the OAG may withhold the information MAB marked and indicated under section 552.104(a).³

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).⁴ *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Upon review, we find the OAG must withhold the e-mail addresses in the remaining under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies.

We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

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

⁴This office will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the OAG may withhold Exhibit B under section 552.103(a) of the Government Code. The OAG must withhold Exhibit D under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code. The OAG may withhold the information it marked under section 552.107(1) of the Government Code. The OAG may withhold the information it marked under the work product privilege encompassed by section 552.111 of the Government Code. The OAG may withhold the information MAB marked and indicated under section 552.104(a) of the Government Code. The OAG must withhold the e-mail addresses in the remaining under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies. The remaining information must be released; however, any information protected by copyright may only be released in accordance with copyright law.

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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 617385

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)