



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 2, 2015

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

OR2015-18385

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# 577840.

The Texas Alcoholic Beverage Commission (the "commission") received a request for documents and communications to or from two named individuals during a specified time period and information pertaining to commission employees and the Employees Retirement System of Texas Pension Plan (the "system"). You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative of sample information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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

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.

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 May 22, 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 June 8, 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 June 12, 2015; as such, you assert the date of receipt of the instant request should be June 12, 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). We note the commission was closed on May 25, 2015, for Memorial Day. We also note this office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Accordingly, the commission's ten-business-day and fifteen-business-day deadlines were, respectively, June 8, 2015, and June 15, 2015. However, the request for a ruling was sent on June 29, 2015, and the submission of the information required by section 552.301(e) was sent on July 7, 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 a compelling reason to withhold the information to overcome this presumption. *See id.* § 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, 552.108, 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), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Therefore, in failing to comply with the requirements of section 552.301, the commission has waived its claims under these discretionary exceptions. Thus, the commission may not withhold any of the submitted information under section 552.103, 552.106, 552.107, 552.108 or 552.111 of the Government Code. However, you also claim section 552.101 of the Government Code, and we note section 552.137 of the Government Code is applicable to some of the submitted information.² As these exceptions can provide compelling reasons to overcome the presumption of openness under section 552.302, we will consider their applicability to the submitted information.

We note Exhibit E includes draft minutes of a meeting of the commission. The minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). In this instance, the submitted minutes are draft minutes. We note the minutes of a public meeting of a governmental body are public records when entered, are public in whatever form they exist, and public access may not be delayed until formal approval is obtained. Open Records Decision No. 225 (1979). Accordingly, section 551.022 is applicable to the draft minutes in Exhibit E. However, as section 552.101 of the Government Code can apply to confidential information, we will consider the applicability of this exception to the submitted minutes of public meetings, as well as 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. 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

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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.

Exhibit D consists of application records for commission licenses or permits. You state none of the information in Exhibit D 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 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 applications, which must be released, the commission must withhold Exhibit D under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code.

Section 552.101 of the Government Code also encompasses section 551.104 of the Government Code provides, in part, “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” Gov’t Code § 551.104(c). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. *See* Gov’t Code § 551.146(a)-(b); *see also* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information from disclosure under statutory predecessor to section 552.101). You state portions of Exhibit E consist of references and details to closed executive session meetings. However, upon review, we find the information at issue is not minutes or certified agendas of closed meetings. *See id.* §§ 551.101-.104.

Therefore, the commission may not withhold any part of the information at issue under section 552.101 of the Government Code on this basis.

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). *See id.* § 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 commission must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

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 Exhibit D under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code. The commission must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. 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, 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 'Meredith L. Coffman', with a long horizontal flourish extending to the right.

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

Ref: ID# 577840

Enc. Submitted documents

c: Requestor
(w/o enclosures)