



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 8, 2016

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

OR2016-07962

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# 605380. Because you suggest that the ruling request is related to litigation to which the Open Records Division is a party, preparation of this ruling has been assigned instead to the Opinion Committee.

The Texas Alcoholic Beverage Commission ("TABC") received on January 22, 2016, a request for information from Mr. Steven Callahan on behalf of McLane Company Inc. ("McLane"). McLane requested fifteen categories of documents related to McLane's previous requests for information from TABC and TABC's public information coordinator. You claim that with the exception of three of the requested categories of documents, all information requested should be excepted under section 552.103 of the Government Code. In addition, you desire to withhold some of the responsive documents from required public disclosure pursuant to sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the documents that you have submitted as a representative sample of the documents responsive to the request.

Section 552.103 of the Government Code provides 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.

TEX. GOV'T CODE § 552.103(a), (c). A 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 (1) litigation was 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.); Tex. Att'y Gen. ORD-551 (1990) at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state and provide documentation showing that a lawsuit styled *Texas Alcoholic Beverage Commission v. Ken Paxton*, Cause No. D-1-GN-15-004380, was filed in the 53rd Judicial District Court of Travis County, Texas, on October 2, 2015. Furthermore, on October 26, 2015, McLane intervened in that action, which was pending when TABC received the instant request for information. Our review of the pleadings in that action indicates that the subject of that lawsuit is Letter Ruling OR2015-18385, which was issued by the Open Records Division of the Office of the Attorney General in relation to a request for information received by TABC from McLane on May 22, 2015. With certain exceptions, Letter Ruling OR2015-18385 requires TABC to release the requested information, and TABC challenges that ruling through its lawsuit.

You also state and provide documentation showing that a lawsuit styled *McLane Co. v. Texas Alcoholic Beverage Commission*, Cause No. D-1-GN-16-000387, was filed in the 419th Judicial District Court of Travis County, Texas, on January 26, 2016. Our review of the pleadings in that action indicates that the subject of that lawsuit is sixteen requests for public information that were submitted to TABC from McLane between March 31, 2015, and August 28, 2015. McLane claims that TABC has not produced its responsive documents in response to these requests, and its lawsuit seeks a court order compelling TABC to do so. While that lawsuit was not filed until after the January 22, 2016 request at issue, you provide multiple reasons for why you anticipated that lawsuit, and McLane agrees that "as of December 1, 2015, the TABC anticipated litigation with McLane with respect to all of McLane's pre-December 1, 2015 PIA requests."

You state the information at issue in the instant request is directly related to this litigation that was pending or anticipated when the request was submitted. Specifically, you claim a majority of the documents requested could be exhibits offered in evidence and that most of the request for documentation relates to searches TABC performed for each request, the preservation of information, documents in an employee's custody and/or control, and TABC strategy related to the litigation.

Based on your representations, the submitted documentation, and our review of the submitted information, we find litigation between TABC and McLane was pending and more litigation was anticipated when TABC received the January 22, 2016 request for information from McLane. The fact that litigation exists between TABC and McLane, however, does not allow TABC to withhold all responsive materials to McLane's subsequent information requests. TABC must still meet its burden of showing that the responsive information it desires to withhold under section 552.103 is related to the pending or anticipated litigation.

The sample documents you have submitted in Exhibit B that you desire to withhold under section 552.103 include communications between TABC staff concerning responses to McLane's prior requests for information. A central issue in *McLane Co. v. Texas Alcoholic Beverage Commission* is whether TABC has produced all documents responsive to McLane's prior requests, and we agree that the documents that you have submitted for our review are relevant to this issue. Therefore, TABC may withhold the records submitted and those records containing similar information under section 552.103(a) of the Government Code. However, once the information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Tex. Att'y Gen. ORD-349 (1982) at 2. And the applicability of section 552.103(a) as recognized in this letter ruling ends once the litigation has concluded. Tex. Att'y Gen. Op. No. MW-575 (1982) at 1; Tex. Att'y Gen. ORD-350 (1982) at 3.

Furthermore, we assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Tex. Att'y Gen. ORD-499 (1988) at 6, Tex. Att'y Gen. ORD-497 (1988) at 4. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

The sample documents you have submitted in Exhibit C that you desire to withhold under sections 552.103, 552.101, and 552.107 include communications between TABC attorneys and employees or between TABC employees and attorneys from the Office of the Attorney General for the purpose of providing legal services to TABC, specifically concerning responses to the requests for information that are the subject of the currently pending litigation between McLane and TABC. Upon review of these sample documents, we conclude that they are directly related to the pending litigation or the litigation that was anticipated when TABC received the January 22, 2016 request. TABC may therefore

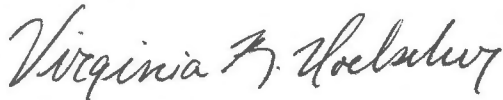
withhold the records submitted and those records containing similar information under section 552.103(a) of the Government Code. The applicability of section 552.103(a) as recognized in this letter ruling ends once the litigation has concluded. Tex. Att’y Gen. Op. No. MW-575 (1982) at 1; Tex. Att’y Gen. ORD-350 (1982) at 3. Because we conclude that the documents may be withheld under that provision, we do not separately consider whether they may be withheld under section 552.101 and 552.107.

The sample documents you have submitted in Exhibit D that you desire to withhold under sections 552.103, 552.101, and 552.111 include documents created by TABC employees, attorneys, and representatives addressing how to respond to the requests for information that are the subject of the currently pending litigation between McLane and TABC as well as drafts of discovery responses in that litigation. Upon review of these sample documents, we conclude that they are directly related to the pending litigation or the litigation that was anticipated when TABC received the January 22, 2016 request. TABC may therefore withhold the records submitted and those records containing similar information under section 552.103(a) of the Government Code. The applicability of section 552.103(a) as recognized in this letter ruling ends once the litigation has concluded. Tex. Att’y Gen. Op. No. MW-575 (1982) at 1; Tex. Att’y Gen. ORD-350 (1982) at 3. Because we conclude that the documents may be withheld under that provision, we do not separately consider whether they may be withheld under section 552.101 and 552.111.

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,



Virginia K. Hoelscher
Assistant Attorney General
Opinion Committee

VKH/sdk

Ref: ID# 605380

Enc. Submitted documents

c: Requestor
(w/o enclosures)