



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 1, 2016

Ms. Julie Allen
Office of the General Counsel
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711

OR2016-24320

Dear Ms. Allen:

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# 632787 (TABC ID Nos. 1471966298 and 1417385250).

The Texas Alcoholic Beverage Commission (the "commission") received two requests for information pertaining to specified communications and information pertaining to commission employees attending non-commission academies. The commission states it will release some information. The commission states it will redact certain information subject to section 552.117 of the Government Code pursuant to section 552.024 of the Government Code, and pursuant to section 552.1175(f) of the Government Code, section 552.130(c) of the Government Code, section 552.136(c) of the Government Code, section 552.147(b) of

the Government Code, and Open Records Decision No. 684 (2009).¹ You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.152 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which you state consists of a representative sample.²

Initially, we note you have marked some of the submitted information as not responsive to the instant requests. Upon review, we find the information we marked is not response to the instant requests. This ruling does not address the public availability of any information that is not responsive to the requests and the commission is not required to release such information in response to these requests. However, we find the remaining information at issue is responsive to the instant requests. Accordingly, we will consider your arguments against the disclosure of this information.

Next, we must address the commission's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) written comments stating the reasons why the claimed 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

¹Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. *See* Gov't Code § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c). Section 552.1175(f) of the Government Code authorizes a governmental body to redact under section 552.1175(b), without the necessity of requesting a decision from this office, the home addresses and telephone numbers, emergency contact information, social security number, date of birth, and family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure who properly elects to keep this information confidential. *See id.* § 552.1175(b), (f). Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See id.* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without requesting a decision from this office under the Act. *Id.* § 552.147(b). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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.

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. Gov't Code § 552.301(e). We note most of the submitted information is responsive to both requests. The commission received the first request for information on August 16, 2016. The commission informs us it was closed on September 5, 2016, in observance of Labor Day. We 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 fifteen-business-day deadline was September 7, 2016, with respect to the first request. However, the commission did not seek to withhold some portions of the submitted information or label such portions to indication sections 552.108 and 552.152 of the Government Code applied until it submitted to our office arguments and responsive documents in response to the second request on September 20, 2016. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the commission failed to comply with section 552.301 of the Government Code with respect to sections 552.108 and 552.152 for the information submitted for the first request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *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, 381-82 (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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.108 is discretionary in nature. This section serves to protect a governmental body's interests and may be waived; as a result, it does not constitute a compelling reason to withhold information. *See Simmons*, 166 S.W.3d at 350 (section 552.108 is not compelling reason to withhold information under section 552.302); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to section 552.108 subject to waiver). Accordingly, the information responsive to the first request that the commission failed to timely seek to withhold under section 552.108 of the Government Code may not be withheld under section 552.108. We note in waiving section 552.108 for the information at issue with respect to the first request, the commission also waived its claim under section 552.108 for the same information with respect to the second request. *See* Gov't Code § 552.007 (prohibiting selective disclosure of information); Open Records Decision No. 463 at 1-2 (1987). However, as section 552.152 of the Government Code makes information confidential under law, we will consider the applicability of that exception to the information at issue. Further, with respect to the

information the commission timely submitted and raised section 552.108 for we will consider the commission's argument under section 552.108.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. The commission informs us some of the submitted information relates to undercover commission officers. The commission asserts release of this information would subject the commission officers to a substantial threat of physical harm. Based on the commission's representations and our review, we conclude the commission has demonstrated release of some of the information at issue would subject commission officers to a substantial threat of physical harm. Therefore, the commission must withhold the names of the undercover officers under section 552.152 of the Government Code.³ However, we find the commission has failed to demonstrate the release of the remaining information at issue would subject commission employees or to a substantial threat of physical harm. Thus, the commission may not withhold any of the remaining information under section 552.152.

Section 552.108 of the Government Code provides:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

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

Id. § 552.108(a)(1), (b)(1). Section 552.108(a)(1) protects information if its release would interfere with a particular pending criminal investigation or prosecution. Section 552.108(b)(1) protects internal law enforcement and prosecution records, the release of which would interfere with law enforcement and prosecution efforts in general. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.) (section 552.108(b)(1) protects information that if released would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws). A governmental body claiming subsections 552.108(a)(1) and (b)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The statutory predecessor to section 552.108(b)(1) protected information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (detailed use of force guidelines), 456 (1987) (information regarding location of off-duty police officers), 413 (1984) (sketch showing security measures to be used at next execution). The statutory predecessor to section 552.108(b)(1) was not applicable to generally known policies and procedures. *See, e.g.*, Open Records Decision Nos. 531 at 2–3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

The commission contends release of some of the remaining information at issue would reveal investigative techniques and procedures, information regarding safety and security protocols, and internal communications codes that assist law enforcement officers in the performance of their duties. The commission argues release of the information at issue would interfere with the officers' elements of surprise when detecting crimes. Based on the commission's representations and our review, we find the information we marked would interfere with law enforcement. Accordingly, the commission may withhold the information we marked under section 552.108(b)(1) of the Government Code. However, we find the commission failed to demonstrate release of any portion of the remaining information at issue would interfere with law enforcement or prosecution efforts in general. Accordingly, the commission may not withhold any of the remaining information at issue under section 552.108(b)(1) of the Government Code. Further, the commission failed to explain release of the information at issue would interfere with a particular pending criminal investigation or prosecution. Accordingly, the commission may not withhold any of the remaining information at issue under section 552.108(a)(1) of the Government Code.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be

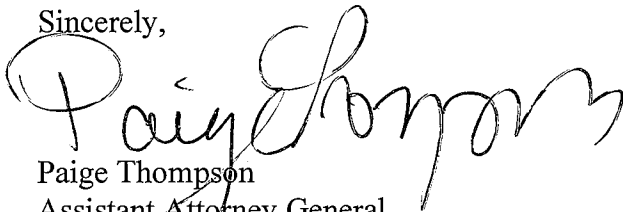
satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the commission must withhold the names of the undercover officers under section 552.152 of the Government Code. The commission may withhold the information we marked under section 552.108(b)(1) of the Government Code. The commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. 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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/eb

Ref: ID# 632787

Enc. Submitted documents

c: Requestor
(w/o enclosures)