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ATTORNEY GENERAL OF TEXAS

March 30, 2017

Ms. Julie Allen
Assistant General Counsel
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711-3127

OR2017-06665

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# 651072 (TABC Reference # 106805138).

The Texas Alcoholic Beverage Commission (the "commission") received a request for a specified case number. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we must address the obligations of the commission under section 552.301 of the Government Code, which prescribes the procedures 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 apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). The commission received the request for

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 those records contain substantially different types of information than that submitted to this office.

information on January 9, 2017. You inform us you were closed for business January 2017, and January 19, 2017. Accordingly, you were required to provide the information required by section 552.301(b) by January 25, 2017. While the commission timely raised sections 552.101, 552.103, 552.107 and rule 503 of the Texas Rules of Evidence, the commission did not raise its rule 192.5 of the Texas Rules of Civil Procedure argument until its letter dated January 30, 2017. Accordingly, with regard to its rule 192.5 argument, we conclude 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 requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (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). We will consider the applicability of the arguments the commission timely raised. However, we find you have failed to establish a compelling reason to address your remaining claim.

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

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases[.]

Gov't Code § 552.022(a)(12). Some of the submitted information consists of orders issued by the State Office of Administrative Hearings ("SOAH"). Therefore, the commission may only withhold the SOAH orders if they are confidential under the Act or other law. Although you raise sections 552.103 and 552.107 of the Government Code for the information at issue, these sections are discretionary exceptions to disclosure 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); 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) (waiver of discretionary exceptions).

Therefore, none of the information subject to section 552.022(a)(12), which we have marked, may be withheld under section 552.103 or section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly

confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will consider your arguments under section 552.101 of the Government Code and your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022(a)(12). Further, we will consider your arguments for the information not subject to section 552.022.

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 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. This office has construed the term “privileged” in this statute 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.

The commission states “[the] responsive records contain original or renewal application materials of a permittee or licensee other than name, proposed location, and type of permit or license sought and/or records provided to or obtained by the commission in connection with an investigation.” The commission also informs us these records have not yet been introduced as evidence in a hearing before the commission or a court in this state or the United States. Based on your representations and our review, we agree portions of Exhibit C, which we have marked, 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 must be released, 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.

However, we find the commission has not established any of the remaining information at issue consists of “private records” of a permittee, licensee, or other person required or obtained by the commission for purposes of section 5.48. Therefore, the remaining information is not confidential under section 5.48, and the commission may not withhold it under section 552.101 on that basis.

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.

Gov’t Code § 552.103(a), (c). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies 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 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.); ORD 551 at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4. We note contested cases conducted under the Administration Procedure Act (the “APA”), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the SOAH is considered litigation for the purposes of the APA. *See id.*

The commission states, and provides documentation showing, an administrative hearing was pending before SOAH between the commission and the specified business when the instant request was received. Therefore, we agree litigation was pending when the commission received the request. We also find the commission has established the remaining information is related to the pending litigation for purposes of section 552.103(a). Therefore, we agree section 552.103(a) is applicable to the remaining information.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a). We note the opposing party to the litigation has seen or had access to some of the information at issue. Therefore, the commission may not withhold this information under section 552.103(a). However, we agree the commission may withhold the remaining information, which we have marked, under section 552.103(a). We note the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision No. 350 (1982).

Texas Rule of Evidence 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

- (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
- (B) between the client's lawyer and the lawyer's representative;
- (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
- (D) between the client's representatives or between the client and the client's representative; or
- (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of

professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

The commission states the information subject to 552.022(a)(12) consists of communications involving commission attorneys, commission representatives, and other commission employees and officials. The commission further represents the communications were made for the purpose of facilitating the rendition of professional legal services to the commission and these communications have remained confidential. Upon review, we find the information subject to section 552.022(a)(12) consists of communications with individuals the commission has not demonstrated are privileged parties. Thus, we find the commission has not demonstrated the remaining information constitutes privileged attorney-client communications for the purposes of rule 503. Therefore, the commission may not withhold any of the information subject to section 552.022(a)(12) under rule 503.

The commission claims section 552.107 of the Government Code for some of the remaining information. Section 552.107(1) protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). The elements of the privilege under section 552.107 are the same as those for 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. *See* ORD 676 at 6-7. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege. *See Huie*, 922 S.W.2d at 923.

The commission states the information at issue consists of communications involving commission attorneys, commission representatives, and other commission employees and officials. The commission further represents the communications were made for the purpose of facilitating the rendition of professional legal services to the commission and these communications have remained confidential. Upon review, we find the remaining information at issue consists of communications with individuals the commission has not

demonstrated are privileged parties. Thus, we find the commission has not demonstrated the remaining information constitutes privileged attorney-client communications for the purposes of section 552.107(1) of the Government Code. Therefore, the commission may not withhold any of the remaining information under section 552.107(1).

In summary, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 5.48 of the Alcoholic Beverage Code. The commission may withhold the information we marked under section 552.103(a) of the Government Code. 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,



Kelly McWethy
Assistant Attorney General
Open Records Division

KSM/sb

Ref: ID# 651072

Enc. Submitted documents

c: Requestor
(w/o enclosures)