



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 16, 2017

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

OR2017-23462

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# 680596 (PIR Ref. Nos. 1656187481, 612850136, 1672491053, 1149180438, & 750298659).

The Texas Alcoholic Beverage Commission (the "commission") received five requests from the same requestor for correspondence related to misconduct pertaining to five named individuals. You state the commission does not have information responsive to portions of the request.¹ You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2017-17642 (2017). In Open Records Letter No. 2017-17642, we concluded 1) the commission must continue to rely on Open Records Letter Nos. 2017-05368 and 2017-10194 as previous

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

determinations and withhold or release the identical information at issue in accordance with those rulings; 2) the commission may withhold the information we marked under section 552.107(1) of the Government Code; 3) the commission may withhold the information we marked under section 552.103(a) of the Government Code; 4) the commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; 5) the commission must withhold the motor vehicle record information we marked under section 552.130 of the Government Code; 6) the commission must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure; 7) the commission must withhold the identifying information of the undercover officers, which we marked, under section 552.152 of the Government Code; and 8) the remaining information must be released. There is no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the commission must continue to rely on Open Records Letter No. 2017-17642 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). To the extent the submitted information was not subject to prior ruling, we will address your arguments under sections 552.103 and 552.107 of the Government Code.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The information we have marked consists of a completed investigation and evaluations subject to section 552.022(a)(1). The commission must release the completed investigation and evaluations pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). Although you raise section 552.103 for the information at issue, this section is a discretionary exception to disclosure and does 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. 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)(1), which we have marked, may be withheld under section 552.103. However as section 552.117 of the Government Code makes information confidential under the Act, we will consider the applicability of this section to the information subject to section 552.022.² Further, we will consider your arguments under sections 552.103 and 552.107 for the information not subject to section 552.022.

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.

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.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You contend the remaining information not subject to section 552.022 of the Government Code is related to pending litigation to which the commission is a party. You inform us, and have provided documentation demonstrating, litigation styled *Salvador Morales, Jr. v. Texas Alcoholic Beverage Comm'n*, Cause No. D-1-GN-14-004320, was pending in the 53rd

²The Office of the Attorney General 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).

District Court of Travis County on the date the commission received the request. You further explain the information at issue is related to the pending lawsuit because it pertains to the retaliation complaint of the requestor, the circumstances of which are the issue of the pending litigation. Based on your representations, the submitted documentation, and our review of the information at issue, we find litigation was pending when the commission received this request for information, and we find the information at issue is related to the pending litigation for purposes of section 552.103. Therefore, the commission may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.³

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to the pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 and 552.1175 of the Government Code.⁴ *See* Gov't Code § 552.117(a)(2). Section 552.117 also protects a peace officer's personal cellular telephone number if a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 670 at 6 (2001) (section 552.117(a)(2) excepts from disclosure peace officer's cellular telephone or pager number if officer pays for cellular telephone or pager service). Accordingly, the commission must withhold the information we have marked under section 552.117(a)(2) of the Government Code; however, the cellular telephone number may only be withheld if a governmental body does not pay for the cellular telephone service.

In summary, for the requested information that is identical to the information previously requested and ruled upon by this office, the commission must continue to rely on Open Records Letter No. 2017-17642 as a previous determination and withhold or release the identical information in accordance with that ruling. The commission may withhold the remaining information not subject to section 552.022 of the Government Code under

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

⁴Section 552.117(a)(2) adopts the definition of peace officer found in article 2.12 of the Code of Criminal Procedure.

section 552.103(a) of the Government Code. The commission must withhold the information we have marked under section 552.117(a)(2) 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# 680596

Enc. Submitted documents

c: Requestor
(w/o enclosures)