



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 31, 2017

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

OR2017-24873

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# 680407 (TABC Ref No. 1123440732).

The Texas Alcoholic Beverage Commission (the "commission") received a request for information, including internal investigations pertaining to a named individual. You claim some the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.137 of the Government Code and privileged under Texas Rule of Evidence 503.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we understand you have marked information that is not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request, and the commission is not required to release such information in response to this request.

¹We understand you to raise sections 552.101 and 552.137 of the Government Code based on your markings.

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.

Next, you state some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2016-07962 (2016) and 2017-03254 (2017). There is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Accordingly, to the extent the submitted responsive information 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 Nos. 2016-07962 and 2017-03254 as previous determinations and withhold or release the identical information in accordance with those rulings. *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). However, to the extent the submitted responsive information is not identical to the information responsive in these previous rulings, we will address your submitted arguments against its disclosure.

Next, we note some of the submitted responsive information is 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;

(15) information regarded as open to the public under an agency's policies; [and]

(17) information that is also contained in a public court record[.]

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(1), (15), (17), (18). The submitted responsive information contains a completed investigations and completed evaluations that are subject to subsection 552.022(a)(1). The commission must release the completed investigations and evaluations pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The remaining responsive information also includes job descriptions that must be released pursuant to subsection 552.022(a)(15) if the commission considers these items to be open to the public under its policies, unless the information is expressly confidential under the Act or other law. *See id.* § 552.022(a)(15). The remaining responsive information also includes court-filed documents that are subject to subsection 552.022(a)(17) and a settlement agreement subject to subsection 552.022(a)(18), and this information must

also be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(17), (18). The commission asserts the information subject to section 552.022 is excepted from release under sections 552.103 and 552.107 of the Government Code. However, sections 552.103 and 552.107 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); *see also* Open Records Decision Nos. 676 at 10-11 (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, the information at issue may not 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 the commission’s assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information subject to section 552.022. Further, as sections 552.101 and 552.117 of the Government Code make information confidential, we will consider these exceptions for the information subject to section 552.022.³ We will also address the commission’s arguments under section 552.103 and section 552.107 for the remaining responsive information not subject to section 552.022.

Section 552.103 of the Government Code provides, in relevant part:

(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 governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is 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

³This office will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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

You state, and provide documentation showing, the commission is a party to pending litigation styled *Moralez v. Texas Alcoholic Beverage Comm'n*, Cause No. D-1-GN-14-004320, in the District Court of Travis County, 53rd Judicial District. You argue the information at issue is directly related to the requestor's claim against the commission. Based on your representations and our review, we agree litigation to which the commission is a party was pending when the commission received the request. We also find the commission has established the information at issue is related to the pending litigation for purposes of section 552.103(a) of the Government Code. Therefore, to the extent the information at issue was not previously released in Open Records Letter No. 2017-03254, the commission may withhold the information we have marked under section 552.103(a) of the Government Code. *See* Gov't Code § 552.007 (information voluntarily released to member of public may not subsequently be withheld from public, unless public disclosure is expressly prohibited by law or information is confidential under law).

However, as you acknowledge, once information has been obtained by all parties to the pending 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 pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides:

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 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 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).

You state the information subject to section 552.022 of the Government Code consists of communications between commission staff and attorneys for the commission. You also state the communications were made for the purpose of facilitating the rendition of professional legal services to the commission. You assert these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue. Accordingly, the commission may generally withhold the information we have marked under rule 503 of the Texas Rules of Evidence. However, we note some of the otherwise privileged e-mail strings includes e-mails received from or sent to a party you have not demonstrated is privileged. Furthermore, if these e-mails are removed from the e-mail string and stand alone, they are responsive to the request for information. Therefore, to the extent the commission maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, the commission may not withhold these non-privileged e-mails under rule 503. Additionally, we note any of the marked information previously released pursuant to Open Records Letter No. 2017-03254 has been shared with a non-privileged party and may not now be withheld under rule 503. *See* Gov’t Code § 552.007. Further, we find you have failed to establish the remaining information at issue constitutes privileged attorney-client communications for the purposes of rule 503. Therefore, the commission may not withhold any portion of the remaining information pursuant to rule 503.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See id.* § 552.107(1). The elements of the privilege under section

552.107(1) are the same as those discussed above 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. 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 unless otherwise waived by the governmental body. *See Huie*, 922 S.W.2d at 923.

You claim some of the information not subject to section 552.022 of the Government Code is protected by section 552.107(1) of the Government Code. You represent the information at issue consists of communications between commission staff and attorneys and outside counsel for the commission and their representatives. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the commission. You further state these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find the commission has demonstrated the applicability of the attorney-client privilege to some of the information at issue. Accordingly, the commission may generally withhold the information we have marked under section 552.107(1) of the Government Code. We note, however, the otherwise privileged e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if these e-mails are removed from the otherwise privileged e-mail strings in which they appear and stand alone, they are responsive to the request for information. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the commission separate and apart from the otherwise privileged e-mail strings in which they appear, then the commission may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code. Additionally, we note any of the marked information previously released pursuant to Open Records Letter No. 2017-03254 has been shared with a non-privileged party and may not now be withheld under section 552.107(1). *See Gov't Code* § 552.007. Further, we find you have failed to establish the remaining information at issue constitutes privileged attorney-client communications for the purposes of section 552.107. Therefore, the commission may not withhold any portion of the remaining information under section 552.107 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information protected by section 560.003 of the Government Code, which provides, “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” *Id.* § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). There is no indication the requestor has a right of access to the submitted fingerprints under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual’s biometric identifier to another person unless the individual consents to disclosure). Accordingly, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 of the Government Code also 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 some of the remaining responsive information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the commission must withhold the information you marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, the information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, if the individuals whose information is at issue timely requested confidentiality under section 552.024, the commission must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, the commission may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024 or the cellular telephone service is paid for by a governmental body, the commission may not withhold the marked information under section 552.117(a)(1).

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* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not of a type specifically excluded by section 552.137(c). *See id.* § 552.137(c). Therefore, the commission must withhold the

e-mail addresses we have marked and you marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release.


In summary, for the submitted responsive 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 Nos. 2016-07962 and 2017-03254 as previous determinations and withhold or release the identical information in accordance with those rulings. The commission must release the information we have marked under subsection 552.022(a)(15) of the Government Code to the extent the commission considers the job descriptions open to the public. To the extent the information at issue was not previously released in Open Records Letter No. 2017-03254, the commission may withhold the information we have marked under section 552.103(a) of the Government Code. To the extent the information at issue was not previously released in Open Records Letter No. 2017-03254, the commission may generally withhold the information we have marked under rule 503 of the Texas Rules of Evidence; however, to the extent the non-privileged e-mails we marked are maintained by the commission separate and apart from the otherwise privileged e-mail strings in which they appear, the commission must release the marked information. To the extent the information at issue was not previously released in Open Records Letter No. 2017-03254, the commission may generally withhold the information we have marked under section 552.107(1) of the Government Code; however, to the extent the non-privileged e-mails we marked are maintained by the commission separate and apart from the otherwise privileged e-mail strings in which they appear, the commission must release the marked information. The commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code. The commission must withhold the information you marked under section 552.101 of the Government Code in conjunction with common-law privacy. The commission must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the individuals whose information is at issue timely requested confidentiality under section 552.024; however, the commission may only withhold the marked cellular telephone number if the cellular telephone service is not paid for by a governmental body. The commission must withhold the personal e-mail addresses we have marked and you marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. The commission must release the remaining information.⁴

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.

⁴We note that the remaining information contains a social security number. 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 the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

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,



Sidney M. Pounds
Assistant Attorney General
Open Records Division

SMP/gw

Ref: ID# 680407

Enc. Submitted documents

c: Requestor
(w/o enclosures)