



October 1, 1999

Ms. Linda Cloud  
Executive Director  
Texas Lottery Commission  
P.O. Box 16630  
Austin, Texas 78761-6630

OR99-2788

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 128629.

The Texas Lottery Commission (the "commission") received requests for the following information: 1) "copies of Toni Smith's daytimer entries" for six particular days; 2) "copies of each and every grievance filed against Toni Smith during her career with Texas Lottery;" and 3) "copies of all memos issued by Greg Haulk between the dates of June 1, 1999 and July 20, 1999." You contend that the requested documents excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the documents at issue.

Section 552.103(a) of the Government Code excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *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). The governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

You have established that the commission reasonably anticipates litigation relating to a former employee's whistleblower claim. We agree that exhibits F and G and the first three pages of exhibit I relate to the anticipated litigation. We note, however, that the opposing party in the anticipated litigation authored several of the documents in exhibit F. Absent

special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, section 552.103 does not except from disclosure documents to which the opposing party has previously had access. The commission may therefore withhold exhibits F and G and the first three pages of exhibit I under section 552.103 only to the extent that the opposing party has not previously had access to them.<sup>1</sup> You have not explained, and we have been unable to determine, how exhibits E and H and the remainder of exhibit I relate to the anticipated litigation. Thus, we conclude that these documents are not excepted from disclosure under section 552.103 and must be released to the requestor.

Finally, you contend that a two-page memorandum in exhibit G is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences communicated to the attorney. *See* Open Records Decision No. 574 (1990). Section 552.107(1) does not protect purely factual information. ORD 574 at 5. We have marked the information in the memorandum that is excepted from disclosure under section 552.107. The commission may withhold the marked information, but must release the remaining information in the memorandum.<sup>2</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

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<sup>1</sup>We note that the applicability of section 552.103 ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

<sup>2</sup>You note that we held in Open Records Letter No. 99-1643 (1999) that portions of exhibit F are excepted from disclosure under section 552.107. The commission may continue to withhold those portions of exhibit F from disclosure in accordance with Open Records Letter No. 99-1643.

Ref: ID# 128629

Encl. Submitted documents

cc: Ms. Staci Morgan  
301 East 4<sup>th</sup> Street, #306  
Austin, Texas 78701  
(w/o enclosures)