



March 15, 2002

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

OR2002-1270

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159931.

The Texas Lottery Commission (the "commission") received eight requests for information relating to certain personnel matters. You state that the commission will release some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.136 of the Government Code. The commission also believes that one of these requests may implicate the proprietary interests of three private parties, Northrop Grumman ("Northrop"), Cisco System ("Cisco"), and GTECH Corporation ("GTECH"). The commission notified Northrop, Cisco, and GTECH of this request for information and of their right to submit arguments as to why the information in question should not be released.¹ GTECH submitted arguments to this office under section 552.110 of the Government Code. We have considered the commission's arguments and those of GTECH and have reviewed the submitted information. We also received comments from one of the requestors.²

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

²See Gov't Code § 552.304 (providing that any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Initially, we address the commission's claim under section 552.107 of the Government Code. Section 552.107(1) protects information that comes 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 communications made in confidence to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information that may be withheld pursuant to the attorney-client privilege under section 552.107(1).

You inform this office that some of the information in question is a draft document that a human resources investigator sent to an attorney for the commission for the purpose of seeking legal advice. You state that this document was not intended for disclosure to third parties and has been communicated only to the legal division of the commission. Based on your representations, we conclude that the commission may withhold the document in question under section 552.107 of the Government Code. We have marked this information accordingly.

The commission also claims that other responsive information is protected by section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App. --San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ). We determined that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (holding that personnel-related communications not involving policymaking were not excepted from public disclosure under section 552.111).

You raise section 552.111 with respect to several e-mail communications. We find, however, that this information relates to specific personnel matters. You have not demonstrated that this information consists of advice, recommendations, or opinions that relate to the commission's policymaking processes. We therefore conclude that the commission may not withhold this information under section 552.111.

The commission also raises section 552.101 of the Government Code in conjunction with the common-law right to privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Common-law privacy under section 552.101 protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). You claim that, in accordance with the holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the names of witnesses, informants, complainants, and other persons are private under section 552.101. You also claim that certain documents are private in their entirety. We note, however, that *Ellen* addressed the applicability of common-law privacy to information concerning sexual harassment investigations. Although most of the documents in question relate to allegations of inappropriate conduct of a sexual nature, these records do not involve allegations of sexual harassment. Consequently, the holding in *Ellen* is not applicable to any of the information in question. Furthermore, because all of the information in question relates solely to the workplace conduct of public employees, we find that the public has a legitimate interest in this information. *See also* Open Records Decision Nos. 405 at 2 (1983) (information relating to manner in which public employee performed his or her job cannot be said to be of minimal public interest), 423 at 2 (1984) (information is not private if it is of sufficient legitimate public interest, even if person of ordinary sensibilities would object to release on grounds that information is highly intimate or embarrassing), 470 at 4 (1987) (public employee's job performance does not generally constitute private affairs). Therefore, we conclude that none of the information in question is confidential under section 552.101 in conjunction with common-law privacy.

Section 552.101 also encompasses information that another statute makes confidential. The commission also raises section 552.101 in conjunction with section 466.022 of the Government Code. Section 466.022 provides in part that

the following information is confidential and is exempt from disclosure:

- (1) security plans and procedures of the commission designed to ensure the integrity and security of the operation of the lottery; [and]
- (2) information of a nature that is designed to ensure the integrity and security of the selection of winning tickets or numbers in the lottery, other than information describing the general procedures for selecting winning tickets or numbers[.]

Gov't Code § 466.022(b)(1)-(2). You have marked information that the commission claims is confidential under section 466.022. You inform us that, in the opinion of the Acting Director of the commission's Security Division, the disclosure of the marked information would threaten the integrity and security of the operation of the lottery. Based on your

representations, we conclude that the marked information is confidential under section 466.022 of the Government Code. Therefore, the commission must withhold this information under section 552.101 of the Government Code as information made confidential by law.

We note that this conclusion under section 466.022 of the Government Code also encompasses the only documents that GTECH claims should be withheld from public disclosure. Therefore, we need not address GTECH's arguments under section 552.110 of the Government Code. As we have received no arguments from either Northrop or Cisco, neither of those parties has demonstrated that any other information must be withheld from disclosure. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

We also note, however, that one of the remaining documents includes the e-mail addresses of members of the public. The commission may be required to withhold these e-mail addresses under section 552.137 of the Government Code. Section 552.137 provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. We have marked the e-mail addresses that the commission must withhold under section 552.137, unless the individuals to whom these e-mail addresses belong have affirmatively consented to their disclosure.

Lastly, we note that some of the submitted information is copyrighted. An officer for public information must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary, some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. The commission must withhold other information under section 552.101 in conjunction with section 466.022 of the Government Code. The

commission also must withhold the marked e-mail addresses under section 552.137 unless the individuals to whom the e-mail addresses belong have affirmatively consented to their disclosure. The commission must release the rest of the submitted information. In doing so, the commission must comply with copyright law. As sections 552.101, 552.107, and 552.137 are dispositive, we need not address the commission's claim under section 552.136.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

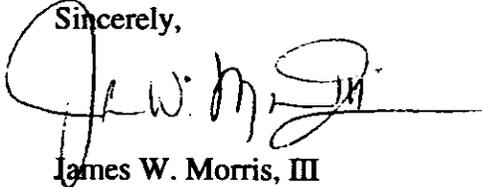
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/seg

Ref: ID# 159931

Enc: Marked documents

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