



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2005

Mr. Ed Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
P.O. Box 12927
Austin, Texas 78711-2927

OR2005-11409

Dear Mr. Seidenberg:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 238416.

The Texas State Library and Archives Commission (the "commission") received requests from multiple requestors seeking documents concerning Harriet Miers from Texas Governor George W. Bush's records and the Texas Lottery Commission records in the holdings of the Texas State Archives.¹ You state that staff for the Governor's Office reviewed the responsive documents related to Governor Bush and determined that they did not wish to assert any exceptions to those documents. You state that the Lottery Commission asserts that one responsive document is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. The Texas Lottery Commission has submitted arguments in support of withholding this document. We have considered the exceptions claimed and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental

¹The commission informs us that at least nine of the initial requestors have withdrawn their requests for this information.

body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. 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 v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The Lottery Commission explains that the submitted document consists of a communication between Lottery Commission staff and its attorneys that was made for the purpose of facilitating the rendition of legal services and advice to the Lottery Commission. The Lottery Commission further explains that this document was not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of legal services. Based on this representation and our review of the submitted document, we find that the commission may withhold the submitted information as attorney-client privileged information that is excepted under section 552.107 of the Government Code. Because our ruling on this issue is dispositive, we need not address the Lottery Commission’s remaining argument.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. 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 Office of the Attorney General 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. 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,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/segh

Ref: ID# 238416

Enc. Submitted documents

c: Mr. Gary Grief
Acting Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630
(w/o enclosures)

Mr. Jay Root
Fort Worth Star-Telegram
1005 Congress Avenue, Suite 920
Austin, Texas 78701
(w/o enclosures)

Ms. Miriam Rozen
Texas Lawyer
7119 Duffield Drive
Dallas, Texas 75248
(w/o enclosures)

Ms. Lianne Hart
Los Angeles Times
440 Louisiana Street, Suite 2080
Houston, Texas 77002
(w/o enclosures)

Mr. Ralph Blumenthal
Mr. Nathan Levy
The New York Times
1100 Louisiana Street, Suite 375
Houston, Texas 77002
(w/o enclosures)

Ms. Sharon Theimer
The Associated Press
2021 K Street NW, Suite 600
Washington, DC 20006
(w/o enclosures)

Ms. Molly Levinson
Deputy Political Director
CNN
820 First Street NE
Washington, DC 20002
(w/o enclosures)

Mr. James Scholz
Ms. Ariane DeVogue
ABC NEWS Washington
1717 DeSales Street NW
Washington, DC 20036
(w/o enclosures)

Ms. Marcie Rickun
NBC News Library
4001 Nebraska Avenue NW
Washington, DC 20016
(w/o enclosures)

Mr. Joel Zand
FindLaw: A Thomson Corporation
800 West California Avenue, 2nd Floor
Sunnyvale, California 94086
(w/o enclosures)

Ms. Sandra Pickett
Chair
Texas State Library and Archives Commission
P.O. Box 1919
Liberty, Texas 77575
(w/o enclosures)

Ms. Terri Lacy
Andrews & Kurth L.L.P.
600 Travis, Suite 4200
Houston, Texas 77002
(w/o enclosures)