ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 6, 2006

Mr. Anthony J. Sadberry
Acting Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR2006-03448

Dear Mr. Sadberry:

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# 245840.

The Texas Lottery Commission (the "commission") received a request for the requestor's personnel file, and for "any separate files having anything to do with [the requestor], such as disciplinary actions, personnel actions, notes, emails sent from anyone but [the requestor], correspondence or any other personnel related documentation" that relates to the requestor's employment by the commission. You state that some responsive information has been provided to the requestor. You claim that some of the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that the requestor specifically excluded from the request e-mails sent from the requestor. The e-mails submitted in Exhibits B-1 through B-6 were sent from the requestor, and therefore are not responsive to the instant request for information. We have marked these documents, which the commission need not release in response to this request and this ruling will not address that information.

You claim that the marked information in Exhibits B-7, B-8, and B-9 is excepted from disclosure under section 552.107(1) of the Government Code. This section protects information that comes 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. *See* 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 body. *See* 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. *See 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 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. *See* 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. *See 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. Section552.107(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 commission explains the communications at issue in Exhibits B-7, B-8, and B-9 are confidential communications among commission attorneys and staff that were made in furtherance of the rendition of professional legal services. The commission states these communications were intended to be confidential and that their confidentiality has been maintained. After reviewing the commission's arguments and the submitted information, we agree that the information you have marked in Exhibits B-7, B-8, and B-9 constitutes privileged attorney-client communications that the commission may withhold under section 552.107.[1]

Next, the commission contends that the e-mail addresses in Exhibit B-10 are excepted from disclosure under section 552.137. Section 552.137 of the Government Code provides:

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[1]Because section 552.107 is dispositive, we do not address the commission's section 552.111 argument for Exhibits B-8 and B-9.

> (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 note that section 552.137 does not apply to a public employee's governmental e-mail address or a business' general e-mail or web page address. You inform us that no member of the public has affirmatively consented to the release of any e-mail address contained in Exhibit B-10. The commission must, therefore, withhold the e-mail addresses that we have marked under section 552.137.

In summary, the commission may withhold the information you have marked in Exhibits B-7, B-8, and B-9 under section 552.107 of the Government Code. We have marked the e-mail addresses in Exhibit B-10 that the commission must withhold under section 552.137 of the Government Code. The remaining responsive information must be released to the requestor.

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).

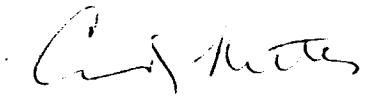
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/er

Ref: ID# 245840

Enc. Submitted documents

c: Ms. Reni Johnson
16508 Colwyn Bay Cove
Pflugerville, Texas 78660
(w/o enclosures)