



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 12, 2006

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

OR2006-04961

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# 248882.

The Texas Lottery Commission (the "commission") received a request for the commission's file for a specified matter before the commission, Docket No. 362-03-0248.B, a specified 2001 audit, and related information. You state you have provided some information to the requestor but claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. Additionally, you state that the requested information may implicate the proprietary interests of third parties represented by an attorney, Mr. Gary Bledsoe ("Bledsoe"). Accordingly, you inform us that you notified these third parties through Bledsoe of the request and their right to submit arguments to this office as to why their information should not be released; Bledsoe has submitted arguments on behalf of his clients. *See Gov't Code § 552.305(d)* (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 in certain circumstances). We have considered the arguments submitted by the commission and Bledsoe, and reviewed the submitted information. We have also considered comments submitted by an attorney representing the requestor. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that the present request encompasses the type of information that is currently the subject of pending litigation between GameTech International, Inc. ("GameTech") and the Office of the Attorney General. *See GameTech International, Inc. v. Abbott, et al.*, Cause No. GN501668, 126<sup>th</sup> District Court of Travis County, Texas. In this litigation, a prior ruling of this office is at issue, Open Records Letter Ruling No. 2005-03642 (2005), which required the commission to release certain information pertaining to GameTech. Some of your arguments and the corresponding information you seek to withhold are similar to the issues and information in the pending litigation. Accordingly, we are closing the portion of the file regarding this information, which we have marked, without issuing a decision and will allow the court to determine whether such information must be released to the public.

Next, we note that some of the submitted information is not responsive to the instant request. Although you argue submitted bank records are excepted from disclosure under the Act, the requestor's attorney has excluded the bank records from the request, informing us that "[a]s to the bank records, same are . . . not at issue in this request for information [and are] not to be included in the request for the case file." Information that is not responsive to this request, which we have marked, need not be released. Moreover, we do not address such information in this ruling.

Next, we address the contention made by the requestor's attorney that the commission is in violation of the procedural requirements of the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten *business* days after receiving the request. *See* Gov't Code § 552.301(a), (b). The instant request for information was received by the commission on February 22, 2006. This office does not count any holidays, including skeleton crew days observed by a governmental body, as business days for the purpose of calculating a governmental body's deadlines under the Act. The commission informs us that the commission observed a skeleton crew day on Texas Independence Day, March 2, 2006; therefore, March 2, 2006 was not a business day for the purpose of the Act. Thus, the tenth business day after the receipt of the instant request was March 9, 2006. The commission's request for a decision to this office was hand-delivered on March 9, 2006. We therefore find the commission complied with the procedural requirements of section 552.301 in requesting this ruling. We now address the submitted arguments.

Both the commission and Bledsoe argue that some of the remaining submitted information consisting of communications pertaining to formal settlement negotiations between the commission and Bledsoe are confidential. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 154.073 of the Civil Practice and Remedies Code provides in relevant part:

(a) Except as provided by Subsections (c), (d), (e), and (f)<sup>1</sup> a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). Further, in Open Records Decision No. 658 (1998), this office found that communications during the formal settlement process were intended to be confidential. Open Records Decision No. 658 at 4 (1998): *see also* Gov't Code § 2009.054(c). The submitted information at issue consists of communications between the commission and Bledsoe, and the mediator appointed to facilitate settlement negotiations between the parties. We find this information was made during the course of an alternative dispute resolution proceeding. Thus, the commission must withhold this information under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code.<sup>2</sup>

The commission claims that some of the remaining submitted information is excepted by section 552.107 of the Government Code. Section 552.107(1) 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 body. TEX. R. EVID. 503(b)(1). We note the attorney-client 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).

---

<sup>1</sup>Subsections 154.073(c), (d), (e), and (f) are inapplicable in this instance.

<sup>2</sup> As our ruling on this issue is dispositive, we need not address your remaining arguments against disclosure of this information.

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)-(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) (emphasis added). 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).

You state that the submitted information you seek to withhold pursuant to section 552.107 was “1) communicated between [c]ommission staff and its attorneys; 2) was not intended to be disclosed to third parties; and 3) was made in the furtherance of the rendition of professional legal services.” You have also identified the parties to the communication at issue. Based on your representations and our review of the information at issue, we agree that this information, which we have marked, is protected by the attorney-client privilege and the commission may withhold this information under section 552.107.

Having considered all of the arguments submitted by the commission, we next address the arguments submitted by Bledsoe for the remaining submitted information. Bledsoe claims all of the remaining submitted information is protected by the attorney-client privilege, enacted by Texas Rule of Evidence 503. *See* TEX. R. EVID. 503. Based on our review of Bledsoe’s representations and the information at issue, we find that the remaining submitted information constitutes communications made between privileged parties for the purpose of facilitating the rendition of professional legal services to Bledsoe’s clients. *See id.* However, as the information at issue was disclosed to the commission, we must determine whether the attorney-client privilege has been waived in the instance. *See In re Monsanto Co.*, 998 S.W.2d 917, 930 (Tex. App.—Waco 1999, orig. proceeding) (finding that disclosure of information to third party waives attorney-client privilege); *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 649 (Tex. 1985) (finding that when communication is disclosed to third party, party asserting attorney-client privilege maintains burden of demonstrating that no waiver occurred); Open Records Decision Nos. 676 at 10-11

(where document has been voluntarily disclosed to opposing party, attorney-client privilege has generally been waived).

Rule 511 of the Texas Rules of Evidence provides that

[a] person upon whom these rules confer a privilege against disclosure waives the privilege if:

- (1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or
- (2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.

TEX. R. EVID. 511. Rule 512 of the Texas Rules of Evidence provides that “[a] claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.” TEX. R. EVID. 512. Thus, if the commission had the authority to compel Bledsoe to provide the commission with the remaining information at issue, or, if this information was provided without an opportunity to claim that the information was protected from disclosure under the attorney-client privilege, then Bledsoe would not have waived the attorney-client privilege when this information was provided to the commission. *See id; cf. Riverside Hosp., v. Garza*, 894 S.W.2d 850, 857 (Tex. App. - Corpus Christi 1995, orig. proceeding) (finding that under rule 512 of Texas Rules of Evidence hospital did not waive discovery privilege in disclosing privileged information in prior case pursuant to court order).

As noted, the remaining information consists of communications between and among Bledsoe and his clients that were communicated to the commission. Bledsoe does not argue that the commission is a privileged party to the communications. Rather, we understand he was compelled to provide the remaining information to the commission with regard to the matter at issue. Accordingly, we conclude that, under Rule 512, Bledsoe did not waive the attorney-client privilege in this instance. Consequently, the remaining submitted information is protected by the attorney-client privilege and must be withheld.<sup>3</sup>

In summary, we have marked the type of information subject to pending litigation and the nonresponsive information that is not at issue in this ruling. We have marked the submitted

---

<sup>3</sup>As we are able to reach this determination under the attorney-client privilege, we need not address Bledsoe's remaining arguments against disclosure of this information.

information that was created during the course of an alternative dispute resolution procedure that is confidential under section 154.073 of the Civil Practice and Remedies Code and must be withheld under section 552.101 of the Government Code. The remaining information, which we have marked, is protected by the attorney-client privilege.

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,



Ramsey A. Abarca  
Assistant Attorney General  
Open Records Division

RAA/eb

Ref: ID# 248882

Enc. Submitted documents

c: Ms. Emma Perez-Trevino  
Brownsville Herald  
1135 East Van Buren  
Brownsville, Texas 78520  
(w/o enclosures)

Mr. Gary Bledsoe  
Law Offices of Gary L. Bledsoe & Associates  
316 West 12<sup>th</sup>, Suite 307  
Austin, Texas 78701  
(w/o enclosures)

Mr. Brian G. Janis, P.C.  
Attorney at Law  
1325 Palm Boulevard, Suite B  
Brownsville, Texas 78520-7268  
(w/o enclosures)