



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 7, 2007

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

OR2007-14621

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 #294030.

The Texas Lottery Commission (the "commission") received a request for all complaints and other documents pertaining to the Littlefield Corporation ("Littlefield") or its subsidiaries. You state that you have provided some of the responsive information to the requestor. You claim that the submitted information, labeled "Exhibit B," is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.116, 552.136, and 552.137 of the Government Code.¹ You also state that release of the requested information may implicate the proprietary interests of Strike It Rich Bingo Unit - Odessa ("Strike It Rich"). Accordingly, you state, and provide documentation showing, that you notified this party of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain

¹Although you initially raised section 552.101 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume that you have withdrawn this exception. *See* Gov't Code §§ 552.301, 552.302.

circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

You claim that portions of Exhibit B are excepted from disclosure under section 552.107(1) 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). 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 Tex. 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, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. 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

²We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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 Exhibit B contains e-mails between commission attorneys and commission employees, including the commission's Charitable Bingo Operations Division, and you have identified every sender or recipient of each e-mail. You inform us that these communications were made in the furtherance of the rendition of legal services and advice for the commission. You further state that all of these communications were made in confidence, intended for the sole use of the commission and its attorneys, and that they have not been shared or distributed to others. Based on our review of your representations and the submitted information, we find that you have demonstrated the applicability of the attorney-client privilege to the requested communications at issue. We note, however, that one of the documents you have marked under section 552.107, titled "Statement of Events," does not appear to be a communication. The commission may not withhold this document under the attorney-client privilege. Therefore, with the exception of this one communication, we conclude that the commission may withhold all of the e-mails you have marked pursuant to section 552.107(1) of the Government Code. As our ruling on these e-mails is dispositive, we need not address your remaining arguments against the disclosure of this information.

Next, you assert section 552.111 for certain highlighted portions of the remaining information within Exhibit B. The purpose of section 552.111 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 from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 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. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

This office has also concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You state that the draft documents you have marked under section 552.111 necessarily contain the opinions and advice of commission employees. You indicate that you have or will release these documents in their final form. Accordingly, the commission may withhold these drafts under section 552.111. You also indicate that the information you have highlighted under section 552.111 consists of the advice, opinions, and recommendations of commission employees. You state that these opinions involve policymaking matters relating to the commission. Upon review of your representations and the information at issue, we agree that some of the information you have highlighted consists of the advice or opinions of commission employees regarding policymaking matters. However, the information you have highlighted within the document titled "Statement of Events" is purely factual and may not be withheld as a policymaking document. Furthermore, you have also highlighted or marked other portions of the submitted information that do not appear to consist of opinions or advice relating to policymaking matters. Therefore, because you raise no further exceptions to disclosure regarding this information, which we have marked, it must be released to the requestor.

You claim that some of the remaining information in Exhibit B is excepted from disclosure under section 552.116 of the Government Code. Section 552.116 provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a

municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(a) intra-agency and interagency communications; and

(b) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116.³ You state that portions of the information you have marked within Exhibit B consist of working papers that were compiled by the commission's Charitable Bingo Operations Division during the course of an audit authorized under section 2001.560(c) of the Texas Occupations Code. *See* Occ. Code §2001.560(c) (the commission shall appoint internal or external auditor to investigate the character of a [bingo] license holder's business). Based on your representations and our review, we conclude that the information you have marked under section 552.116 of the Government Code constitutes audit working papers and may therefore be withheld on this basis.

We note that Exhibit B contains information subject to section 552.130 of the Government Code.⁴ Section 552.130 excepts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. Accordingly, the commission must withhold the Texas driver's license numbers we have marked pursuant to section 552.130 of the Government Code.

You assert that Exhibit B contains information subject to section 552.136 of the Government Code. Section 552.136(b) states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. However, upon review, we find that you have failed to demonstrate that Exhibit B contains

³Act of May 17, 1993, 73rd Leg., R.S., ch. 268, 1993 Tex. Gen. Laws 583, 601, *amended by* Act of May 28, 2007, 80th Leg., R.S., ch. 1372, § 24, 2007 Tex. Sess. Law Serv. 4658, 4670-71.

⁴The Office of the Attorney General will raise a mandatory exception like section 552.130 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information subject to section 552.136, nor have you marked any account or access numbers under this exception. Therefore, the commission may not withhold any information within Exhibit B under section 552.136.

You assert that the e-mail addresses you have highlighted within Exhibit B are excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). You state that the e-mail addresses you have highlighted are not of a type specifically excluded by section 552.137(c). Therefore, the commission must withhold most of the e-mail addresses you have highlighted within Exhibit B in accordance with section 552.137, unless the commission receives consent for their release. We note that we have marked additional e-mail addresses within Exhibit B that are subject to section 552.137 and one address that is not subject to section 552.137. We note further that the commission highlighted one e-mail address, which we have marked, that appears to pertain to a machine rather than an individual. If this address does, in fact, pertain to a machine, then it must be released to the requestor; if it is an individual’s e-mail address, then it is subject to section 552.137.

Finally, you assert that release of one page, which you have marked, may implicate the proprietary interests of Strike It Rich. We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov’t Code* § 552.305(d)(2)(B). As of the date of this letter, we have not received any arguments from Strike It Rich for withholding its information. Therefore, we have no basis to conclude that the release of any of the submitted information would harm the proprietary interests of Strike It Rich. *See id.* § 551.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110 must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). Accordingly, the commission must release the page it has marked under section 552.110.

In summary, with the exception of the information we have marked to be released, the commission may withhold the information it has marked under sections 552.107, 552.111, and 552.116 of the Government Code. The commission must withhold the information we have marked under section 552.130 of the Government Code. Finally, unless it receives consent for their release, the commission must withhold the e-mail addresses it has

highlighted, in addition to the e-mail addresses we have marked, under section 552.137 of the Government Code.⁵ The remaining 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.

⁵We note that Exhibit B contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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,

A handwritten signature in black ink, appearing to read "Reg Hargrove", with a long, sweeping horizontal line extending to the right.

Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 294030

Enc. Submitted documents

c: Mr. Jeffrey L. Minch
President, CEO
Littlefield Corporation
2501 North Lamar Boulevard
Austin, Texas 78705
(w/o enclosures)