



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 28, 2008

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

OR2008-10165

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# 317026.

The Texas Lottery Commission (the "commission") received a request for information pertaining to complaints against certain businesses. You state that you have released some of the responsive information. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, 552.111, 552.130, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You inform us that some of the responsive information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-10134 (2008). Additionally, we note that some of the responsive information may be subject to Open Records Letter No. 2007-14621 (2007). To the extent the pertinent facts and circumstances have not changed since the issuance of these rulings, the commission may continue to rely on Open Records Letter Nos. 2008-10134 and 2007-14621 for the information that was at issue in these prior rulings. *See* Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as a previous determination when (1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); (2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney

general; (3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and (4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). To the extent the submitted information is not the same as the information previously ruled upon, we will address your arguments.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in subchapter F of chapter 411 of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with subchapter F of chapter 411. Upon review, we find that no portion of the submitted information constitutes CHRI made confidential under federal law or chapter 411. Therefore, the commission may not withhold any portion of the submitted information on that basis under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683; *see also Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 551 (Tex. App.—Austin 1983, *writ ref'd n.r.e.*). Upon review, we find that no portion of the submitted information is protected by common-law privacy. Therefore, the commission may not withhold any portion of the submitted information on that basis under section 552.101 of the Government Code.

Next, 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 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)-(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).

You state that some of the submitted information constitutes communications between a commission employee and a commission attorney made in furtherance of the rendition of professional legal services to the commission. You have identified the parties to the communications. You also state that these communications were intended to be confidential and their confidentiality has been maintained. Based on your representations and our review of the information at issue, we agree that the information you have marked under section 552.107 constitutes privileged attorney-client communications. Accordingly, the commission may withhold this information under section 552.107 of the Government Code.

Next, section 552.130 of the Government Code 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.” Gov’t Code § 552.130(a)(1). Accordingly, the commission must withhold the Texas

driver's license information you have marked under section 552.130 of the Government Code.

Finally, 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). *Id.* § 552.137(a)-(c). You state that the e-mail addresses you have marked belong to members of the public and are not subject to section 552.137(c). You inform us that these members of the public have not affirmatively consented to the release of their e-mail addresses contained in the submitted information. Accordingly, the commission must withhold the e-mail addresses you have marked, except as we have marked for release, under section 552.137 of the Government Code. The commission must also withhold the additional e-mail addresses we have marked on this basis.

In summary, to the extent the pertinent facts and circumstances have not changed since the issuance of these rulings, the commission may continue to rely on Open Records Letter Nos. 2008-10134 and 2007-14621 for the information that was at issue in these prior rulings. The commission may withhold the information you have marked under section 552.107 of the Government Code. The commission must withhold: (1) the Texas driver's license information you have marked under section 552.130 of the Government Code; (2) the e-mail addresses you have marked, except as we have marked for release, under section 552.137 of the Government Code; and (3) the additional e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released.¹

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 file suit in

¹We note that the submitted information 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. We note that the commission would be required to withhold some of the remaining information from the public to protect the requestor's privacy. In this instance, however, that requestor has a special right of access to his own private information. *See* Gov't Code § 552.023(a). Should the commission receive another request for this same information from a person who would not have a right of access to this requestor's private information, the commission should resubmit this same information and request another ruling. *See* Gov't Code §§ 552.023; .302.

Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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,



Bill Dobie
Assistant Attorney General
Open Records Division.

WJD/jh

Ref: ID# 317026

Enc. Submitted documents

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