



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 18, 2009

Mr. Gary Grief  
Deputy Executive Director  
Texas Lottery Commission  
P.O. Box 16630  
Austin, Texas 78761

OR2009-13197

Dear Mr. Grief:

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# 355722.

The Texas Lottery Commission (the "commission") received two requests for records pertaining to complaints filed against 31 specified entities, and for commission correspondence concerning those entities. You state the commission released some of the responsive records. You claim the remaining submitted records are 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.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Gov't Code § 552.107(1). 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). 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.*, 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 the e-mails you marked in the submitted documents were communicated between commission staff and attorneys, were not intended to be disclosed to third parties, and were made in furtherance of the rendition of professional legal services.<sup>1</sup> You have also identified most of the individuals in these communications as commission officials, staff, and attorneys.<sup>2</sup> Accordingly, we agree that most of the communications you marked are privileged and may be withheld under section 552.107.<sup>3</sup> However, one of the individual e-mails contained in an e-mail string was sent to the commission by an attorney for the City of Arlington. Because you have not explained the nature of the commission’s relationship with this attorney or how she is a privileged party, we find that you have failed to establish that this communication is privileged under section 552.107. *See* ORD 676 at 8. We have

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<sup>1</sup>Although you marked a lone e-mail address under section 552.107 of the Government Code, we understand this marking was unintentional. Accordingly, we will address the public availability of this e-mail address along with the other e-mail addresses you marked under section 552.137 of the Government Code.

<sup>2</sup>For a communication to be excepted under section 552.107(1), a governmental body must inform this office of the identities and capacities of *each* individual to whom the communication at issue has been made. ORD 676 at 8.

<sup>3</sup>As our ruling is dispositive for this information, we need not address your argument against its disclosure under section 552.111.

also marked the e-mails which were sent to the requestor or his representative, who are not privileged parties. Thus, to the extent these non-privileged e-mails exist separate and apart from the submitted e-mail chains, they must be released.

You claim three remaining e-mails are excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Open Records Decision No. 615 at 2 (1993). 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, 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 section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5.

This office has also concluded a preliminary draft of a document 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 assert the three remaining e-mails you marked under section 552.111 contain the advice, recommendations, and opinions reflecting the policymaking processes of the commission. One of these e-mails contains a document as an attachment.<sup>4</sup> The body of this e-mail, which you marked, does not contain any advice, recommendations, or opinions. We conclude this e-mail, which we marked for release, may not be withheld. The remaining e-mails you marked under section 552.111 pertain to the commission's response to a complaint. Upon review, we agree that one of these e-mails contains the advice, opinion, or recommendation of commission employees with respect to the policymaking functions of the commission. Accordingly, the commission may withhold this e-mail, which we marked under

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<sup>4</sup>Although the attached document may reflect the drafter's advice, opinions, or recommendations and relate to the commission's policymaking functions, we are unable to determine the applicability of section 552.111 to this document because it was not submitted for our review. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

section 552.111 of the Government Code. Although the remaining e-mail also relates to the commission's response to this complaint, you have not shown how this e-mail contains any advice, recommendations, or opinions. Accordingly, this e-mail, which we marked for release, may not be withheld.

You claim some of the remaining information is excepted from disclosure under section 552.137, which generally requires a governmental body to withhold the e-mail address of a member of the general public. Gov't Code § 552.137(a). However, section 552.137(b) provides that an e-mail address "may be disclosed if the member of the public [to which the address belongs] affirmatively consents to its release." *Id.* § 552.137(b). Accordingly, we find a person, or a person's authorized representative, has a right of access under section 552.137(b) to that person's e-mail address. Thus, the requestor's e-mail address, which we marked for release, may not be withheld from him under section 552.137. You inform this office that the remaining e-mail addresses you marked are not specifically excluded by section 552.137(c). You also state that the commission has not received consent for these e-mail addresses' release. Accordingly, the commission must withhold the remaining e-mail addresses you marked, as well as the e-mail address we marked, under section 552.137 of the Government Code.

In summary, the commission may generally withhold the information you marked under section 552.107 of the Government Code. To the extent the e-mails we marked as non-privileged exist separate and apart from the submitted e-mail strings, they must be released. The commission may also withhold the e-mail contents we marked under section 552.111 of the Government Code. With the exception of the requestor's e-mail address, the commission must withhold the e-mail addresses you marked and the e-mail address we marked under section 552.137 of the Government Code. The remaining information must be released.<sup>5</sup>

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

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<sup>5</sup>Some of the information being released here may be protected by exceptions and laws enacted to protect a person's right to privacy. In this instance, however, the requestor has a right of access to this information under section 552.023 of the Government Code. *See* Gov't Code § 552.023. In the event that the commission receives another request for this particular information from a different requestor, the commission should again seek a decision from this office.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Davis", written in a cursive style.

Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 355722

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)