



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2010

Mr. Gary Grief
Deputy Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR2010-00118

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# 366360.

The Texas Lottery Commission (the "commission") received a request for: 1) travel request forms, travel reimbursement forms, e-mails, telephone messages, and any written documentation concerning travel by specified individuals to Waco, Texas on specified dates; 2) the investigative report/findings related to a specified individual; 3) rough drafts of the investigative report or findings, including handwritten notes, memoranda, or e-mails; 4) e-mails sent or received by specified individuals regarding a specified investigation; 5) telephone log of all incoming and outgoing telephone calls from specified telephones between specified dates; 6) internal ISR documents/requests regarding a specified incident; 7) documents concerning corrective and/or performance measures taken by the commission pertaining to a specified individual; 8) details of all employee reprimands issued by a specified individual during his employment with the commission; and 9) the investigative report and all investigative material obtained during a specified investigation. You state the commission is releasing some information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.107 and 552.108 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. 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), (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 pet.). 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 information you have marked under section 552.107 consists of communications between the commission’s legal counsel and identified commission staff. You explain the communications were made in furtherance of the rendition of professional legal services. You state the confidentiality of the communications has been maintained. Therefore, based on your representations and our review of the information at issue, the commission may withhold the information you have marked under section 552.107 of the Government Code as privileged attorney-client communications.

You also assert certain portions of the submitted records are excepted under section 552.108 of the Government Code. Section 552.108 provides in pertinent part as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

....

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

....

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

....

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(2), (b)(2). Subsections 552.108(a)(2) and (b)(2) protect information that relates to a concluded criminal investigation or prosecution that did not result in conviction or deferred adjudication. *Id.* § 552.108(a)(2), (b)(2). A governmental body claiming subsections 552.108(a)(2) and (b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). We note that this office has determined that the commission is a law enforcement agency. *See id.* §§ 466.019 (commission is authorized to enforce violations of lottery laws), .020 (commission is authorized to maintain department of security staffed by commissioned peace officers or investigators). You have submitted an affidavit from the commission's enforcement director explaining that some of the submitted information concerns investigation number L20091082 which is a closed criminal matter that did not result in conviction or deferred adjudication. Therefore, based on your representations and our review, we find subsection 552.108(a)(2) is applicable to the marked portions of the investigative report, notes, and e-mails related to investigation number L20091082.

The remaining information you assert is excepted under section 552.108 consists of internal records of the commission relating to an administrative investigation that arose from the commission's criminal investigation. Although section 552.108 is generally not applicable to information relating to an administrative investigation, because the administrative

investigation here reveals certain details of investigation number L20091082, it is not solely a personnel matter. Therefore, the commission may withhold the remaining information you have marked under subsection 552.108(b)(2).

In summary, the commission may withhold the information you have marked under section 552.107. The commission may withhold the information you have marked under section 552.108. The remaining information must be released.

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, 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 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,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/eeg

Ref: ID# 366360

Enc. Submitted documents

c: Requestor
(w/o enclosures)