



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 31, 2012

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

OR2012-13863

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# 463641 (TLC File No. L-15862).

The Texas Lottery Commission (the "commission") received a request for all communications regarding the requestor or a named media outlet sent from or received by a named employee, all communications between the named employee and lottery commissioners, and all time sheets and the 2012 calendar for the named employee. You state you have provided some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.117, 552.137, and 552.139 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107 of the Government Code protects information that comes 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. *See Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate the information constitutes or

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<sup>1</sup>Although you do not raise section 552.137 of the Government Code in your brief, we understand you to raise this exception based on your markings in the submitted information. Further, you state the commission withdraws its claims under sections 102, 103, 108, 110, and 116 of the Government Code.

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. *See* 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. *See 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, and lawyer representatives. *See* 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 claim the information you have marked is protected by section 552.107(1) of the Government Code. You state the information you have marked constitutes communications between commission employees and commission attorneys or consultants. You state these communications were made for the purpose of rendering professional legal services to the commission. You state these communications were intended to be and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the commission may generally withhold the information at issue under section 552.107(1) of the Government Code. We note, however, you have marked e-mails from non-privileged parties, including the requestor, within these otherwise privileged e-mail strings that are separately responsive to the instant request. Consequently, if these e-mails, which we have marked,

exist separate and apart from the privileged e-mail strings in which they are included, the commission may not withhold them under section 552.107(1) of the Government Code.<sup>2</sup>

You seek to withhold portions of the remaining information under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *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); *see also* 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 that section 552.111 excepts only those internal communications that consist of advice, opinions, recommendations and other material reflecting the policymaking processes of the governmental body. *See* ORD 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. *See id.*; *see also City of Garland v. The 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). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office also has 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,

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

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.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See Open Records Decision 561 at 9 (1990)* (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

You state the remaining information you have marked contains communications among commission employees or between commission employees and specified third parties with whom the commission has contractual relationships. You state the commission shares a privity of interest with these entities on the matters discussed in the information at issue. You further state the communications pertain to policy matters. You also state some of the information at issue consists of draft documents which will be released in their final form. Based on your representations and our review of the information at issue, we conclude the commission may generally withhold the remaining information at issue under section 552.111 of the Government Code.<sup>3</sup> However, we find portions of the remaining information at issue, which we have marked for release, consist of communications with third parties. You have not identified the third parties at issue or explained the nature of the relationship between the commission and these third parties; thus, we find you have failed to establish a privity of interest or a common deliberative process with those third parties for purposes of section 552.111. Therefore, the commission may not withhold this information under section 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, including section 466.022(b) of the Government Code. Section 466.022(b) provides that the following information is confidential and exempt from disclosure:

- (1) security plans and procedures of the commission designed to ensure the integrity and security of the operation of the lottery;

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

(2) information of a nature that is designed to ensure the integrity and security of the selection of winning tickets or numbers in the lottery, other than information describing the general procedures for selecting winning tickets or numbers[.]

*Id.* § 466.022(b)(1)-(2). The commission states a portion of the remaining information directly relates to security plans and procedures, as well as to the design, operation, and security of the commission's computer network and associated application programs. Based upon these representations and our review of the information at issue, we conclude the commission must withhold the information at issue under section 552.101 of the Government Code in conjunction with section 466.022(b)(1) of the Government Code.

Section 552.101 also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. 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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos.* 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure), 422 (1984), 343 (1982). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the commission must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we note a portion of the remaining information you seek to withhold pertains to an individual who has been de-identified and whose privacy interests are thus protected. Additionally, we find you have not demonstrated how the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the remaining information at issue may not be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No.* 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of

a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. You inform us the individuals whose information is at issue elected confidentiality under section 552.024 prior to the commission's receipt of the request for information. Accordingly, the commission must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, upon review, we find the remaining information you seek to withhold does not consist of the home address, telephone number, emergency contact information, social security number, or family member information of a current or former employee of the commission. Therefore, the remaining information at issue may not be withheld under section 552.117(a)(1) of the Government Code.

To the extent the non-privileged e-mails exist separate and apart from the privileged e-mail strings in which they are included, portions of the non-privileged e-mails are subject to section 552.137 of the Government Code. Section 552.137 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). Gov't Code § 552.137(a)-(c). The e-mail addresses you have marked, and the additional e-mail addresses we have marked, are not a type specifically excluded by section 552.137(c). Accordingly, the commission must withhold these e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release under section 552.137(b).

In summary, the commission may generally withhold the information you have marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mails we have marked exist separate and apart from the otherwise privileged e-mail strings, the marked e-mails may not be withheld under section 552.107(1) of the Government Code. With the exception of the information we have marked for release, the commission may withhold the portions of the remaining information you have marked under section 552.111 of the Government Code. The commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 466.022 of the Government Code and common-law privacy, and under section 552.117(a)(1) of the Government Code. To the extent the non-privileged e-mails exist separate and apart from the otherwise privileged e-mail strings, the commission must withhold the e-mail addresses you have marked, and the additional e-mail addresses we have marked, under section 552.137 of the Government Code, unless the owners affirmatively consent to disclosure. The commission must release the remaining information.

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 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,



Cynthia G. Tynan  
Assistant Attorney General  
Open Records Division

CGT/akg

Ref: ID# 463641

Enc. Submitted documents

c: Requestor  
(w/o enclosures)