



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 3, 2013

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

OR2013-11345

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# 492148 (TLC File Nos. B-16980 & B-16981).

The Texas Lottery Commission (the "commission") received two requests for information that supports the commission's contention that a named entity or individual is in violation of any statutes cited in two specified notices. You state the commission will redact personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information is a completed investigation subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). Although you seek to withhold the submitted information

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

under sections 552.103 and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the commission may not withhold the submitted information under section 552.103 or 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" that makes information confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Therefore, we will address your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5. You also claim some of the submitted information is protected from disclosure under section 552.101 in conjunction with the common-law informer's privilege. The common-law informer's privilege is other law for the purpose of section 552.022. *See id.*; *Tex. Comm'n on Envtl. Quality v. Abbott*, No. GV-300417 (126th Dist. Ct., Travis County, Tex.). Thus, we will address your assertion of section 552.101 in conjunction with the informer's privilege.

Rule 192.5 encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold core attorney work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation or for trial, has two parts. A governmental body must demonstrate that (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental

impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

If a requestor seeks a governmental body's entire litigation file, and the governmental body seeks to withhold the entire file, the governmental body may assert that the file is excepted from disclosure in its entirety because such a request implicates the core work product aspect of the attorney work product privilege. *See* ORD 677 at 5-6. In such an instance, if the governmental body demonstrates the file was created in anticipation of litigation or for trial, this office will presume the entire file is within the scope of the privilege. *See* Open Records Decision No. 647 at 5 (1996) (citing *Nat'l Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993)) (organization of attorney's litigation file necessarily reflects attorney's thought processes); *see also Curry v. Walker*, 873 S.W.2d 379, 380 (Tex. 1994) (holding that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case").

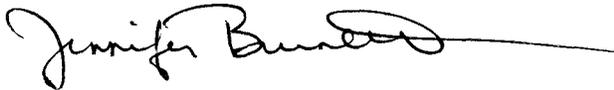
You inform us the submitted information pertains to a complaint filed against a specified bingo conductor and registered bingo worker. You explain that, in response to this complaint, a commission auditor conducted an investigation, determined statutory and rule violations likely occurred, and recommended further enforcement action be taken against the two parties. As a result, you state the commission notified the parties of its decision to initiate administrative disciplinary action against them unless the parties could demonstrate compliance with all applicable requirements. You also explain the administrative disciplinary action hearing at issue would be conducted as a contested case hearing under the Administrative Procedure Act (the "APA"). *See* 16 Tex. Admin. Code § 402.700(c)(1); *see also* Gov't Code § 2001.054(c); Occ. Code § 2001.313(e). You represent the information at issue consists of the entire case file pertaining to the commission's investigation of the alleged violations. You explain the file was compiled in the course of conducting the investigation and was created by commission attorneys and staff in anticipation of litigation. *Cf.* Open Records Decision No. 588 (1991) (contested case under APA constituted litigation for purposes of statutory predecessor to section 552.103). Based on your representations, we conclude the commission may withhold the submitted information as core attorney work product under Texas Rule of Civil Procedure 192.5.²

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.

²As our ruling is dispositive, we need not address your remaining argument against disclosure.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer Burnett", with a long horizontal flourish extending to the right.

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/tch

Ref: ID# 492148

Enc. Submitted documents

c: Requestor
(w/o enclosures)