



October 12, 1999

Ms. Linda Cloud
Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR99-2903

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 128210.

The Lottery Commission (the "Commission") received two requests for information related to an incident that occurred on July 12, 1999, and one request for information related to the termination of employment of a commission employee related to that incident.¹ You have supplied responsive information to this office for review. You assert that information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision. You contend that exhibit E (also designated exhibit Q), which consists of records of medical treatment, is excepted by this provision. However, access to medical records is governed by section 5.08 of the Medical Practice Act (the "MPA"), V.T.C.S. article 4495b, rather than chapter 552 of the Government Code. Open Records Decision No. 598 (1991). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* V.T.C.S. art. 4495b § 5.08(a), (b), (c), (j); Open Records Decision Nos. 598 (1991), 546 (1990). Therefore this information may only be released as provided under the MPA.

¹The commission also received a request, dated July 27, 1999 and marked as received July 28, 1999, for "all material relating to any grievance or appeal procedure relating to suspension or termination of employment." As no exception has been argued regarding this information, we assume it has been released.

Section 552.103(a), the “litigation exception,” excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. To secure the protection of section 552.103(a), a governmental body has the burden of providing relevant facts and documents to show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref’d n.r.e.). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated. Open Records Decision No. 452 at 4 (1986). You have supplied letters from an attorney representing the subject terminated employee. One of these letters threatens litigation. We conclude that the you have demonstrated a reasonable anticipation of litigation. The information, designated by you as exhibits K, L, M, N, O, P, and Q may generally be withheld under section 552.103 as relating to this anticipated litigation.² However, absent special circumstances, where the opposing party to the anticipated litigation has had access to the records at issue, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there is no justification for now withholding that information from the requestor pursuant to section 552.103(a). Lastly, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim that the information identified by you as exhibits B, C, and D (also designated as exhibits N, O, and P) is excepted from disclosure by section 552.107 or 552.111 of the Government Code. Section 552.107(1) excepts information from disclosure if it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct. This exception does not apply to all client information held by a governmental body’s attorney; rather, it excepts from public disclosure only “privileged information,” *i.e.* communications made to the attorney in confidence and in furtherance of rendering professional services or that reveal the attorney’s legal opinion or advice. Open Records Decision Nos. 589 at 1(1991), 574 at 3 (1990), 462 at 9-11(1987). Information gathered by an attorney as a fact-finder, purely factual information, and the factual recounting of events including the documentation of calls made, meetings attended, and memos sent, are not excepted from disclosure by section 552.107(1). Open Records Decision No. 574 (1990). Section 552.107 may except from disclosure notes in an attorney’s client file if they contain confidences of the client or reveal the opinions, advice, or recommendations that have been

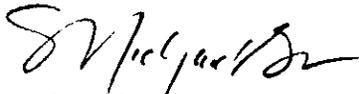
²You indicate that some of this information has been released. While Government Code section 552.007 prohibits the selective disclosure of information, where a change of circumstances warrants the exception of previously released information under section 552.103, that information may be withheld without violating section 552.007. Open Records Decision No. 638 (1996).

made or will be made to the client or associated attorneys. Open Records Decision No. 574 at 6 (1990). As section 552.111 generally protects only advice, opinion, and recommendations, any protection afforded to memoranda information under section 552.111 will usually be no greater or less than the protection offered under section 552.107. See Open Records Decision No. 574 at 2 (1990). Information may be protected as attorney work product under section 552.111 if a governmental body can show (1) that the information was created for trial or in anticipation of litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a lawsuit is filed, and (2) that work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 at 5 (1996) (citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)).

In this case, we conclude that the hand written portions of exhibits B and C (also designated as exhibits N and O), as well as a portion of exhibit D (also designated as exhibit P), which we have bracketed, may be withheld. Note that neutral recitations of fact are not excepted from disclosure under either section 552.107 or section 552.111.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 128210

Encl. Submitted documents

cc: Mr. Lee Billington
1402 Westmoor Drive
Austin, Texas 78723
(w/o enclosures)