



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 24, 2003

Mr. Reagan E. Greer  
Executive Director  
Texas Lottery Commission  
P. O. Box 16630  
Austin, Texas 78761-6630

OR2003-8447

Dear Mr. Greer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191640.

The Texas Lottery Commission (the "commission") received a request for all correspondence, including electronic correspondence, between the commission and Mega Millions since August 5, 2003. You claim that the requested information is excepted from disclosure under sections 552.101, 552.104, 552.110, 552.111, 552.117, and 552.136 of the Government Code. Pursuant to section 552.305 of the Government Code, you have notified ten interested third parties of the request for information.<sup>1</sup> See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act ("Act") in certain circumstances). We have received correspondence from the Maryland State Lottery Agency. We have considered all submitted arguments and reviewed the submitted information.

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<sup>1</sup>The following third parties were notified pursuant to section 552.305: New York Lottery, Georgia Lottery, New Jersey Lottery, Virginia Lottery, Illinois Lottery, Michigan Lottery, Ohio Lottery, Massachusetts Lottery, Maryland Lottery, and Washington Lottery.

Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except information relating to competitive bidding situations once a contract is in effect. *Id.*

In this instance, you state that at the time of the request, the commission had begun negotiating an agreement with Mega Millions, but that the negotiations had not yet resulted in an agreement. You state that the information you have identified in Exhibits B and C is information that, if released, would “give an advantage to Powerball in the event that negotiations between Mega Millions and the Commission do not lead to a final agreement.” You further state that if the information is released it could weaken the commission’s bargaining position, and that disclosure “could potentially disrupt the ability of the Commission to protect the interests of the State of Texas and negotiate the best deal for the people of the State of Texas.” Based on your arguments and our review of the information you have marked under section 552.104, we conclude that this information may be withheld pursuant to section 552.104 of the Government Code until such time as a contract has been executed.

You also seek to withhold a portion of the remaining submitted 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.” This section encompasses the deliberative process privilege. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The deliberative process privilege incorporated by section 552.111 protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters of a governmental body. *See id.*; Open Records Decision No. 615 at 5 (1993). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); Open Records Decision No. 615 at 4-5 (1993). Having considered your arguments and reviewed the information you seek to withhold under section 552.111, we conclude that it does not constitute a discussion concerning the commission’s policymaking functions and thus may not be withheld pursuant to section 552.111.

Next, you seek to withhold a portion of the submitted information under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request is received by the governmental body. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, pursuant to section 552.117(a)(1), the commission must withhold the information you have marked if the employee in question elected, prior to the commission's receipt of this request, to keep such information confidential. The commission may not withhold such information under section 552.117 if the employee did not make a timely election.

You have also marked information that you claim is excepted from disclosure under section 552.136 of the Government Code. Section 552.136 of the Government Code makes certain account number information confidential and provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value;  
or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Upon review of the information you have marked, we find that you have failed to demonstrate how this information constitutes an "access device" subject to section 552.136 of the Government Code. Consequently, the commission may not withhold this information under this exception.

Finally, we note that the submitted information contains e-mail addresses of members of the public. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating

electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 909, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. Thus, the commission must withhold the e-mail addresses we have marked under section 552.137(a), unless it has received consent for release from the individuals whose addresses are at issue. As our ruling is dispositive, we need not address the remaining arguments.

In summary, we conclude (1) the commission may withhold the information it has marked under section 552.104 of the Government Code, (2) the commission must withhold the information it has marked if the employee in question elected, prior to the commission's receipt of this request, to keep such information confidential; otherwise such information

may not be withheld, and (3) the commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

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

Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/lmt

Ref: ID# 191640

Enc. Submitted documents

c: Ken Herman  
Austin-American Statesman  
P. O. Box 670  
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(w/o enclosures)