



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 12, 2007

Mr. Anthony J. Sadberry
Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR2007-07319

Dear Mr. Sadberry:

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# 280750.

The Texas Lottery Commission (the "commission") received a request for a specific investigative report pertaining to GameTech, International, Inc, ("GameTech") as well as a copy of the written response, if any, from GameTech or its representatives. You state that some information responsive to the request has been released to the requestor, but claim that the remaining requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted to this office by representatives of GameTech. *See Gov't Code § 552.304.*

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure

under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The commission must meet both prongs of this test for information to be excepted under section 552.103(a). Contested cases conducted under the Administrative Procedures Act, Chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.*

Upon review of your arguments, we agree that the commission reasonably anticipated litigation on the date it received the present request. We further find the information at issue relates to the anticipated litigation.

We note, however, that both the commission and GameTech, the opposing party in the matter at issue, or its representatives, have had prior access to the submitted information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551. Once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). Consequently, because the submitted information has been seen by both sides, there is no justification for now withholding such information pursuant to section 552.103, and none of it may be withheld on that basis.

We next address your argument under section 552.101 of the Government Code. The Office of the Attorney General currently has a lawsuit pending against the commission and GameTech, in *Gametech International Inc. v. Abbott*, Cause No. GN501668, 126th District Court of Travis County, Texas, *appeal filed*, No. 03-06-00257-CV (Tex. App.—Austin Oct. 6, 2006). You inform us that the information at issue consists of

documents related to informal settlement negotiations and that “[t]he precise issue of whether such documents prepared in connection with, or relating to informal settlement negotiations are excepted from the required disclosure” is the subject of the pending litigation. We further note that the applicability to the settlement documents of sections 2009.054 of the Government Code and 154.073 of the Civil Practice and Remedies Code, the statutes you raise in the instant request, is at issue in the pending litigation. Accordingly, because the commission’s arguments are similar to the issues and information at issue in the pending litigation, we do not address the applicability of these statutes to the submitted information, and will allow the court to determine whether the type of information at issue must be released to the public pursuant to the Act.

To summarize, the commission may not withhold the submitted information under section 552.103 of the Government Code. However, the commission need not release the information at this time, pending the appeals court’s decision in *Gametech International Inc. v. Abbott*, Cause No. GN501668, 126th District Court of Travis County, Texas, appeal filed, No. 03-06-00257-CV (Tex. App.—Austin Oct. 6, 2006).

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

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 Office of the Attorney General 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. 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jb

Ref: ID# 280750

Enc. Submitted documents

c: Mr. Steven W. Hieronymus
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(w/o enclosures)