



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 16, 2007

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

OR2007-10580

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# 286663.

The Texas Lottery Commission (the "commission") received a request for all information "that the [c]ommission has produced or received since January 1, 2004 that mention former state Rep. Ron Wilson." You state that the commission has released some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.139 of the Government Code. You also state, and provide documentation showing, that you notified GTECH Corporation ("GTECH") of the commission's receipt of the request for information and of its right to submit arguments to this office as to why the requested information should not be released to the requestor. See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). GTECH asserts that some of its information is excepted under section 552.101 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

We first address your arguments under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information made confidential by other statutes. The commission and GTECH claim that

section 154.073 of the Civil Practice and Remedies Code and section 2009.054 of the Government Code are applicable to some of the submitted information. The Office of the Attorney General currently has a lawsuit pending against the commission, *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. Thus, the court in the pending litigation will decide whether section 2009.054 of the Government Code and section 154.073 of the Civil Practice and Remedies Code are applicable to settlement documents. Accordingly, because the commissions arguments here address the same question and relate to the same type of information as the question and information 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 these statutes apply to this type of information.

You also raise section 552.101 of the Government Code in conjunction with 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;
- (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; and
- (3) the street address and telephone number of a prize winner, if the prize winner has not consented to the release of the information.

Id. § 466.022(b). The commission states that release of the information at issue “would compromise the lottery games and threaten the integrity and security of the lottery.” The commission further states that release of this information “would assist computer hackers in infiltrating the Commission’s computer networks.” Based upon your representations and our review of the documents at issue, we conclude that the commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 466.022(b) of the Government Code.

Section 552.107(1) 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 that the information constitutes or

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 is 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)(A), (B), (C), (D), (E). 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.* 503(b)(1), 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, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that 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 seek to withhold a portion of the submitted information under section 552.107(1). You state that the information at issue consists of communications involving commission staff, attorneys for the commission, and a consultant for the commission that was made in furtherance of the rendition of professional legal services to the commission. You have identified the parties to the communications. You also state that the communications were intended to be and remain confidential. Based on your representations, we conclude that most of the information you have marked under section 552.107 consists of privileged attorney-client communications that the commission may withhold under section 552.107. However, we conclude you have not established that the remaining information you have marked under section 552.107 consists of privileged attorney-client communications; therefore, the commission may not withhold this information, which we have marked, under section 552.107.

In summary: (1) the commission need not release the submitted documents related to informal settlement negotiations at this time, pending the 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); (2) the

commission must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 466.022(b) of the Government Code; and (3) with the exception of the information we have marked for release, the commission may withhold the information you have marked under section 552.107(1) of the Government Code. The remaining submitted information must be released. As our ruling is dispositive, we do not address any remaining claims against disclosure.

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).

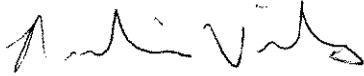
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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).

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 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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/mcf

Ref: ID# 286663

Enc: Submitted documents

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