



January 28, 2015

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

OR2015-01687

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# 551875 (TLC File No. L-19186).

The Texas Lottery Commission (the "commission") received a request for e-mail communications sent to or received by certain commission personnel during a specified time frame.<sup>1</sup> You state you will release some responsive information to the requestor. You state you will redact personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> You claim the remaining requested information is excepted from disclosure under sections 552.107, 552.111, and 552.116 of the

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<sup>1</sup>We note the commission sought and received clarification of this request from the requestor. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

<sup>2</sup>Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold specific 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.

Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). 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. 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. 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. *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 acting in a 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. 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. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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).

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<sup>3</sup>We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You state the information you have marked consists of confidential communications made in furtherance of legal services rendered to the commission. You state these communications were exchanged between commission staff, attorneys for the commission, and other parties with whom the commission shares a matter of common interest. *See In re XL Speciality Ins. Co.*, 373 S.W.3d 46, 51 (Tex. 2012) (discussing common interest rule under attorney-client privilege). You state these communications were intended to be confidential and confidentiality has been maintained. Based on your representations and our review, we find the commission may generally withhold the information you have marked under section 552.107(1) of the Government Code.<sup>4</sup> However, some of the otherwise-privileged e-mail strings include e-mails received from or sent to non-privileged third parties. We find these e-mails are separately responsive. Therefore, if these non-privileged e-mails, which we have marked, are maintained by the commission separate and apart from the otherwise-privileged e-mail strings in which they appear, then the commission may not withhold them under section 552.107(1) of the Government Code.

Section 552.116 of the Government Code provides,

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

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<sup>4</sup>As our ruling is dispositive, we do not address your other argument to withhold this information.

(2) “Audit working paper” includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov’t Code § 552.116. You assert the information you have marked consists of audit working papers pertaining to an audit conducted by the commission’s internal auditor. You state the audit was undertaken pursuant to the Texas Internal Auditing Act, chapter 2102 of the Government Code. *See id.* ch. 2102. Based on your representations and our review, we agree the information at issue constitutes audit working papers. Therefore, the commission may withhold the information you have marked under section 552.116 of the Government Code.<sup>5</sup>

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” *Id.* § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, we determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to

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<sup>5</sup>As our ruling is dispositive, we do not address your other argument to withhold this information.

make severance of the factual data impractical, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded section 552.111 exempts from disclosure a preliminary draft of a document intended for public release in its final form because the draft necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents of a preliminary draft of a policymaking document, including comments, underlining, deletions, and proofreading marks, that will be released to the public in its final form. *See id.* at 2.

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party, with which the governmental body establishes it has a privity of interest or common deliberative process. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body.

You state the remaining information consists of advice, opinions, and recommendations relating to the commission's policymaking. You also state the information at issue includes draft documents that will be released to the public in final form. Further, you inform us some of the communications at issue involve third parties, including the Multi-State Lottery Association, GTECH Corporation, Grant Thornton, LLP, and McConnel & Jones LLP, with which you state the commission shares a privity of interest. However, you do not state whether some of the draft documents, which we have marked, will be released to the public in final form. Thus, to the extent the commission will release these draft documents to the public in their final form, the commission may withhold them in their entireties under section 552.111. However, to the extent the commission will not release these draft documents to the public in their final form, the commission may not withhold them in their entireties under section 552.111. Further, we find the information we have marked, including information within the draft documents, consists of advice, opinions, and recommendations pertaining to a policymaking matter. Accordingly, the commission may withhold the information we have marked under section 552.111 of the Government Code. However, we find you have failed to demonstrate how the commission shares a privity of interest or common deliberative process with some of the individuals in the remaining communications. Further, some of the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we find you have failed to demonstrate how the remaining information at issue is excepted under section 552.111. Accordingly, the commission may

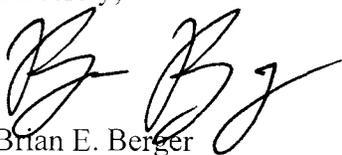
not withhold the remaining information at issue under section 552.111 of the Government Code.

In summary, the commission may generally withhold the information you have marked under section 552.107(1) of the Government Code. However, if the non-privileged e-mails we have marked are maintained by the commission separate and apart from the otherwise-privileged e-mail strings in which they appear, then the commission may not withhold them under section 552.107(1) of the Government Code. The commission may withhold the information you have marked under section 552.116 of the Government Code. To the extent the commission will release the draft documents we have marked to the public in their final form, the commission may withhold them in their entirety under section 552.111. The commission may withhold the information we have marked, including the information we have marked within the draft documents, under section 552.111 of the Government Code. The remaining information must be released.

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.

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](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,



Brian E. Berger  
Assistant Attorney General  
Open Records Division

BB/ac

Ref: ID# 551875

Enc. Submitted documents

c: Requestor  
(w/o enclosures)