



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 27, 2016

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

OR2016-02047

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# 597159 (TLC File No. L-20654).

The Texas Lottery Commission (the "commission") received a request for all communications to or from any commission employee concerning sports betting and/or fantasy sports betting during a specified time frame. You state the commission has released some responsive information. You claim some of the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.139 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state some of the submitted information, which you have marked, is not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request and the commission is not required to release such information in response to this request.

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. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the

communication must have been made “to facilitate 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 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. Finally, 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: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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).

The submitted information consists of communications between commission attorneys, commission staff, and other privileged parties. You further state the communications were made for the purpose of facilitating the rendition of professional legal services to the commission and these communications have remained confidential. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the commission may generally withhold the information you have marked under section 552.107(1) of the Government Code.¹

However, we note one of the e-mail strings at issue includes an e-mail received from or sent to a non-privileged party. Furthermore, if this e-mail is removed from the e-mail string and stands alone, it is responsive to the request for information. Therefore, if the commission maintains this non-privileged e-mail, which we have marked, separate and apart from the otherwise privileged e-mail string in which it appears, then the commission may not withhold

¹As our ruling is dispositive, we do not address your other argument to withhold this information.

this non-privileged e-mail under section 552.107(1) of the Government Code. As you raise no further exceptions to disclosure for this information, to the extent the e-mail at issue exists separate and apart, it must generally be released.

However, we note some of this information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

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[.]” Gov’t Code § 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 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.

You state the remaining information you have marked consists of advice, opinions, and recommendations relating to the commission's policymaking. You also state the information at issue contains draft documents, which we understand will be released to the public in final form. Upon review, we find the information at issue consists of advice, opinions, and recommendations relating to the commission's policymaking. Accordingly, the commission may withhold the remaining information you have marked under section 552.111 of the Government Code.

Section 552.139 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides in part:

(b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). You assert some of the remaining information “may relate to the design, operation and security of the [commission]’s computer network” However, upon review, we find you have not demonstrated any of the remaining information relates to computer network security, or to the design, operation, or defense of a computer network as contemplated in section 552.139(a). Further, we find you have failed to explain any of the information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the commission may not withhold any of the remaining information under section 552.139 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code.² *See id.* § 552.117(a)(1). We note that section 552.117 encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular phone service. *See Open Records Decision No. 506 at 5-6 (1988)* (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body’s receipt of the request for information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body’s receipt of the request for information. Therefore, to the extent the individual whose cellular phone number we have indicated timely requested confidentiality under section 552.024 and a governmental body does not pay for the individual’s cellular phone service, the commission must withhold the cellular phone number we have indicated under section 552.117(a)(1) of the Government Code. However, if the individual did not timely request confidentiality under

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

section 552.024 or a governmental body does pay for the individual's cellular phone service, then the commission may not withhold this information under section 552.117(a)(1).

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov't Code* § 552.137(a)-(c). We note the requestor has a right of access to her own e-mail address under section 552.137(b). *See id.* § 552.137(b). The e-mail address at issue is not of a type excluded by subsection (c). Therefore, the commission must withhold the personal e-mail address we have indicated under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the commission may generally withhold the information you have marked under section 552.107(1) of the Government Code. To the extent the e-mail we have marked exists separate and apart from e-mail string in which it appears, it must be released; however, any information subject to copyright may only be released in accordance with copyright law. The commission may withhold the remaining information you have marked under section 552.111 of the Government Code. To the extent the individual whose cellular phone number we have indicated timely requested confidentiality under section 552.024 and a governmental body does not pay for the individual's cellular phone service, the commission must withhold the cellular phone number we have indicated under section 552.117(a)(1) of the Government Code. Otherwise, the commission may not withhold this information under section 552.117(a)(1). The commission must withhold the personal e-mail address we have indicated under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. The remaining information must be released.³

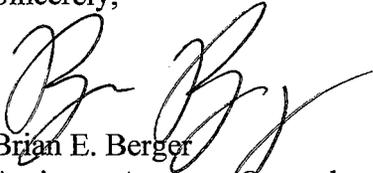
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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/>

³As previously noted, the requestor has a right of access to her own personal e-mail address being released. *See Gov't Code* § 552.137(b). Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. Thus, if the commission receives another request for this same information from a person who does not have such a right of access, Open Records Decision No. 684 authorizes the commission to redact the requestor's personal e-mail address without again seeking a ruling from this office.

[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,

A handwritten signature in black ink, appearing to read "Brian E. Berger". The signature is fluid and cursive, with the first name "Brian" and last name "Berger" clearly distinguishable.

Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 597159

Enc. Submitted documents

c: Requestor
(w/o enclosures)