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ATTORNEY GENERAL OF TEXAS

March 30, 2022

Ms. Deanne Rienstra
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Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR2022-09287

Dear Ms. Rienstra:

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# 939253 (TLC File No. R027853-010422).

The Texas Lottery Commission (the "commission") received a request for certain contracts and communications pertaining to a specified entity. We understand the commission has destroyed some of the requested information pursuant to the commission's records retention schedule.¹ The commission states it will release some of the requested information. The commission claims some of the requested information is subject to a previous ruling by our office. The commission also claims some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. Additionally, the commission states release of some of the submitted information may implicate the proprietary interests of IGT Solutions Corporation f/k/a GTECH Corporation ("IGT"). Accordingly, the commission states, and provides documentation showing, it notified IGT of the request for information and of the right to submit arguments to this office as to why the submitted information should not be released. *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). We have considered the submitted arguments and reviewed the submitted information.

¹ The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

Initially, the commission informs us some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2019-00473 (2019). In Open Records Letter No. 2019-00473, we determined the commission: (1) may withhold certain information under section 552.104 of the Government Code; (2) must withhold the information it marked under section 552.101 of the Government Code in conjunction with section 466.022(b) of the Government Code; (3) must withhold certain information under section 552.110 of the Government Code; (4) may generally withhold the information it marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mails and attachments we 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 this non-privileged e-mails and attachments under section 552.107(1); (5) may withhold the information we marked under section 552.111 of the Government Code; and (6) must release the remaining information. As we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based with respect to the information withheld 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, and section 552.111 of the Government Code, the commission must continue to rely on Open Records Letter No. 2019-00473 as a previous determination with respect to that information and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we note, since the previous ruling was issued, the laws regarding section 552.104 of the Government Code and section 552.110 of the Government Code have changed. Thus, the commission may not rely on Open Records Letter No. 2019-00473 as a previous determination with respect to the information previously withheld under sections 552.104 and 552.110 of the Government Code. *See id.*

Next, we must address the commission's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the claimed exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). In this instance, the commission states it received the request for information on January 4, 2022. Further, the commission states it sought and received clarification on January 6, 2022. *See id.* § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). The commission states it was closed on January 17, 2022, and operated on a skeleton crew on January 19, 2022. This office does

not count the date the request was received or holidays, including skeleton crew days observed by a governmental body, for the purpose of calculating a governmental body's deadlines under the Act. Thus, the commission was required to provide the information required by section 552.301(e) by January 31, 2022. We understand the commission initially mailed the information required by section 552.301(e) on January 27, 2022, but the United States Postal Service returned that correspondence to the commission for insufficient postage. The commission hand delivered the information required by section 552.301(e) on March 14, 2022. Section 552.308 of the Government Code provides, when a submission within a specified time period is required under the Act, the time requirement is met if the submission is sent by first class mail "with postage . . . prepaid" and the postmark date is within the required time period. *See id.* § 552.308. Consequently, we find the commission failed to comply with the requirements of section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). The commission claims sections 552.107 and 552.111 of the Government Code for the information at issue. Because section 552.107 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will address the commission's argument under this section for the information at issue. However, we find the commission has failed to establish a compelling reason to address its remaining claimed exception. Nevertheless, because third party interests can provide a compelling reason to overcome the presumption of openness, we will consider whether the submitted information may be withheld on behalf of the notified third party. *See Gov't Code* §§ 552.007, .302, .352.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from IGT explaining why the submitted information should not be released. Therefore, we have no basis to conclude IGT has a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the commission may not withhold any portion of the submitted information on the basis of any proprietary interest IGT may have in the information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See id.* § 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 “to facilitate 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). 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.*, 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. *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).

The commission states the information it marked consists of communications involving attorneys for the commission and commission employees and officials in their capacities as clients. The commission states these communications were made in furtherance of the rendition of professional legal services to the commission, and were intended to be, and have remained, confidential. Based on these representations and our review, we find the commission has demonstrated the applicability of the attorney-client privilege to most of the information at issue. Accordingly, the commission may generally withhold the information it has marked under section 552.107(1) of the Government Code. We note, however, some of these e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if the e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the request for information. 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 these non-privileged e-mails under section 552.107(1) of the Government Code.

In summary, with respect to the information withheld 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, and section 552.111 of the Government Code, the commission must continue to rely on Open Records Letter No. 2019-00473 as a previous determination with respect to that information and withhold the identical

information in accordance with that ruling. The commission may generally withhold the information it 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 these non-privileged e-mails may not be withheld under section 552.107 of the Government Code. The commission must release the remaining information.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Alexandra C. Burks
Assistant Attorney General
Open Records Division

ACB/jxd

Ref: ID# 939253

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)