



February 26, 1999

Ms. Linda Cloud
Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR99-0564

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 122318.

The Texas Lottery Commission (the "commission") received an open records request for, among other things, "all audits prepared by outside auditors concerning G-Tech."¹ You have submitted to this office as responsive to this request two documents each entitled "Report on Policies and Procedures Placed in Operation and Tests of Operating Effectiveness" for the periods of September 1, 1996 through August 31, 1997, and September 1, 1997 through August 31, 1998, respectively. You have requested an open records decision from this office pursuant to, *inter alia*, section 552.305 of the Government Code, which authorizes governmental bodies to rely on the arguments of a third party to demonstrate how the requested information implicates the party's privacy or proprietary interests, and thus, is excepted from required public disclosure.

In accordance with the practice this office established in Open Records Decision No. 575 (1990), this office notified representatives of GTECH Corporation ("GTECH") that we received your request for an open records decision regarding matters affecting their proprietary interests. In our notification, this office requested an explanation as to why the information at issue was excepted from public disclosure, with the caveat that unless we received such explanation, this office would instruct the commission to disclose the information unless the information is otherwise excepted from required public disclosure.

GTECH timely responded to our notification, arguing that the requested audits should be withheld from the public pursuant to, among other reasons, section 552.110 of the

¹You state that the commission has released all other requested documents to the requestor.

Government Code. Section 552.110 of the Government Code excepts from required public disclosure “[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.” GTECH contends that its proposal comes under the protection of both categories. The proposal is commercial information concerning GTECH. To fall within the second prong of section 552.110, however, the proposal must be “privileged or confidential by statute or judicial decision.”

Section 552.110 is patterned after section 552(b)(4) of the federal Freedom of Information Act. 5 U.S.C. § 552, *et. seq.*; Open Records Decision Nos. 639 (1996), 309 (1982), 107 (1975). The test for determining whether commercial or financial information is confidential within the meaning of section 552(b)(4) is as follows:

a commercial or financial matter is ‘confidential’ for purposes of the exemption if disclosure of the information is likely to have *either* of the following effects: 1) to impair the Government's ability to obtain necessary information in the future; *or* 2) to cause substantial harm to the competitive position of the person from whom the information was obtained. [Emphasis added.]

National Parks and Conserv. Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

In order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. *Actual competition and the likelihood of substantial competitive injury* is [sic] all that need be shown. [Emphasis added.]

Gulf & Western Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979); *see National Parks*, 547 F.2d at 679 (D.C. Cir. 1976). “Conclusory and generalized allegations” of competitive harm have been held insufficient to satisfy the requirements for non-disclosure. *See id.* at 680.

We have examined the arguments advanced by GTECH concerning the totality of the submitted Exhibits C and D. In this instance we believe that GTECH has demonstrated the manner in which substantial competitive harm could result to its marketplace position if the requested audits were released. We therefore conclude that the commission must withhold the two audits pursuant to section 552.110. We do not believe, however, that the two cover letters accompanying the respective audits contain information that is protected under section 552.110. These two cover letters therefore may not be withheld pursuant to section 552.110.

Because you have also raised section 466.022(b) of the Government Code, we will consider whether this statute applies to the two cover letters. Section 466.022(b) makes confidential, among other things, 1) security plans and procedures of the commission designed to ensure

the integrity and security of the operation of the lottery and 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. It is not apparent to this office, however, how the statute applies to the information contained in the cover letters. We therefore conclude that the commission may not withhold the cover letters pursuant to section 466.022 of the Government Code. These two letters therefore must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/RWP/ch

Ref: ID# 122318

Enclosures: Submitted documents

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