



July 20, 1999

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

OR99-2042

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 125831.

The Texas Lottery Commission (the "commission") received a written request for its records pertaining to "possible new lottery games to be initiated in the State of Texas in the next eighteen (18) months." You contend that the requested information is excepted from required public disclosure pursuant to sections 552.101, 552.107(1), and 552.111 of the Government Code.

You first contend that a small portion of Exhibit C may be withheld from the public pursuant to section 552.107(1), which protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and client confidences. Open Records Decision No. 574 (1990). *Id.* Based on your representation that the information in Exhibit C that you have bracketed constitutes a client confidence, we conclude that that information may be withheld pursuant to section 552.107(1).

You contend that the remaining portions of Exhibit C are excepted from public disclosure pursuant to sections 552.101 and 552.111 of the Government Code as attorney work-product. In Open Records Decision No. 647 (1996), this office concluded that a governmental body may withhold information as work product under section 552.111 of the Government Code if the governmental body can show (1) that the information was created for trial or in anticipation of litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a lawsuit is filed, and (2) that the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 at 5 (1996) citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)). You have not demonstrated how the information at issue meets these tests. The commission may not withhold any of the requested information as attorney work product under section 552.111.

You also contend that the remaining requested information may be withheld pursuant to section 552.111 as inter- and intra-agency memoranda. Section 552.111 of the Government Code excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the policymaking process. Open Records Decision No. 615 at 5 (1993). The purpose of this section is “to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref’d n.r.e.) (emphasis added). In Open Records Decision No. 615 at 5, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency’s policymaking functions do not encompass routine internal administrative and personnel matters [Emphasis in original.]

We agree with your contention that the subject matter of the records at issue pertain to a policy matter concerning the commission.

In Open Records Decision No. 429 (1985), this office indicated that information protected by section 552.111 must be prepared by a person or entity with an official reason or duty to provide the information in question. *See also* Open Records Decision Nos. 283 (1981), 273 (1981). This helps assure that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 552.111. Open Records Decision No. 464 (1987). *See Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.), *cert. denied*, 410 U.S. 926 (1972). In this regard, we note that GTECH submitted to the commission much of the information at issue pursuant to its contract to provide lottery services and to evaluate possible game changes and the introduction of new lottery games. We conclude, therefore, that any advice, opinion, or recommendation submitted by GTECH to the commission in connection with its lottery services may properly be withheld from the public pursuant to section 552.111. We have marked the portions of Exhibits D - P that the commission may withhold pursuant to section 552.111.

Finally, because GTECH has represented to the commission that portions of its proposals are confidential, you have sought a decision from this office pursuant to section 552.305 of the Government Code so that GTECH could submit its arguments for confidentiality to this office. Contrary to its initial assertion, GTECH now contends that only certain portions of Exhibit L constitute “trade secrets” and “commercial or financial information” for purposes of section 552.110. We note, however, that because we have determined that most of the information for which GTECH asserts section 552.110 protection is protected as advice, opinion, or recommendation under section 552.111, we need not also address the applicability of section 552.110 for that information.

On the other hand, because not all of Exhibit L may be withheld pursuant to section 552.111, we will address whether section 552.110 protects any of the remaining information. 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.”

A “trade secret” “may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it.” RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978). There are six factors to be assessed in determining whether information qualifies as a trade secret.¹ This office must accept a claim that information is excepted as a trade secret if a prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990). Although GTECH has made arguments to demonstrate how the identified portions of Exhibit L constitute trade secret information, we do not believe that these arguments apply to the information not otherwise excepted from disclosure pursuant to section 552.111.

As noted above, GTECH also contends that certain portions of Exhibit L constitute confidential “commercial or financial information.” To be withheld as “commercial or financial information” for purposes of section 552.110, however, the information must be “privileged or confidential by statute or judicial decision.”

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts’ interpretation of exemption 4 of the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. Thus, this office relied on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as a judicial decision and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110. However, the Third Court of Appeals

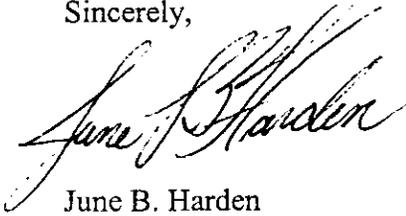
¹These six factors are

- 1) the extent to which the information is known outside of [the company’s] business;
- 2) the extent to which it is known by employees and others involved in [the company’s] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 1999 WL 314976 (Tex. App.–Austin May 20, 1999, no pet. h.). Because GTECH has not cited to a statute or judicial decision that makes the information privileged or confidential, the commission may not withhold any of the requested information under the commercial or financial information prong of section 552.110. Consequently, the only information contained in Exhibit L that may be withheld is that which we have identified as coming within the protection of section 552.111.

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,

A handwritten signature in cursive script that reads "June B. Harden". The signature is written in black ink and is positioned to the left of the typed name.

June B. Harden
Assistant Attorney General
Open Records Division

JBH/RWP/eaf

Ref.: ID# 125831

Encl. Marked documents

cc: Mr. William C. Blount
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(w/o enclosures)