



May 30, 2001

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

OR2001-2221

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# 147762.

The Texas Lottery Commission (the “commission”) received a request for all final working papers issued for each scratch game produced in the past two fiscal years. The requestor also asked for a copy of all items printed by the commission’s marketing department in the past 12 months that relate to the scratch games.<sup>1</sup> You claim that the submitted working papers are excepted from disclosure under sections 552.101 and 552.111 of the Government Code. You also advise this office that the submitted information is considered proprietary by Pollard Banknote Limited (“Pollard”) and Scientific Games International (“SGI”). You have submitted a copy of a letter notifying Pollard and SGI about the request as required by section 552.305(d).<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative samples of information.<sup>3</sup>

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<sup>1</sup>Because you have not requested a decision concerning the items printed by the marketing department, we assume that you have already released any information responsive to this portion of the request. If not, you must do so at this time. See Gov’t Code §§ 552.301, .302.

<sup>2</sup>See Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions to the Public Information Act in certain circumstances).

<sup>3</sup>In reaching our conclusion here, 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 contend that the marked portions of Exhibits B, C, D, E, F, and G are excepted under section 552.101 in conjunction with section 466.022(b) of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statute. Section 466.022(b) of the Government Code provides as follows:

In addition to commission records excepted from disclosure under Chapter 552, the following information is confidential and is exempt from disclosure:

- (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[.]

You assert that the working papers are part of the commission's security procedures designed to ensure the integrity and security of the operation of the lottery. You contend that release of the marked information would compromise the integrity and security of lottery tickets and the validation of winning tickets. Based on your representations that disclosing the marked information would compromise the security and integrity of the lottery, we conclude that the commission must withhold the marked portions of the working papers pursuant to section 552.101 in conjunction with section 466.022 of the Government Code. Because we are able to make a determination under section 552.101, we need not address the applicability of section 552.111 of the Government Code or section 552.110 with regard to the information marked proprietary by Pollard.

With regard to the information you have not marked in Exhibits B, C, D, and E, you claim that SGI wants to withhold this information. SGI submitted a brief to this office and asserts sections 552.104 and 552.110 of the Government Code for its information. SGI also claims that the information is copyrighted and, therefore, may not be "commercialized by any third party without the express written consent of SGI." A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information.<sup>4</sup> *Id.* Therefore, we will determine whether sections 552.104 or 552.110 apply to the remaining submitted information not excepted under section 552.101 in conjunction with section 466.022 of the Government Code.

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<sup>4</sup>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. See Open Records Decision No. 550 (1990).

The purpose of section 552.104 is to protect the interests of a *governmental body* in situations such as competitive bidding and requests for proposals in which the governmental body may wish to withhold information to obtain more favorable offers. See Open Records Decision No. 592 at 8 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information, such as bids and proposals, to governmental bodies. *Id.* at 8-9. Because SGI has no standing to assert the protection of section 552.104, we do not address its arguments under that exception.

Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

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. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

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) 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.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). 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 (1990). However, where no demonstration of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

SIGI contends that its security and validation information is confidential and if released the security measures preventing fraud could be affected. As discussed above, we have determined that information marked by the commission that would impact the security of the lottery must be withheld under section 466.022 of the Government Code. After reviewing SIGI's comments, we conclude that SIGI has failed to demonstrate that the small amount of information not excepted under section 466.022 is a trade secret under section 552.110(a).

SIGI also argues that printing specifications, colors, benday patterns, and production information which lead to pricing are excepted under section 552.110(b) of the Government Code. Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). We have already found that this type of information must be withheld under section 552.101 in conjunction with section 466.022 of the Government Code. With regard to the small amount of information that the commission did not mark to withhold, we do not believe that SIGI has provided specific factual evidence that release of this remaining information would cause substantial competitive harm under section 552.110(b). Gov't Code § 552.110(b) Accordingly, we conclude that SIGI's remaining information in Exhibits B, C, D, and E may not be withheld under section 552.110 of the Government Code.

In conclusion, the commission must withhold the information it marked in Exhibits B, C, D, E, F, and G under section 552.101 in conjunction with section 466.022 of the Government Code. The commission must release the remaining submitted information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer H. Bialek  
Assistant Attorney General  
Open Records Division

JHB/sdk

Ref: ID# 147762

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