



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2005

Mr. Reagan E. Greer
Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761

OR2005-04827

Dear Mr. Greer:

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# 225285.

The Texas Lottery Commission (the "commission") received a request for all information pertaining to the requestor's complaint against GameTech International, Inc. ("GameTech") from September 9, 2002 through March 15, 2005. You state that you have released some responsive information to the requestor. You claim, however, that some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You also claim that the requested information may contain proprietary information subject to exception under the Act. Therefore, pursuant to section 552.305(d) of the Government Code, you have notified the interested third parties, GameTech, Moore Supplies, Inc. ("Moore"), and Thompson Allstate Bingo, Inc. ("Thompson"), of the request and of their opportunity to submit comments to this office. 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain

circumstances). We have received correspondence from GameTech. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, we note that the present request encompasses information that is currently the subject of a pending lawsuit by GameTech against the Office of the Attorney General (the "attorney general"). See *GameTech International, Inc. v. Abbott, et al.*, Cause No. GN501668, 126th District Court of Travis County, Texas. In the lawsuit, GameTech is challenging a prior ruling of this office, issued as Open Records Letter Ruling No. 2005-03642 (2005), which required the commission to release certain information pertaining to GameTech. Because the present request encompasses, in part, the same information at issue in that litigation, we do not issue a decision with regard to this information and will allow the trial court to determine whether such information must be released to the public.

Next, we note that GameTech seeks to withhold information that the commission has not submitted to us for review. Accordingly, we conclude that this ruling does not address the arguments submitted to us by GameTech pertaining to information that has not been submitted to us by the commission for our review. See Gov't Code § 552.301(e)(1)(D) (governmental body seeking attorney general's opinion under Act must submit copy or representative samples of specific information requested).

We now address the commission's obligations under section 552.301 of the Government Code. 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) general written comments stating the reasons why the stated 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. The commission received the request for information on March 15, 2005, but did not submit some of the responsive information until May 10, 2005. Consequently, the commission failed to comply with section 552.301(e) of the Government Code with regard to this information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. See *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex.

¹ 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.

App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. See Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). The commission claims that a portion of the information it submitted on May 10, 2005 is excepted from disclosure under section 552.103 of the Government Code; however, section 552.103 serves only to protect a governmental body's interests and may be waived. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); see also Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, section 552.103 does not constitute a compelling reason to withhold information for purposes of section 552.302. However, because third party interests can provide compelling reasons to withhold information, we will address whether the information at issue must be withheld to protect the interests of third parties.

But first, we turn to the commission's claim that the information submitted in accordance with the requirements of section 552.301 is excepted from disclosure under section 552.103 of the Government Code.² Section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in this particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records

² GameTech also raises section 552.103 as an exception to disclosure. We note, however, that section 552.103 is designed to protect the litigation interests of a governmental body, not third parties. Open Records Decision No. 551 (1990).

Decision No. 551 at 4 (1990). The commission must meet both prongs of this test for information to be excepted under 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis.³ *See* Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body’s attorney determines that it should be withheld pursuant to Gov’t Code § 552.103 and that litigation is “reasonably likely to result”).

The commission states that on January 17, 2005, a commission enforcement attorney completed an investigation into alleged price fixing and other violations of the Bingo Enabling Act by GameTech. The commission further informs us that, prior to its receipt of the present request, the commission decided to pursue an enforcement action and has taken formal steps to resolve the matter, including the offering of settlement terms, which are still pending. Additionally, the commission advises that, if a settlement is not reached, the commission will pursue litigation before the State Office of Administrative Hearings. After reviewing the commission’s arguments and the submitted documents, we agree that the commission reasonably anticipated litigation on the date the commission received the request for information. We also agree that the information at issue relates to the anticipated litigation.

We note however, that some of the documents at issue reflect on their face that they were obtained from or provided to representatives of GameTech, which appears to be the only other party in the anticipated litigation. Once information has been obtained by all parties to a litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent that the submitted information has either been obtained from or provided to GameTech or its representatives, it is not excepted from disclosure under section 552.103(a) and may not be withheld on that basis. However, to the extent that the information at issue has not been obtained from or provided to GameTech or its representatives, it may be withheld from disclosure under section 552.103(a).⁴ Furthermore, the applicability of section 552.103(a) ends once litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

³For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, to constitute “litigation.” *See* Open Records Decision No. 588 (1991).

⁴As we are able to make this determination, we need not address the commission’s arguments under sections 552.107 and 552.111 of the Government Code and the proprietary interests of Thompson. We also need not address the proprietary interests of Moore in so far as the documents related to Moore have not been obtained from or provided to GameTech or its representatives.

We now turn to GameTech's arguments regarding the submitted information that is not excepted from disclosure under section 552.103. GameTech claims that some of the information at issue is excepted from disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "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." See Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him 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 a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] 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); see also *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private party's claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.⁵ See Open Records

⁵The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other 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 [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (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 Nos. 319 at 2 (1982), 306 at 2

Decision No. 552 at 5 (1990). The private party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See* Open Records Decision No. 402 at 3 (1983). 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* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review of GameTech's arguments and the submitted information at issue, we determine that GameTech has made a specific factual showing that release of most of the information at issue would cause substantial competitive harm to GameTech. We have marked the information that the commission must withhold under section 552.110(b).⁶ However, we find that GameTech has not established by specific factual evidence that the remaining information it seeks to withhold is excepted from disclosure as either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b). Accordingly, no portion of the remaining information at issue may be withheld under section 552.110 of the Government Code.

GameTech also argues that a portion of the remaining information at issue is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common law privacy, which protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate public concern. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For example, information related to an individual's mortgage payments, assets, bills, and credit history is generally protected by the common law right to privacy. *See* Open Records Decision Nos. 545, 523 (1989); *see also* Open Records Decision No. 600 (finding personal financial information to include choice of particular insurance carrier). The document we have marked contains personal financial information, and we do not believe that the public has a legitimate interest in it. *See* Open Records Decision Nos. 620 (1993), 600 (1992).

(1982), 255 at 2 (1980).

⁶As we are able to make this determination, we need not address the proprietary interests of Moore with regard to this information.

Thus, we conclude that this document is confidential under common law privacy, and the commission must withhold it pursuant to section 552.101.⁷

In summary, because the present request encompasses, in part, the same information at issue in pending litigation, we do not issue a decision with regard to this information and will allow the trial court to determine whether such information must be released to the public. To the extent that the information that was timely submitted to this office has not been obtained from or provided to GameTech or its representatives, the commission may withhold this information under section 552.103(a) of the Government Code. The commission must withhold the marked information under section 552.110(b) of the Government Code. The commission must withhold the marked document under section 552.101 of the Government Code in conjunction with common law privacy. The remaining information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

⁷As we are able to make this determination, we need not address GameTech's remaining argument against disclosure for this information. Similarly, we need not address the commission's privacy argument for this information.

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); *Tex. Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 225285

Enc. Submitted documents

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