



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 9, 2005

Mr. Gary Grief
Acting Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761

OR2005-10146

Dear Mr. Grief:

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# 236060.

The Texas Lottery Commission (the "commission") received a request for the "recently completed" investigative report regarding a price fixing complaint. You state that the request may implicate third party proprietary interests. Accordingly, you indicate and provide documentation showing that, pursuant to section 552.305 of the Government Code, you notified GameTech International, Inc. ("Gametech"); Moore Bingo Supply ("Moore"); and Thompson Allstate Bingo Supply, Inc. ("Thompson") of the request for information and of each company's right to submit arguments explaining why the information concerning it should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 in certain circumstances). In response to the notice, each of the third parties claims that the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code, while Gametech also raises section 552.103 of the Government Code. Furthermore, because each of the third parties asserts that the requested information is confidential by law pursuant to section 2001.216(b) of the Occupations Code, you raise the applicability of this provision to the information at issue.¹ We have considered the claimed exceptions and reviewed the submitted information.

¹We note that you have, pursuant to section 402.042 of the Government Code, a currently pending request for a formal Attorney General Opinion, RQ399, regarding the applicability of section 2001.216(b) of the Occupations Code.

Initially, we note that the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information consists of two completed reports made for the commission. Therefore, as prescribed by section 552.022, you must release the submitted information unless it is confidential under other law. Section 552.103 is a discretionary exception under the Act, and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). In addition, because section 552.103 protects the litigation interests of governmental bodies, not private parties, Gametech lacks standing to raise this exception. *See* Open Records Decision Nos. 575 at 2 (1990), 551 at 3 (1990) (section 552.103 enables governmental entities to protect their position in litigation), 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived by governmental body). Accordingly, the commission may not withhold any of the submitted information under section 552.103. However, because sections 552.101 and 552.110 are "other laws" for purposes of section 552.022, we will address those claims.

Section 552.101 of the Government Code 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 information protected by other statutes. Section 2001.216 of the Occupations Code provides as follows:

- (a) The commission may examine the books and records of the holder of or an applicant for a manufacturer's or distributor's license.
- (b) The commission may not disclose information obtained during the examination except as necessary to carry out this chapter.

Occ. Code §2001.216. You state that it is the commission's "longstanding interpretation" that the confidentiality provision in section 2001.216(b) is applicable "only to the examination of books and records of the license applicant (or renewal applicant) during the performance of an application investigation as required by" particular licensing provisions contained in the Occupations Code. You inform us that the requested information relates to an investigation of a complaint against two licensed bingo distributors. Further, you state

that the commission has statutory authority other than section 2001.216 to request information from a licensee and to obtain information for a complaint investigation, and that no portion of the information at issue was obtained pursuant to section 2001.216, despite the investigator's assertion to the contrary. Thus, we understand you to indicate that section 2001.216 is inapplicable to the requested information. Therefore, no portion of the information at issue may be withheld under section 552.101 of the Government Code on that basis.

Gametech contends that the submitted information comprises settlement negotiation materials that are confidential under sections 154.053(c) and 154.073(c) of the Civil Practice and Remedies Code as well as under section 2009.054(a) of the Government Code. These provisions relate to confidentiality of certain matters during the course of an alternative dispute resolution procedure. The information at issue consists of two investigative reports prepared in response to a complaint filed against commission licensees, and does not pertain to an alternative dispute resolution procedure. Thus, sections 154.053(c), 154.073(c), and 2009.054(a) are inapplicable to the information at issue, and no portion of the information may be withheld under section 552.101 on that basis.

Thompson claims that the submitted reports contain information that is protected from public disclosure under the common law right of privacy.² Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

Prior decisions of this office have determined that financial information relating only to an individual ordinarily satisfies the first element of the common law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See, e.g.*, Open Records Decision Nos. 545 at 4 (1990) ("In general, we have found the kinds of financial information not excepted from public disclosure by common law privacy to be those regarding the receipt of governmental funds or debts owed to governmental entities"), 523 at 4 (1989) (noting distinction under common law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

²Section 552.101 also encompasses the doctrine of common law privacy.

We note, however, that the subjects of the submitted reports are business entities. Common law privacy is designed primarily to protect human feelings and sensibilities, rather than to safeguard property, business, or other pecuniary interests. See Open Records Decision No. 192 at 4 (1978); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co., Inc.*, 777 S.W.2d 434, 436 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). After careful review, we find that none of the information at issue is confidential under common law privacy; therefore, the commission may not withhold the information under section 552.101 on that ground.

Gametech, Thompson, and Moore each argue that portions of the submitted reports are excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. See Gov't Code § 552.110(a). 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); see also *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 552 at 2 (1990), 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 Nos. 319 (1982), 306 (1982), 255 (1980), 232 (1979). This office must accept a claim that information subject to the Act is exempted 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, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial 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[.]” Gov’t Code § 552.110(b). This exception to disclosure 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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

After reviewing the submitted information and the arguments of Gametech, Thompson, and Moore, we find that each of the third parties has made a *prima facie* case that some of the information each seeks to withhold is protected as trade secret information. We have marked the customer list information in the submitted documents that the commission must withhold pursuant to section 552.110(a) of the Government Code. However, we determine that neither Gametech, Thompson, or Moore has demonstrated that any portion of the remaining submitted information meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for this information. We note that pricing information pertaining to a particular contract is generally not a trade secret

because it is “simply information as to single or ephemeral events in the conduct of the business” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). We therefore determine that no portion of the remaining information is excepted from disclosure under section 552.110(a).

We further find that neither Gametech, Thompson, or Moore has provided specific factual evidence demonstrating that release of the remaining information would result in substantial competitive harm to each company. Accordingly, we determine that none of the remaining information is excepted from disclosure under section 552.110(b). *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110).

To summarize: We have marked the customer list information in the submitted documents that the commission must withhold pursuant to section 552.110(a) of the Government Code. 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

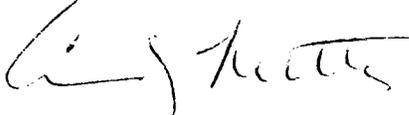
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 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 Office of the Attorney General 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jpa

Ref: ID# 236060

Enc. Submitted documents

c: Mr. Steven W. Hieronymus
Trend Gaming Systems, LLC
Suite 500
8868 Research Boulevard,
Austin, Texas 78758
(w/o enclosures)

Ms. Amy Tabor
Baker Botts L.L.P.
One Shell Plaza
910 Louisiana
Houston, Texas 77002-4995
(w/o enclosures)

Mr. Daniel Moore
Moore Supplies Inc.
8505 Mosley
Houston, Texas 77075
(w/o enclosures)

Mr. James F. McNally
Clark, Thomas & Winters
P.o. Box 1148
Austin, Texas 78767
(w/o enclosures)

Ms. Jane Thompson
Thompson Allstate Bingo Supply
5446 Hwy 290 West, Suite 205
Austin, Texas 78735
(w/o enclosures)

Ms. Caroline Scott
Mr. Dewey Brackin
Gardere Wynne Sewell L.L.P.
600 Congress Avenue, Suite 3000
Austin, Texas 78702-2978
(w/o enclosures)