ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 15, 2006

Mr. Anthony J. Sadberry
Acting Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR2006-04988

Dear Mr. Sadberry:

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# 248998.

The Texas Lottery Commission (the "commission") received a request for seven specified categories of information, including information that pertains to litigation involving Moore Supply, Inc. ("Moore") and Thompson Allstate Bingo Supply, Inc. ("Thompson"). You state that some of the requested information has been released, but claim that some of the submitted information may be excepted from disclosure under section 552.101 of the Government Code. You also state, and provide documentation showing, that you notified GameTech International, Inc. ("GameTech"), Thompson, and Moore of the commission's receipt of the request for information and of the right of each company to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). Thompson asserts that its information is excepted under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. GameTech asserts that some of its information is excepted under section 552.110 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the commission's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. 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 a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e)(1)(D). The commission received the request for information on February 23, 2006; however, it submitted some of the responsive information on May 3, 2006. Thus, the commission failed to comply with the procedural requirements mandated by section 552.301 for the information submitted on May 3, 2006.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.–Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). As third-party interests are at stake, we will consider the submitted arguments to withhold this information from release pursuant to the Act.

We next note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Moore has not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes Moore's proprietary information, and the commission may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We also note a governmental body has the discretion to assert that information requested under the Act is excepted from release under sections 552.103, 552.107, and 552.111 of the Government Code. These sections serve only to protect a governmental body's interests and may be waived by the governmental body. *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); Open Records Decision Nos. 677 at 10 (2002) (claim of attorney work-product privilege under section 552.111 or Texas Rule of Civil

Procedure 192.5 may be waived), 676 at 11-12 (2002) (claim of attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 may be waived), 473 (1987) (statutory predecessor to section 552.111 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). The commission does not assert that the submitted information is excepted under section 552.103, 552.107, or 552.111; therefore, the information may not be withheld pursuant to any of these sections.

Thompson asserts that (1) any submitted correspondence between the commission and Thompson containing settlement offers and (2) "any responsive documents that relate to a [commission] examination of Thompson Allstate records" are excepted under section 552.101 of the Government Code.[1] The commission, however, does not inform us, and it is not otherwise apparent, that the documents submitted by the commission to this office contain either of these categories of information. We also note GameTech has submitted information to this office that it asserts is excepted from release under section 552.110 of the Government Code; however, the commission did not submit this information for our review. This ruling does not address information beyond what the commission has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the commission submitted as responsive to the request for information. *See id.*

The commission asserts that the submitted information may be confidential under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The commission states the following:

> Some of the documents requested, and included herein as Exhibit B, may have been determined confidential by court protective order in the lawsuit styled Docket No. CIV01-00540 PHX-LOA, *GameTech International Inc. v. Trend Gaming Systems, L.L.C.* in the United States District Court for the District of Arizona (Phoenix). The detailed information concerning this court protective order, if it is still in existence and the documents (depositions) it covers, if any, will be made available by GameTech International, Inc.

Neither the commission nor GameTech has provided this office with a court protective order pertaining to the submitted information; therefore, we conclude the commission has not

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[1]Thompson asserts that any submitted correspondence between the commission and Thompson is confidential under sections 2009.002 and 2009.054 of the Government Code and section 154.073 of the Civil Practices and Remedies Code, and any responsive documents that relate to a commission examination of Thompson Allstate records are confidential section 2001.216 of the Occupations Code. *Cf.* Occ. Code ch. 2001 (Bingo Enabling Act).

established that the submitted information is excepted under section 552.101 of the Government Code pursuant to a court protective order.

GameTech asserts that some of the information at issue is excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

> 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 single or ephemeral events 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 Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.[2] RESTATEMENT OF TORTS § 757 cmt. b (1939). This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that

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[2]The following are the six factors that the Restatement gives 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 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 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 (1982), 255 at 2 (1980).

section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[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." 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 requested information. *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).

Having considered GameTech's arguments and reviewed the information at issue, we find that GameTech has not shown that any of the submitted information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. Thus, the commission may not withhold any of the information at issue pursuant to section 552.110(a). We also find that GameTech has made only conclusory allegations that release of the information at issue would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Thus, none of the information at issue may be withheld pursuant to section 552.110(b).

We note that some of the submitted information is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the commission must withhold the e-mail addresses we have marked under section 552.137. The commission must release the remaining information 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. 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,

James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 248998

Enc. Submitted documents

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