



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 23, 2006

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

OR2006-05374

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# 249749.

The Texas Lottery Commission (the "commission") received a request for the supplemental information to the 2004 and 2005 manufacturer and distributor quarterly reports. You indicate that the commission has released some of the requested information to the requestor. You state that the request may implicate third party proprietary interests. Accordingly, you state, and provide documentation showing, that pursuant to section 552.305(d) of the Government Code, you notified the interested third parties¹ of the request for information and of each third party's right to submit arguments explaining why the information concerning it should not be released. *See Gov't Code § 552.305(d)* (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

¹The commission sent third-party notice to Applied Concepts, Inc., Arrow International, Inc., Austin Capital, L.L.C., Betja Bingo, Inc., Bettina Corporation, Bingo Holdings, Inc., Bingo Wholesalers of Texas, Inc., BK Entertainment, Mr. Arthur Breaux, Jr., Budget Bingo Supply, Inc., Douglas Press, Inc., Fortunet, Inc., Mr. David T. Isbell, Electronics Game Solutions, Inc., F&L, L.L.C., GamePilot, Inc., GameTech International, International Gamco, Inc., K&B Sales, Inc., Daniel R. Moore, Inc., Planet Bingo, Tabco, Inc., Texas Gaming International, Inc., Thompson Allstate Bingo Supply, Inc., Trend Gaming Systems, L.L.C., Ms. Joan Watson, and Universal Manufacturing Co., Inc.

of exception in certain circumstances). We have received correspondence from four third parties: BK Entertainment ("BK"), Planet Bingo, L.L.C. ("Planet Bingo"), Arrow International, Inc. ("Arrow"), and International Gamco, Inc. ("Gamco").² We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2005-11402A (2006), where we held that Fortunet, Inc., Pollard Games, Inc. d/b/a American Games, and Gamco's customer information was subject to section 552.110(a) of the Government Code. With regard to the submitted information that is identical to the information previously requested and ruled upon by this office in that prior ruling, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, you must continue to rely on Open Records Letter No. 2005-11402A as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we 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 the requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only BK, Planet Bingo, Arrow, and Gamco have submitted comments to this office explaining how release of the requested information would affect each company's proprietary interests. The remaining third parties failed to submit comments to this office explaining how release of the requested information would affect each company's proprietary interests. Thus, the remaining third parties whose information is responsive have failed to provide us with any basis to conclude that any of their information is proprietary for purposes of the Act. Therefore, the commission may not withhold any information relating to the remaining third parties under section 552.110. *See, e.g., id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990).

²We note that the brief submitted by Gamco encompasses information that the commission did not submit to this office in requesting this decision. This decision is applicable only to the information submitted by the commission.

Planet Bingo contends that its submitted information may be excepted from disclosure under section 552.101 of the Government Code. 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. However, Planet Bingo has cited no law under which any of the submitted information relating to Planet Bingo is considered to be confidential for purposes of section 552.101 of the Government Code. Therefore, none of the information relating to Planet Bingo is excepted from disclosure under section 552.101.

BK, Planet Bingo, Arrow, and Gamco claim that their information is 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.); 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); Open Records Decision No. 661 (1999).

After reviewing the submitted information and the arguments of BK, Planet Bingo, Arrow, and Gamco, we find that BK, Planet Bingo, and Gamco have made a *prima facie* case that some of the information at issue 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 BK, Arrow, Planet Bingo, and Gamco have failed to demonstrate that any portion of the remaining submitted information meets the definition of a trade secret, nor has any of these companies demonstrated the necessary factors to establish a trade secret claim for this information. We therefore determine that no portion of the remaining submitted information is exempted from disclosure under section 552.110(a).

We further find that BK, Planet Bingo, Arrow, and Gamco have failed to provide 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 this information is excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 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).

In summary, the commission must continue to rely on Open Records Letter No. 2005-11402A as a previous determination with regard to the submitted information that is identical to the information previously requested and ruled upon by this office in that prior ruling. The commission must withhold the information we have marked under section 552.110 of the Government Code. The remaining submitted information must be released.

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,



Lisa V. Cubriel
Assistant Attorney General
Open Records Division

LVC/

Ref: ID# 249749

Enc. Submitted documents

c: Mr. Dale D. Robertson
Director of Quality Control
and Regulation Compliance
American Games, Inc.
504 34th Avenue
Council Bluffs, Iowa 51501
(w/o enclosures)

Mr. Jeff Jalovec
Applied Concepts, Inc.
19668 Progress Drive
Strongsville, Ohio 44119
(w/o enclosures)

Mr. John Gallagher, Jr.
Arrow International, Inc.
9900 Clinton Road
Brooklyn, Ohio 44144
(w/o enclosures)

Mr. Roy V. Gray III
Austin Capital Group LLC
1330 Nightingale Drive
Cedar Park, Texas 78613-5101
(w/o enclosures)

Betja Bingo Inc.
1571 N. Glenville Dr., Suite 150
Richardson, Texas 75081
(w/o enclosures)

Mr. Dale Breedlove
Bingo Holdings, Inc.
6625 W. 19th Street, Space 207
Lubbock, Texas 79407
(w/o enclosures)

Ms. Christine Stromski
BK Entertainment
55 Williams Street
St. Catharines, Ontario L2R 5J2
Canada
(w/o enclosures)

Mr. Richard Henry
Budget Bingo Supply, Inc.
2408 Jackson Lane
League City, Texas 77573
(w/o enclosures)

Ms. Elaine Mione
Fortunet, Inc.
2620 S. Highland Drive
Las Vegas, Nevada 89109
(w/o enclosures)

Mr. Lawrence Midows
Electronics Game Solutions, Inc.
149 Weldon Parkway, Suite 105
Maryland Heights, MO
63043-3103
(w/o enclosures)

Mr. Raymond Garfield, Jr.
GamePilot, Inc.
13455 Noel Road, Suite 2150
Two Galleria Tower
Dallas, Texas 75240
(w/o enclosures)

Mr. Joe Marshall
Bettina Corp.
1860 Crown Drive, Suite 1406
Dallas, Texas 75234-9415
(w/o enclosures)

Mr. Andrew Madar, Jr.
Bingo Wholesalers of Texas, Inc.
P. O. Box 6980
Fort Worth, Texas 76115
(w/o enclosures)

Mr. Arthur Breaux, Jr.
P. O. Box 5655
McAllen, Texas 78502
(w/o enclosures)

Ms. Susan Schultz
Douglas Press, Inc.
2810 Madison Street
Bellwood, Illinois 60104-2295
(w/o enclosures)

Mr. David T. Isbell
4407 Secluded Hollow
Austin, Texas 78727-1702
(w/o enclosures)

Mr. Timothy A. Foil
F&L L.L.C.
1080 Pearl Drive
Bossier City, Louisiana 71111
(w/o enclosures)

GameTech International
c/o Mr. Jamie McNally
Clark, Thomas & Winters
P. O. Box 1148
Austin, Texas 78767
(w/o enclosures)

Mr. Robert Koory
International Gamco, Inc.
9335 North 48th Street
Omaha, Nebraska 68152
(w/o enclosures)

Ms. Deidre Colello
Daniel R. Moore, Inc.
8505 Mosley
Houston, Texas 77075
(w/o enclosures)

Mr. Stephen Finch
Tabco Inc./800743 Alberta
Limited - Group
417 Lakeshore Road
St. Catharines, Ontario L2R7K6
Canada
(w/o enclosures)

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

Ms. Joan Watson
2618 Baycrest Drive
Nassau Bay, Texas 77058
(w/o enclosures)

Mr. Mark Newton
Director of Regulatory Compliance
Video King, Inc.
2717 North 118th Circle, Suite 210
Omaha, Nebraska 68164
(w/o enclosures)

Mr. John H. Adams
Vice President and General Counsel
International Gamco, Inc.
9335 North 48th Street
Omaha, Nebraska 68152-1541
(w/o enclosures)

Mr. Kenneth Griffith
K&B Sales, Inc.
11827 Judd Court
Dallas, Texas 75243
(w/o enclosures)

Mr. Rick White
Planet Bingo
41-750 Rancho Las Palmas, Building A
Rancho Mirage, California 92270
(w/o enclosures)

Mr. William Motz
Texas Gaming International, Inc.
604 Kerlick Avenue
New Braunfels, Texas 78130
(w/o enclosures)

Mr. Steven Hieronymus
Trend Gaming Systems, L.L.C.
10219 Matoca Way
Austin, Texas 78726
(w/o enclosures)

Mr. Joe Wellner
Universal Manufacturing Co., Inc.
5450 Deramus
Kansas City, Missouri 64120
(w/o enclosures)

Mr. Jeffrey Weiss
Weiss, Moy & Harris, P.C.
1101 14th Street, N.W., Suite 500
Washington, DC 20005
(w/o enclosures)