



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 5, 2006

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

OR2006-05855

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# 249535.

The Texas Lottery Commission (the "commission") received a request for a specific administrative report "together with a copy of all documents referenced in the Administrative Report." You state that the requestor has agreed to accept a copy of the administrative report that has been redacted in accordance with a settlement agreement resulting from an earlier ruling issued by this office regarding this document.¹ You claim, however, that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. In addition, pursuant to section 552.305 of the Government Code, you notified Thompson Allstate Bingo Supply, Inc. ("Thompson") and GameTech International ("GameTech") 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 considered the arguments of both the commission and Thompson,

¹See Open Records Letter No. 2005-010146 (2005); *GameTech International, Inc., et al. v. Greg Abbott et al.*, No. GN504185 (98th Dist. Ct., Travis County, Tex., April 20, 2006) (settlement agreement).

and have reviewed the submitted information. GameTech has not submitted any arguments against disclosure in regard to this request.

We first note that this office has previously addressed the public availability of some of the submitted information. In Open Records Letter No. 2006-04606 (2006), we ruled that portions of Tab O in the administrative report were proprietary information subject to section 552.110 of the Government Code. As we have no indication that the law, facts, and circumstances surrounding this prior ruling have changed, you may continue to rely on the prior ruling as a previous determination for Tab O of the administrative report. *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 a 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 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 is from a completed investigation made of, for, or by 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 552.022.² *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). 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. In addition, the Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53

²Thompson provides arguments concerning the applicability of sections 552.107 and 552.111 of the Government Code. However, as the commission did not raise these exceptions to disclosure, we need not consider their applicability to the requested information.

S.W.3d 328 (Tex. 2001). Therefore, we will also consider Thompson's arguments under these rules.

Thompson raises both rule 503 of the Texas Rules of Evidence, the attorney-client privilege, and Rule 192.5 of the Texas Rules of Civil Procedure, the attorney work-product privilege, and claims that the commission can demonstrate the applicability of these rules to the submitted information. However, the commission does not seek to withhold any information under either the Texas Rules of Evidence or the Texas Rules of Civil Procedure in conjunction with the attorney-client and work product privileges. Therefore, none of the submitted information may be withheld on these grounds. *See* 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).

Section 552.101 of the Government Code exempts 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. While Thompson asserts that section 2001.216 is applicable to the requested information, the commission indicates that section 2001.216 is inapplicable to this information. We understand 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. The commission indicates that the requested information relates to an investigation of a complaint against two licensed bingo distributors. Further, the commission states that it 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. Therefore, no portion of the information at issue may be withheld under section 552.101 of the Government Code on that basis.

Thompson also contends that the submitted information comprises settlement negotiation materials that are confidential under sections 154.073(a) of the Civil Practice and Remedies

Code as well as under section 2009.054 of the Government Code.³ However, these provisions relate to confidentiality of certain matters during the course of an alternative dispute resolution procedure. The information at issue consists of an investigative report and attachments prepared in response to a complaint filed against a commission licensee, and was not created pursuant to section 154.073(a) of the Civil Practice and Remedies Code or section 2009.054 of the Government Code. Thus, these provisions are inapplicable to the information at issue, and no portion of the information may be withheld under section 552.101 on that basis.

Thompson also argues that the submitted 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.), *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:

³These sections are also encompassed by section 552.101 of the Government Code.

- (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).

We note that this office considered the arguments of Thompson as well as GameTech in an earlier settlement negotiation concerning the administrative report at issue in this ruling. Those negotiations resulted in a settlement agreement, mentioned previously in this ruling, in which this office agreed that Thompson and GameTech had established a proprietary interest in much of the information in the administrative report. In this instance, the documents at issue are the “case binder tabs” that are specifically referenced in the administrative report. Therefore, after review of Thompson’s arguments and in accordance with the settlement agreement, we have marked the information of GameTech and Thompson in the submitted documents that must be withheld under subsections 552.110(a)

and 552.110(b) of the Government Code. The remaining submitted information may not be withheld under section 552.110.

We note, however, that Tab E contains e-mail addresses obtained from the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential. Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not inform us that the individuals at issue have affirmatively consented to the release

of the e-mail addresses contained in the submitted information. Accordingly, the commission must withhold the e-mail addresses we have marked under section 552.137.

In summary, the commission must withhold the information we have marked under section 552.110 of the Government Code. The commission must withhold the e-mail addresses we have marked under section 552.137 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).

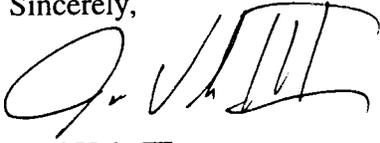
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



José Vela III
Assistant Attorney General
Open Records Division

JV/krl

Ref: ID# 249535

Enc. Submitted documents

c: Mr. Stephen Fenoglio
Attorney and Counselor at Law
508 West 12th Street
Austin, Texas 78701-1819
(w/o enclosure)

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

Mr. Dewey A. Brackin
Gardere
Attorneys and Counselors
600 Congress Avenue, Suite 3000
Austin, Texas 78701-2978
(w/o enclosures)