



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 5, 2007

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

OR2007-00201

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# 268975.

The Texas Lottery Commission (the "commission") received a request for the manufacturer and distributor reports for all of 2005 and the first two quarters of 2006. 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 parties 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 of exception in certain circumstances). We have received correspondence from International Gamco, Inc. ("Gamco"). We have considered their arguments and reviewed the submitted information.

Initially, you note that the 2005 manufacturers and distributors reports were the subject of four previous requests for information, in response to which this office issued Open Records Letter Nos. 2005-11402A (2006) and 2006-05374 (2006), 2006-07713 (2006), and 2006-07904 (2006). As you state that the law, facts, and circumstances on which the

prior rulings were based have not changed, you must continue to rely on Open Records Letter Nos. 2005-11402A (2006), 2006-05374 (2006), 2006-07713 (2006), and 2006-07904 (2006) as previous determinations for the 2005 manufacturers and distributors reports and release or withhold the information in accordance with those prior rulings. *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 Gamco seeks to withhold backup documentation attached to its supplemental reports that was not submitted by the commission to this office for our review. Because such information was not submitted by the commission, this ruling does not address that information and is limited to the information submitted as responsive by the commission. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

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 Gamco has submitted comments to this office explaining how release of the requested information would affect its 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.

Gamco claims that its 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 id.* § 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 excepted 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. 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. *Id.*; Open Records Decision No. 661 (1999).

After reviewing Gamco’s information and arguments, we find that Gamco has 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 Gamco has failed to demonstrate that any portion of the remaining submitted information meets the definition of a trade secret, nor has the company 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 excepted from disclosure under section 552.110(a).

Further, we find that Gamco has failed to provide specific factual evidence demonstrating that release of the remaining submitted information would result in substantial competitive harm to the company. Accordingly, we determine that none of the remaining submitted information is excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 661 (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 Nos. 2005-11402A (2006), 2006-05374 (2006), 2006-07713 (2006), and 2006-07904 (2006) as previous determinations with regard to the 2005 manufacturers and distributors reports. 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,



José Vela III  
Assistant Attorney General  
Open Records Division

JV/eb

Ref: ID# 268975

Enc. Submitted documents

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(w/o enclosures)

Mr. John H. Adams  
International Gamco, Inc.  
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(w/o enclosures)