



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 24, 1997

Ms. Kimberly Kiplin
Acting Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761

OR97-0922

Dear Ms. Kiplin:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 105126.

The Texas Lottery Commission (the "commission") received a request for "all publicly available information relevant to the licensing by (the commission) of the following manufacturers of Bingo devices: Gametech, Inc. ("Gametech"), Bingo Card Minder Corp. ("BCM"), Stuart Entertainment, Inc. ("Stuart")." You state that certain responsive documents have been released. However, you assert that portions of the requested information are excepted from disclosure pursuant to sections 552.101, 552.104, 552.107, 552.108, 552.110 and 552.111 of the Government Code.¹ We have considered your arguments and have reviewed the sample information submitted.²

You assert that the entire investigative report, as well as all of the information contained in the background investigations, are excepted from disclosure under section 552.108 of the Government Code. This information is contained in Exhibits E, F, G, H, I, J and O of the information submitted to this office. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[a]n internal record or notation of a law enforcement agency or

¹We do not address in this letter what effect, if any, section 467.104 of the Government Code or V.T.C.S. art. 179d §28 might have upon the exceptions in Chapter 552 of the Government Code.

²In reaching our conclusion here, we assume that the "representative samples" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution. Gov't Code § 552.108; *see Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996).

Section 552.108 applies to a "law enforcement agency," that is, an agency which investigates crimes and enforces criminal laws. *See, e.g.,* Open Records Decision No. 126 (1976) (Attorney General's Organized Crime Task Force). It does not as a general rule apply to an agency whose chief function is regulatory in character. Attorney General Opinion MW-575 (1982) (Department of Agriculture). The commission has statutory authority to maintain a department of security staffed by commissioned peace officers or investigators, Gov't Code § 466.020; and authority to enforce violations of the lottery law, *id.* § 466.019, and the Bingo Enabling Act, V.T.C.S. art. 179d, §§16(a), (e), (i) (control and supervision), 16a (administrative penalties), 36(b) (misdemeanors). However, the commission in this case seeks to withhold records generated by the commission during an investigation of the qualifications of an applicant for a license to manufacture or distribute bingo supplies. *See* V.T.C.S. art. 179d, § 13(a). As the records at issue relate to a function of the commission that is administrative in character, we conclude that the commission may not withhold the requested information pursuant to section 552.108.

You also contend information located in Exhibit E, "Investigative Report," consists of internal documents containing the advice, opinions and recommendations of staff and thus is protected by section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. Upon review of the documents contained in Exhibit E, we conclude they primarily contain information that is factual and thus, except for one document we have marked, (see red tag), the commission may not withhold the "Investigative Report" under section 552.111.

Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision and incorporates the doctrine of common-law privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. Common-law privacy generally protects information about an individual's overall financial status, financial history, and private investment decisions. Open Records Decision No. 373 (1983) at 3 (background financial information is type of intimate information generally protected under common-law privacy), Open Records Decision No. 523

(1989).

Contained within Exhibits D, E, F, G and H is information pertaining to personal and business applications, financial disclosure statements, financial records, credit reports, account information and other personal and/or organizational information. We conclude some of this information invokes the subject individuals' privacy and is therefore excepted from disclosure under section 552.101. We note, however, that this office has found some of the types of information in these exhibits to be public information. In Open Records Decision No. 215 (1978), we stated:

[o]n two prior occasions, we have held the contents of licensing files to be public information. In Attorney General Opinion H-242 (1974), we said that the Board of Vocational Nurse Examiners must disclose information regarding a licensee's name, address, date of birth, social security number, age, sex, marital status, license number, date of graduation from nursing school, date of license, present status of license, present employment status, and whether the licensee has been arrested for a felony or misdemeanor within the past year. In Open Records Decision No. 157 (1977), we held that the licensing file of a professional engineer, including college transcript, date and place of birth, registration in other states, prior and present employment, and names and addresses of persons requested to provide references was not excepted from disclosure. To the extent that the files at issue here contain similar information about physician licensees, we believe they should be disclosed.

Open Records Decision No. 215 (1978) at 1. Thus, for your convenience, we have marked the information in Exhibits E, F, G and H that may be withheld from disclosure under section 552.101.³ (See green tags). We also conclude the two pages in Exhibit D sought to be withheld by BCM may not be withheld under common law privacy.

You note that the three companies whose records are the subject of this request have raised sections 552.101, 552.104 and 552.110 to except the requested information from disclosure, and you requested that these companies be given an opportunity to submit to this office their reasons for non-disclosure. Pursuant to section 552.305 of the Government Code, we notified Gametech, BCM, and Stuart of the request for information and of their opportunity to claim that the information at issue is excepted from disclosure. We received responses from Gametech and BCM; Stuart did not respond to our notification.

³ We note that Exhibits E, F, G and H all contain references to individuals' social security numbers. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 (1994). We note that the federal statute provides that the *law* requiring the maintenance of the employee's social security number must have been enacted on or after October 1, 1990. In other words, the fact that the social security number was obtained after October 1, 1990 by itself does not dispose of the issue. Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.

Section 552.104 protects from required public disclosure “information which, if released, would give advantage to competitors or bidders.” Section 552.104 is generally invoked to except information relating to competitive bidding situations involving specific commercial or contractual matters. Open Records Decision No. 463 (1987). It does not protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. Therefore because the interests of private parties, and not the commission, are being asserted, the commission may not withhold the requested information under section 552.104.

We next address the arguments of Gametech and BCM under 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information 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.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. 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) (emphasis added). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).⁴ 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

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (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.

Records Decision No. 552 (1990) at 5-6.

Based on our review of the submitted information and the arguments made by Gametech, we conclude Gametech has met its burden under section 552.110 with regard to the information in Exhibits I, J, K, P and Q and thus, to the extent these exhibits contain information relating to Gametech, it must be withheld. However, we conclude BCM has not met its burden under 552.110 with regard to the information in Exhibits I, J, K P and Q, or the third and fourth pages of Exhibit D, and thus the information relating to BCM must be released. As Stuart did not respond to our invitation to provide comments, we conclude the commission may not withhold any requested information pertaining to Stuart under section 552.110.⁵

Finally, you note that litigation is pending between the requestor and Gametech, BCM, and Stuart and thus, section 552.107 may be invoked to except the requested information from disclosure. We note that section 552.107 excepts information that an attorney cannot disclose because of a duty to his client. You have not argued, nor does it appear, that the information submitted consists of attorney/client communications. Thus, you may not withhold the requested information pursuant to section 552.107.⁶

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

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Ref.: ID# 105126

Enclosures: Marked documents

⁵We note that in a letter to the commission dated January 29, 1997, (Exhibit L), Stuart argued that certain information, including but not limited to operator manuals, software and source code, and object code relating to the Power Bingo King unit, as well as individual financial statements of officers and others, is confidential and not subject to disclosure. As noted above, we conclude that certain financial information pertaining to individuals is excepted from disclosure. However, the arguments advanced by Stuart in its January 29, 1997 letter to the commission do not meet the burden for withholding information pursuant to section 552.110.

⁶Further, even under section 552.103, the "litigation exception," the commission could not withhold the requested information, since 552.103 applies only when the governing body is a party to the litigation. See Open Records Decision No. 575 (1990) (a discovery privilege relevant to litigation between private parties does not shield information held by a governmental body from public disclosure).

cc: Mr. Richard A. Prato
Nevada Counsel
Fortunet, Inc.
2620 S. Highland Drive
Las Vegas, Nevada 89109

Mr. Michael Brandt, General Counsel
Bingo Card Minder Corporation
P.O. Box 3256
Stateline, Nevada 89446

Mr. Mike Schalk, General Counsel
Stuart Entertainment, Inc.
3211 Nebraska Avenue
Council Bluffs, Iowa 51501

Ms. Sandra Smith McCoy
Gametech, Inc.
Fenwick & West
2 Palo Alto Square, Suite 800
Palo Alto, California 94306
(w/o enclosures)