



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 2, 1998

Ms. Linda Cloud  
Executive Director  
Texas Lottery Commission  
P.O. Box 16630  
Austin, Texas 78761-6630

OR98-0313

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 112342.

The Texas Lottery Commission (the "commission") has received two requests for several categories of information, including specific correspondence of the commission's former Executive Director. You explain that much of the requested information will be released. You claim, however, that three letters, labeled exhibits C, D, and E, are excepted from required public disclosure by sections 552.101 and 552.103. You also explain that some of the requested information may be proprietary in nature and protected from disclosure by sections 552.104 and 552.110 of the Government Code. Gov't Code § 552.007; Gov't Code § 552.305. We have considered the exceptions you claim and have reviewed the documents at issue.

Since the property and privacy rights of a third party may be implicated by the release of the requested information, this office notified GTECH Corporation ("GTECH") about the request for information. 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 Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). GTECH responded to this notice and argues that the correspondence is excepted from disclosure by sections 552.101, 552.103, and 552.110 of the Government Code.

Although, the commission has shown that litigation is currently pending, *GTECH Corp. v. Texas Lottery Comm'n*, (Dist. Ct., Travis County, Tex., Nov. 7, 1997), we do not believe that section 552.103 protects the correspondence at issue. Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records

Decision Nos. 349 (1982), 320 (1982). It is apparent in this case that all parties to the litigation have had access to the information at issue. We do not believe that section 552.103 is applicable here.

We next address whether the information may be withheld under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Both the commission and GTECH argue that specific marked portions of exhibits C and D must be withheld under section 466.022 of the Government Code. In addition, both argue that the Communications Department Overview in exhibit E must be withheld. Section 466.022 of the Government Code provides:

(a) Except as otherwise provided by law, all commission records are subject to public inspection in accordance with Chapter 552.

(b) In addition to commission records excepted from disclosure under Chapter 552, the following information is confidential and is exempt from disclosure:

(1) security plans and procedures of the commission designed to ensure the integrity and security of the operation of the lottery;

(2) information of a nature that is designed to ensure the integrity and security of the selection of winning tickets or numbers in the lottery, other than information describing the general procedures for selecting winning tickets or numbers; and

(3) the street address and telephone number of a prize winner, if the prize winner has not consented to the release of the information.

We have reviewed the correspondence and find that you must withhold the information you have marked on exhibits C and D. We also find that you must withhold the information we have marked in exhibit E; the Communications Department Overview documentation. The letter dated September 22, 1997 and the attached weekly sales summary in exhibit E must be released.<sup>1</sup>

GTECH additionally argues that three other portions of exhibits C and D, not protected by section 466.022, must be withheld under section 552.110 because they are protected trade secrets. Section 552.110 protects the property interests of private parties 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.

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<sup>1</sup>Because we make a determination under section 552.101 for exhibit E, we need not consider GTECH's other arguments against disclosure of this information.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be

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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we 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 one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.<sup>2</sup> After examining GTECH's arguments and the portions it has marked, we believe that GTECH has established that portions of exhibit C must be withheld. We do not believe that the additional marked paragraph in exhibit D, the letter dated July 25, 1997, must be withheld. It does not identify any "specialized compilation of unique equipment, communication devices and systems, components, and technologies that relate to the services, goods, and operations of GTECH's business." We have marked the information that must be withheld.

Furthermore, we do not believe that this paragraph in exhibit D may be withheld under section 552.104. The purpose of section 552.104 is to protect the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from

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<sup>2</sup>The 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 other 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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 (1991) at 2, 463 (1987), 453 (1986) at 3. The commission has not established nor has it argued that release of the requested information would harm a particular competitive situation.

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,



Don Ballard  
Assistant Attorney General  
Open Records Division

JDB/ch

Ref: ID# 112342

Enclosures: Marked documents

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