



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 6, 1998

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

OR98-0364

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests have been assigned ID#s 112478 and 113094.

The Texas Lottery Commission (the "commission") received two requests from the same requestor seeking "the current pay scale of all current lottery sales representatives be they employed by the Texas Lottery Commission or by GTECH in Texas," and "an organizational chart of the Texas Lottery Commission including, but not limited to, a breakdown by department, the title of each department, the number of employees in each department and all regional office addresses in Texas." You state that GTECH's organization chart and a copy of GTECH's current pay scale for sales representatives are responsive to the request for information. You claim that this requested information may be proprietary in nature and protected from disclosure by the Government Code. Gov't Code § 552.305. You raise no exception to disclosure on behalf of the commission, and make no arguments regarding the proprietary nature of the requested information. You have submitted for our review the responsive information. Because you do not seek an opinion about the remaining requested information, we presume that it has been released to the requestor.

Since the property and privacy rights of a third party may be implicated by the release of the requested information, this office notified 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 requested information is confidential commercial or financial information protected from disclosure by section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

GTECH specifically asserts that its organizational chart and salary data must be withheld under the test articulated in *Critical Mass*, a case which reexamined the *National Parks* standard for the commercial or financial information prong of section 552.110. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984, 113 S.Ct. 1579 (1992). *Critical Mass* held that commercial or financial information that is voluntarily provided to a governmental body by a third party is confidential when the information is the kind that would not customarily be released to the public by the third party. *Id.* at 879. GTECH contends that it voluntarily provided the commercial or financial information at issue to the commission and that it does not customarily release this information to the public. GTECH states:

Here, the GTECH organizational charts and salary data are "confidential." First, they were voluntarily produced to the Commission following its receipt of the Pendergrass requests. Under an assertion of confidentiality, GTECH voluntarily produced these responsive items to the Commission following the Commission's requests. This is not to say that the Commission does not have the power to compel the production of documents from GTECH pursuant to its statutory powers - they may. Yet, the fact that a governmental agency may have the power to force production of information does not mean that the muscle is flexed in each circumstance. The voluntary production of items, conducive to the goal of cooperation and the corresponding governmental interests, can and does coexist with the latent power to compel information. Here, the items were voluntarily provided by GTECH and were not produced as mandatory routine governmental reports, such as nuclear safety reports or EEO-1's under duress of formal demands or subpoenas. See Critical Mass at 877.

While the commission may not have received the documents at issue pursuant to its regulatory authority or as a routine report, it appears that GTECH provided the requested

information to the commission in response to the Open Records Act requests. For the reasons set out below, we do not believe that *Critical Mass* applies in this instance.

The Open Records Act (the "Act") mandates a governmental body's responsibility to provide public information. Section 552.221 states that

(a) An officer for public information of a governmental body shall promptly produce public information for inspection, duplication, or both on the application by any person to the officer.

Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) *for a governmental body and the governmental body owns the information or has a right of access to it.*" [Emphasis added.]. Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under chapter 552 of the Government Code if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988) (relevant facts in determining whether information held by consultant is subject to the Open Records Act are: 1) information collected by consultant must relate to the governmental body's official business; 2) consultant must have acted as agent of the governmental body in collecting information; and 3) governmental body must have or be entitled to access to the information). Where a third party has prepared information on behalf of a governmental body, the information is subject to the Open Records Act, even though it is not in the governmental body's custody. Open Records Decision No. 558 (1990) at 2. Moreover, if a governmental entity employs an agent to carry out a task that otherwise would have been performed by the entity itself, information relating to that task that has been assembled or maintained by the agent is subject to disclosure. Open Records Decision No. 518 (1989) at 3. Consequently, we do not believe that a *Critical Mass* analysis is appropriate where a governmental body or third party is merely responding to a request made under the Act.

Furthermore, although the Act does not ordinarily require a governmental body to obtain information not in its possession, it appears in this instance that the commission sought the requested information from GTECH pursuant to its statutory obligations under the Act. *See* Open Records Decision Nos. 558 (1990), 499 (1988). We do not believe that submitting information in response to an Open Records Act Request can be viewed as "voluntary." *See* Gov't Code § 552.301(b) (governmental body is required to submit to attorney general copy of specific information requested). *Critical Mass* is, therefore, inapplicable here. Open Records Decision Nos. 639 (1996) at 4 n. 2, 494 (1988) at 5. Because GTECH advances no other argument against disclosure, the commission must release the requested information.

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#s 112478 and 113094

Enclosures: Submitted documents

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