



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 27, 1998

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

OR98-1311

Dear Ms. Cloud:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 115133.

The Texas Lottery Commission (the "commission") received several public information requests for copies of proposals submitted in response to the commission's request for proposal, and also for information from the selection committee. You assert that these records are protected from disclosure under sections 552.101, 552.104, 552.110, and 552.111. You also indicate that other information sought by the requestors has already been publicly disclosed.

The commission received proposals from BABN Technologies Corporation ("BABN"), Scientific Games, Inc. ("Scientific Games"), and Automated Wagering International, Inc. ("AWI"). You state that the commission seeks a decision from this office concerning the request "due to the liability imposed by the Open Records Act for the release of a document made confidential by law." Pursuant to section 552.305 of the Government Code, this office notified BABN, Scientific Games, and AWI of the public information requests and provided the companies an opportunity to assert reasons why the submitted proposals should be excepted from disclosure. This office received responses from all three companies.

BABN asserts that its ticket construction chart and data that is marked as confidential, and also its financial information submitted to the commission, is protected from disclosure pursuant to sections 552.101, 552.104, and 552.110 of the Government Code. Scientific

Games asserts that portions of its proposal and its written response to questions from the commission are protected from disclosure under sections 552.101, 552.104, and 552.110. AWI asserts that its entire proposal is excepted from disclosure under sections 552.101, 552.104, and 552.110.

We first address the arguments from the commission, BABN, Scientific Games, and AWI that the responsive information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 protects a governmental body's interests in a particular commercial context, rather than the interests of private entities. Open Records Decision No. 541 (1990) at 4. However, generally neither the contract nor information submitted with a bid is excepted under section 552.104 once the bidding process is over and a contract awarded. *Id.* at 5. Section 552.104 also protects the legitimate marketplace interests of a governmental body when there is a possibility of specific harm in particular competitive situations. Open Records Decision No. 593 (1991). You state that section 552.104 is applicable because (1) "the Commission retains the option to renegotiate its contract with GTECH", and (2) "the Commission also retains the option to issue a modified Request for Proposals for the goods and services contemplated by the canceled Request for Proposals." You also assert that the commission is authorized to engage in on-line gaming and instant ticket gaming and that release of the proposals for these systems, which were submitted in response to the request for proposal, could harm the commission's legitimate marketplace interests. Open Records Decision No. 593 (1991).

However, the commission has not demonstrated the possibility of specific harm in a particular competitive situation to show that section 552.104 is applicable. You inform this office that the commission canceled the request for proposal. The commission has an existing contract with GTECH, the current lottery operator. Also, the commission has not explained how its own competitive, legitimate marketplace interests would be harmed by the release of proposals from private entities. The submitted information may not be withheld from disclosure under section 552.104.

The commission, BABN, Scientific Games, and AWI also argue that sections 552.101 and 552.110 of the Government Code protect the information at issue from disclosure. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.110 protects from disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Section 552.110 protects a specific subset of information that is also protected under disclosure under section 552.101. We will address the section 552.110 arguments submitted to this office, because if information is protected under section 552.110 it also is protected under section 552.101.

Section 552.110 protects the property interests of third 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. 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).¹ 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 trade secret claim 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 Records Decision No. 552 (1990) at 5-6.

Commercial or financial information is excepted from disclosure under the second prong of 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. In *National Parks & Conservation Ass'n 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,

¹The 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.

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.

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. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure 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. *Id.*

The commission offered no argument concerning the applicability of either prong of section 552.110 to the submitted records. BABN and Scientific Games provided only general and conclusory arguments concerning the applicability of section 552.110 to their proposals. Thus, this office has no basis on which to determine that section 552.110 is applicable to the BABN and Scientific Games proposals. *See* Open Records Decision No. 363 (1983) (third party has duty to establish how and why exception protects particular information). The proposals from BABN and Scientific Games must be released.

AWI argues that its marketing plan, found in AWI's proposal at sections 5.13.9, 5.13.11, 5.30, 5.31, 5.7.3, 6.18, 6.19, and Appendix D, is a protected trade secret. We have reviewed the portions of the proposal for which AWI asserts trade secret protection. AWI submitted an affidavit from Scott Milne, its Senior Vice President, explaining that portions of its marketing plan are known to certain individuals within AWI that were responsible for developing the plan, but that AWI required individuals working on the plan to enter non-disclosure agreements, and also that the only employees with knowledge of the entire marketing plan are certain key, highly-placed individuals within AWI. To further maintain the secrecy of the marketing plan, AWI asserts that the plan is maintained in a secured facility with no public access. AWI estimates that its direct expenses to develop the marketing plan were in excess of \$101,000, and that the marketing plan would be valuable to competitors in the industry who could use the plan for lottery product sales development and to estimate expected sales for bid purposes. AWI also asserts that the plan could not be readily duplicated by competitors because AWI developed the plan by use of its proprietary game performance models. We agree that AWI has demonstrated that its marketing plan is a trade secret. Thus, sections 5.13.9, 5.13.11, 5.30, 5.31, 5.7.3, 6.18, 6.19, and Appendix D of the AWI proposal must be withheld from disclosure.

You assert that Exhibit M, the report on the proposals that was prepared by the evaluation committee, is protected from disclosure under sections 552.101, 552.104, and 552.111 of the Government Code. Section 552.111 excepts from disclosure inter-agency or intra-agency communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. *See Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ); Open Records Decision No. 615 (1993) at 5. However, section 552.111 does not except from disclosure purely factual information.

We note initially that you marked only certain pages and a portion of one page in Exhibit M as being protected under section 552.111. We assume that the unmarked portions are not at issue. We agree that information marked under "Finding #9" on page 6, as projected calculations done by the committee itself, is protected from disclosure under section 552.111. This information constitutes the committee's opinion. However, you marked other information on page 6 that does not appear to be a committee calculation or projection, and is not protected under section 552.111. We agree that pages 9 and 10, which appear to be estimates prepared by the committee, may be withheld in their entirety. However, the pricing information you marked on 11 is not part of the committees' advice, opinion, or recommendation.

We have previously addressed your section 552.104 argument. No section 552.110 argument was made regarding Exhibit M. Thus, you may withhold the marked portions of Exhibit M that we concluded are protected under section 552.111. The remaining portions of Exhibit M must be disclosed.

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,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 115133

Enclosures: Submitted documents

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