



June 1, 1999

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

OR99-1493

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID# 124739 and ID# 124740.

The Texas Lottery Commission (the "commission") received two requests for information relating to the commission's Request for Proposal for instant tickets and services issued December 21, 1998. Scientific Games International ("SGI"), BABN Technologies, Inc. ("BABN"), and Pollard Banknote Limited ("Pollard") claim that their bid proposals contain proprietary information. You do not take a position on the release of this information, but you ask that we consider their claims. We assume that you have released all other information responsive to the requests.

Pursuant to section 552.305 of the Government Code, we notified SGI, BABN, and Pollard about the request for information and their opportunity to claim that the information at issue is excepted from disclosure. *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 Public Information Act in certain circumstances). SGI responded by claiming that the following sections of its proposal are excepted from disclosure pursuant to sections 552.101, 552.104, and 552.110 of the Government Code: sections 5.1.1, 7.1.1, and attachment H, section 19.V. BABN responded by claiming that the marketing strategy and financial information found on the pages of its proposal marked "confidential" are excepted from disclosure pursuant to section 552.110.<sup>1</sup> Pollard responded by claiming that its financial statements are excepted from disclosure pursuant to section 552.110.

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<sup>1</sup>We note that the submitted information includes pages from a document titled "BABN Technologies Corp. Economic Impact Study." BABN does not contend that this document is excepted from disclosure. Therefore, the commission must release this document to the requestors.

SGI argues that section 552.104 protects portions of its bid proposal from disclosure. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of this exception is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 does not, therefore, protect the interests of private parties such as SGI that submit information to a governmental body. *Id.* at 8-9. Because the commission does not raise section 552.104, it is not applicable to the information at issue. *Id.* (governmental body may waive protection of section 552.104).

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 at 2 (1990). 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).<sup>2</sup> This office has held that if a governmental

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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 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]

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

SGI contends that section 7.1.1 of its proposal is a trade secret. We find that SGI has established, by a *prima facie* case, that section 7.1.1 of its proposal should be withheld from disclosure under the trade secret prong of section 552.110.

BABN contends that its marketing strategy and financial information are trade secrets. The financial information does not fit within the Restatement definition of trade secret, and therefore is not excepted from disclosure under the trade secret prong of section 552.110. BABN has established, by a *prima facie* case, that its marketing strategy should be withheld from disclosure under the trade secret prong of section 552.110.

Finally, we address the arguments raised under the commercial or financial information prong of section 552.110. SGI contends that section 5.1.1 and attachment H, section 19.V of its proposal are protected under this prong. BABN and Pollard contend that their financial information are protected under this prong. 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. Thus, this office relied on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as a judicial decision and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110. However, the Third Court of Appeals recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 1999 WL 314976 (Tex. App.—Austin May 20, 1999, no pet. h.). The third parties have not cited to a statute or judicial decision that makes the commercial or financial information privileged or confidential. Therefore, the commission may not withhold any of the information at issue from disclosure pursuant to the commercial or financial information prong of section 552.110. With the exception of the information that the commission must withhold under the trade secret prong of section 552.110 (section 7.1.1 of SGI's proposal and BABN's marketing strategy), the commission must release the information at issue to the requestors.

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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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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.

Sincerely,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

KEH/ch

Ref: ID# 124739

Encl. Submitted documents

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