



June 26, 2001

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

OR2001-2732

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 # 148755.

The Texas Lottery Commission (the "commission") received a request for the bid specifications submitted to the commission by Sirchie Finger Print Laboratories, Inc. ("Sirchie"), in connection with "IFB #361-1-647, Bid Opening Date: 3-20-01." You have submitted the responsive information to this office. You have marked a portion of the information that the commission claims is confidential under section 552.101 of the Government Code. Under section 552.305 of the Government Code, the commission also notified Sirchie of the request for information and of its right to submit arguments as to why the information should not be released. *See* Gov't Code § 552.305(d); 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 to disclosure under Public Information Act in certain circumstances). You state that Sirchie notified the commission of its claim that all of the requested information is excepted from disclosure under sections 552.101 and 552.110. Sirchie also submitted arguments to this office. We have considered Sirchie's arguments and those of the commission and have reviewed the documents you submitted.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that is made confidential by another statute. Section 466.022 of the Government Code provides in relevant part that

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; [and]

(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[.]

Gov't Code § 466.022(b). You have marked the information that the commission claims is confidential under section 466.022. You inform this office that the marked information relates to a surveillance vehicle. You state that two officers of the commission's security division, including the commission's chief law enforcement officer, reviewed the marked information. You represent to this office that these two officers "agree that disclosure of [the marked information] would directly compromise the integrity and security of the lottery operations and lottery games as well as the security plans and procedures that are designed to ensure the integrity and security of the operation of the lottery and lottery games." Based on your representations and our review of the marked information, we conclude that the commission must withhold that information under section 552.101 of the Government Code in conjunction with section 466.022(b).

Sirchie asserts that the rest of the submitted information also is confidential under section 552.101. We first address Sirchie's statement that it considers its production methods, materials, and/or systems to be confidential and proprietary and that Sirchie so informed the commission in submitting its bid. Information that is subject to disclosure under chapter 552 of the Government Code is not confidential simply because the party submitting the information anticipates or requests confidentiality. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Sirchie has not directed our attention to any law, nor we are aware of any law, under which the rest of the information at issue is deemed to be confidential. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common law privacy). Therefore, the remaining information may not be withheld from disclosure under section 552.101.

Sirchie also contends that the requested information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See Gov't Code § 552.110(a), (b).*

The Texas Supreme Court has adopted the definition of "trade secret" from section 757 of the Restatement of Torts, 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) (emphasis added); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763; 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If, as is true here, a governmental body takes no position on the application of the “trade secrets” component of section 552.110 to requested information, this office will accept a private person’s claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>1</sup> *See* Open Records Decision No. 552 at 5 (1990).

Sirchie asserts that “[r]eleasing Sirchie’s detailed response to this IFB would infringe on property rights Sirchie identifies as Trade Secrets.” Sirchie fails to demonstrate, however, that any of the requested information qualifies as a trade secret under section 757 of the Restatement of Torts. Therefore, none of the remaining information may be withheld from disclosure under section 552.110.

In summary, the information that the commission marked for withholding is confidential under section 466.022 of the Government Code and thus must be withheld from the requestor under section 552.101 of the Government Code. The rest of the submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

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<sup>1</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

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

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

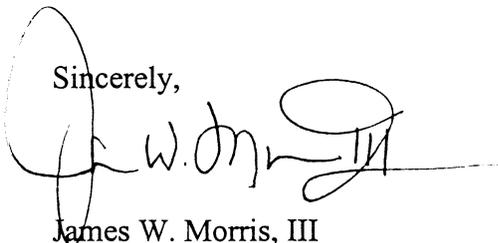
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a horizontal line extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 148755

Enc: Submitted documents

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