



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 15, 2003

Mr. Reagan Greer
Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR2003-1472A

Dear Mr. Greer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181074. This office issued Open Records Letter No. 2003-1472 on March 6, 2003. In that decision, we determined, in part, that although GTECH Corporation ("GTECH") and Ipsos Reid, third parties whose proprietary interests may be implicated by the request, notified the Texas Lottery Commission (the "commission") that they wished to assert sections 552.101 and 552.110 of the Government Code to protect their information from disclosure, neither GTECH nor Ipsos Reid submitted to our office their reasons explaining why their information should not be released. Accordingly, we concluded that GTECH and Ipsos Reid provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. Since that ruling was issued, we have received your letter of March 13, 2003, containing an affidavit signed by an Assistant General Counsel for the commission stating that, although the commission notified GTECH and Ipsos Reid of the records request, it did not send GTECH or Ipsos Reid the notice required by section 552.305 of the Government Code until March 13, 2003. Gov't Code § 552.305 (requiring a governmental body who requests a decision from this office to make a good faith effort to, within 10 business days of its receipt of the request, notify a third party that its proprietary information may be subject to exception under section 552.101, 552.110, 552.113, or 552.131). In light of this additional information, we will review the arguments which have since been submitted to our office by both GTECH and Ipsos Reid explaining their reasons why their information should not be released. We have re-examined our ruling in Open Records Letter No. 2003-1472. This decision supplements our previous decision issued on March 6, 2003, and substitutes for it to the extent it conflicts with our previous decision.

GTECH and Ipsos Reid claim that some of the submitted information is protected from disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. Gov't Code § 552.110. The Texas Supreme Court has adopted the definition of a "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 [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees.... A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;

(5) the amount of effort or money expended by [the company] in developing this information; and

(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 No. 232 (1979). This office must accept a claim that information is exempted as a trade secret if a prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, where no demonstration of the factors necessary to establish a trade secret claim is made, we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial 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[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

In support of its section 552.110 claim, Ipsos Reid states only that the submitted information should be protected from disclosure because public disclosure would likely compromise their competitive advantage. The company has not, however, provided us with any specific facts or arguments to support this allegation. *See* Gov’t Code § 552.110(b) (to prevent disclosure of commercial or financial information, party 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). Ipsos Reid did not claim exception for its information under section 552.110(a) and did not demonstrate any of the factors necessary to establish a trade secret claim. *See* Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Thus, we conclude that Ipsos Reid has not established that any of its submitted information is protected by section 552.110. Since Ipsos Reid has failed to demonstrate that its claimed exception to disclosure applies, we conclude that Exhibit E must be released. However, upon review of the submitted information and GTECH’s arguments, we find that GTECH has established the applicability of section 552.110(a) to most of its submitted information. Further, no arguments have been submitted that rebut GTECH’s claims as a matter of law. Accordingly, with the exception of the information that we have marked for release, the commission must withhold Exhibit D under section 552.110(a).

In summary, the commission must withhold Exhibit D from disclosure, with the exception of the information that we have marked for release, under section 552.110. The commission must release Exhibit E.

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 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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. 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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 181074

Enc: Submitted documents

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