



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 28, 2003

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

OR2003-3617

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# 181758.

The Texas Lottery Commission (the "commission") received several written requests for numerous categories of commission records that encompass a wide variety of commission functions. You indicate that some of the responsive information will be released to the requestors. You contend, however, that the remaining information coming within the scope of the requests, a representative sample of which you submitted to this office, is excepted from required disclosure pursuant to sections 552.101, 552.102, 552.103, 552.104, 552.106, 552.107(1), 552.108, 552.111, 552.117, 552.136, and 552.137 of the Government Code.¹

Additionally, you do not contend that certain other requested information is excepted from public disclosure, but rather you have requested a decision from this office pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information should be withheld from the public. In accordance with

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

section 552.305(d), the commission notified representatives of GTECH Corporation² ("GTECH") of the records request and of their right to submit arguments to this office as to why portions of the materials GTECH submitted to the commission should not be released to the public. *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). An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B).

GTECH responded to your section 552.305 notice and contends that its "Functional Specification for Texas Two Step" (the "Specification") constitutes both "trade secret" information under section 552.110(a) and "commercial or financial" information under section 552.110(b) of the Government Code. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See 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). 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.³ *See id.* This office has held that we must accept a 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. *See* Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); Open Records Decision No. 639 at 4 (1996) (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).

²Although you also state that you notified "Ipsos Reid" of the records request, this office did not receive any briefing from that entity.

³The 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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

After considering GTECH's arguments, we conclude that GTECH has established that the release of portions of the Specification would result in substantial competitive injury to GTECH. Accordingly, we have marked the information in the Specification that the commission must withhold pursuant to section 552.110(b) of the Government Code. The remaining portions of the Specification must be released.

We will now address in turn each of the exceptions to disclosure that you raised for the remaining submitted information. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses statutory confidentiality provisions such as section 466.022 of the Government Code, which provides in 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)(1)-(2). You inform us that Commander Mike Pitcock of the commission's Security Division is of the opinion that release of the information that you have marked under this provision "would directly compromise the integrity and security of the lottery operations and the integrity and security of the selection of winning tickets or numbers in the lottery." Based on your representations, and after reviewing the information at issue, we conclude that much of the information you have marked is confidential under section 466.022 of the Government Code. We have marked the information that the commission must withhold pursuant to section 552.101 of the Government Code as information made confidential under section 466.022 of the Government Code.

You also contend that portions of the submitted information implicate commission employees' privacy interests and thus must be withheld pursuant to section 552.102 of the Government Code, which is specifically designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982) (names of employees taking sick leave and dates thereof not protected by privacy); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* is of no legitimate concern to the public).

However, a public employee's privacy under section 552.102(a) is less broad than common-law privacy under section 552.101 because of the greater public interest in disclosure of information regarding public employees. Open Records Decision Nos. 269 (1981), 169 (1977).

In *Industrial Foundation*, the Texas Supreme Court considered intimate and embarrassing information that relates to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has also determined that common-law privacy protects the following information: the kinds of prescription drugs a person is taking, Open Records Decision No. 455 (1987); the results of mandatory urine testing, *id.*; illnesses, operations, and physical handicaps of applicants, *id.*; the fact that a person attempted suicide, Open Records Decision No. 422 (1984); the names of parents of victims of sudden infant death syndrome, Attorney General Opinion JM-81; and information regarding drug overdoses, acute alcohol intoxication, obstetrical/gynecological illnesses, convulsions/seizures, or emotional/mental distress. Open Records Decision No. 343 (1982). Upon review, we conclude that only a very small portion of the submitted information is protected by section 552.102. We have marked this information accordingly.

You next contend that portions of the submitted documents are excepted from required public disclosure pursuant to section 552.103 of the Government Code. Section 552.103 is often referred to as the "litigation" exception. To show that section 552.103(a) is applicable, the commission must demonstrate that (1) litigation was pending or reasonably anticipated on the date the commission received the records request and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

In this instance, you have established that some of the submitted information relates to litigation to which the commission is a party and that the litigation was pending on the date the commission received the records requests. The commission therefore may withhold the information that we have marked as being excepted from required public disclosure pursuant to section 552.103 of the Government Code. In reaching this conclusion, we assume that the opposing parties to the litigation have not previously had access to the records at issue; once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Consequently, if the opposing parties in the litigation have seen or had access to these records, there would be no justification for now withholding those records from the requestor pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address your arguments under section 552.104 of the Government Code, which protects from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” The primary purpose of section 552.104 is to protect the government's interests in competitive bidding situations. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government’s interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. *See* Open Records Decision No. 306 (1982). Section 552.104 does not, however, except bids or proposals from disclosure once the bidding is over and the contract is in effect, Open Records Decision Nos. 306 (1982); 184 (1978), or where no contract is awarded. Open Records Decision No. 201 (1978).

You seek to withhold pursuant to section 552.104 certain “cost benefit analysis” information. You explain that the commission

has a practice of developing a ‘cost benefit analysis’ for certain purchases or contracts. Information contained in the cost benefit analysis involves the interests of the Commission in situations that involve decisions whether to begin a competitive bidding process, including issuing requests for proposals or invitations for bids.

You have not explained or otherwise demonstrated that the information you seek to withhold pertains to a current competitive bidding situation. We therefore conclude that you have not met your burden of establishing the applicability of section 552.104 to the information. Accordingly, we conclude that the commission may not withhold any of the submitted information pursuant to section 552.104 of the Government Code.

Section 552.106 of the Government Code protects drafts and working papers involved in the preparation of proposed legislation. The purpose of the exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body; it protects the internal “deliberative” or policy-making processes of a governmental body. Open Records Decision No. 460 (1987). Section 552.106 does not except purely factual material; rather, it excepts only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation. *Id.* After reviewing the information you seek to withhold under section 552.106, we agree that much of the information you have marked comes under the protection of this exception, and we have marked the documents accordingly.

You also contend that certain communications are excepted from required public disclosure pursuant to section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the

elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). After reviewing the submitted information, we conclude that the commission may withhold most of the information you seek to withhold pursuant to section 552.107(1) of the Government Code. We have marked the documents accordingly.

You next contend that certain information coming within the scope of the request is excepted from required disclosure pursuant to section 552.108(a)(1) of the Government Code, which excepts from required public disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime.” Section 552.108(a)(1) protects information pertaining to a pending criminal investigation or prosecution because it is presumed that the release of such information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). You indicate that the submitted records relate to a pending criminal investigation being conducted by the commission. We therefore conclude that the commission may withhold the information we have marked pursuant to section 552.108(a)(1) of the Government Code.

Section 552.111 of the Government Code excepts from required public disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas*

Department of Public Safety v. Gilbreath, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Additionally, although section 552.111 applies to advice, opinion, or recommendation prepared by outside consultants, it does not apply to materials prepared by an individual outside the commission who has no official responsibility to do so, but acts only as an interested party. Open Records Decision Nos. 563 (1990), 470 (1987), 466 (1987), 462 (1987).

The draft of a document that has been released or is intended for release in final form necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document, and may therefore be withheld under section 552.111 of the Government Code. *See* Open Records Decision No. 559 (1990). Generally, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. Open Records Decision No. 615 at 5 (1993). However, where a document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.*

After reviewing the submitted information, we generally agree that most of the information you seek to withhold pursuant to section 552.111 may be withheld from the public. Consequently, we have made markings only to indicate where we disagreed with your section 552.111 markings. However, in concluding that all of the draft documents you submitted to this office are excepted from public disclosure under section 552.111, we assume that the final form of each of those documents either has been or will be released to the public. *See* Open Records Decision No. 559 (1990).

Section 552.117(1) of the Government Code requires that the commission withhold an employee's home address, home telephone number, social security number, and information that reveals whether the employee has family members, but only if the employee elected to keep this information confidential in accordance with section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, in order to withhold section 552.117(1) information from the public, a proper election must be made prior to the receipt of the request for information. We have marked information the commission must withhold pursuant to section 552.117(1) regarding commission employees who have made timely section 552.024 elections.

You next contend that certain information pertaining to the commissions's computer network is excepted from required public disclosure pursuant to section 552.136 of the Government Code, which provides as follows:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.136. You describe the information you seek to withhold under section 552.136 as relating to "the Commission's computer network systems, including its associated application programs." Based on our review of your representations and the information at issue, we agree that much of the information you seek to withhold is encompassed by section 552.136(a). We have marked the information accordingly.

Finally, you contend that the commission must withhold certain e-mail addresses pursuant to section 552.137 of the Government Code, which provides as follows:

(a) An e-mail address *of a member of the public* that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release. [Emphasis added.]

After reviewing the e-mail addresses you seek to withhold, we agree that those e-mail addresses consist of private e-mail addresses that must be withheld pursuant to section 552.137 unless the board receives an affirmative consent to release from the person to whom an e-mail address belongs. We note that section 552.137 does not apply to a public employee's governmental e-mail address or a business' general e-mail or web page address.

In summary, the commission must withhold the information we have marked as coming within the protection of sections 552.102, 552.110, 552.117, and 552.137. The commission may also withhold the information we have marked as coming within the protection of sections 552.103, 552.106, 552.107(1), and 552.136. Additionally, the commission may

withhold the information you have marked as being excepted from public disclosure pursuant to section 552.111, except as otherwise marked. The remaining 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 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,



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Assistant Attorney General
Open Records Division

DRS/RWP/seg

Ref: ID# 181758

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