



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 28, 2005

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

OR2005-05732

Dear Mr. Greer:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 227134.

The Texas Lottery Commission (the "commission") received a request for "the license application, renewal applications, any license amendments or modifications, and any related correspondence or other documents" for three named companies. You state that the requestor narrowed her request to exclude personal information such as social security and driver's license numbers.¹ You claim that some of the requested information is excepted from disclosure pursuant to section 552.107 of the Government Code. You also claim that some of the requested information may contain proprietary information subject to exception under the Act. Therefore, pursuant to section 552.305(d) of the Government Code, you have notified the interested third parties, Austin Capital Group LLC ("Austin Capital"), Trend Gaming Systems, LLC ("Trend Gaming"), and Planet Bingo, LLC ("Planet Bingo") of the request and of their opportunity to submit comments to this office. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain

¹We note that you have redacted all social security and driver's license numbers from the submitted information. This decision does not address the public availability of that information.

circumstances). We have received correspondence from Austin Capital and Planet Bingo. We have considered the submitted arguments and reviewed the submitted information.²

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Trend Gaming has not submitted comments to this office explaining why any portion of the submitted information relating to it should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information relating to Trend Gaming would implicate its proprietary interests. *See, e.g.*, Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the commission may not withhold any portion of the submitted information based on the proprietary interests of Trend Gaming.

We now address your claim that a portion of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) 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). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the

²We also note that you have redacted a loan number and an account number from the submitted information. A governmental body that submits information to this office for the purpose of requesting an open records ruling must do so in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. As we are able in this instance to ascertain the nature of the information that you have redacted, we will determine whether it is excepted from public disclosure. In the future, however, the commission should refrain from redacting any information that it submits to this office in seeking an open records ruling. *See* Gov't Code §§ 552.301(e)(1)(D), .302.

government does not demonstrate this element. 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). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Finally, 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 the definition of a confidential communication 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). Having considered your representations and reviewed the information at issue, we agree that the information you have marked in Exhibit E constitutes privileged attorney-client communications. Therefore, the information you have marked may be withheld pursuant to section 552.107(1) of the Government Code.

Next, we address Austin Capital’s and Planet Bingo’s arguments for withholding the submitted information. Austin Capital claims that some of the submitted information, including personal home phone numbers, addresses, and corporate tax identification numbers, is protected under common law privacy. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses the common law right to privacy, which protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* include information relating 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. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual’s criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision

Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical disabilities). Upon review of the submitted information relating to Austin Capital, we conclude that it does not contain information that is highly intimate or embarrassing for purposes of common law privacy and may not be withheld on this basis. See Open Records Decision Nos. 659 at 5 (1999) (listing types of information that attorney general has held to be protected by right to privacy), 554 (1990) (concluding that disclosure of a person's home address and phone number is not an invasion of privacy). Furthermore, the doctrine of common law privacy protects the privacy interests of individuals, not of corporations or other types of business organizations. See Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); see also *U. S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy). Accordingly, Austin Capital has no privacy interest in any of the submitted information. We note, however, that a portion of the information relating to Trend Gaming is protected from disclosure under common law privacy. We have marked the information that the commission must withhold under section 552.101 in conjunction with common law privacy.

Planet Bingo claims that some of the submitted information is subject to section 552.110 of the Government Code. We understand Austin Capital to raise this section as well. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov't Code § 552.110(a), (b).

Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. See Gov't Code § 552.110(a). 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 a single or ephemeral event 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 [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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). 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 RESTATEMENT OF TORTS § 757 cmt. b (1939). 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 will accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for the 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)*. However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret, and the necessary factors have been demonstrated to establish a trade secret claim. *See Open Records Decision No. 402 (1983)*.

Section 552.110(b) of the Government Code excepts from disclosure "[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. *Id.*; *see also Open Records Decision No. 661 at 5-6 (1999)*.

Upon review of the submitted information and arguments, we find that Planet Bingo has made a specific factual or evidentiary showing that the release of some of the information it seeks to withhold would cause the company substantial competitive harm. This information, which we have marked, must be withheld pursuant to section 552.110(b). However, we find that Planet Bingo and Austin Capital have not shown that any of the

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)*.

remaining information each seeks to withhold meets the definition of a trade secret or that its release would cause that company substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Therefore, the remaining submitted information may not be withheld pursuant to section 552.110.

However, we note that a portion of the remaining submitted information is subject to section 552.136 of the Government Code, which states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Accordingly, the commission must withhold the account number that we have marked under section 552.136.

In summary, the information you have marked may be withheld pursuant to section 552.107 of the Government Code. The commission must withhold the marked information under sections 552.101 in conjunction with common law privacy, 552.110(b), and 552.136 of the Government Code. The remaining information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 227134

Enc. Submitted documents

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