



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 4, 2006

Mr. Gary Grief
Acting Executive Director
Texas Lottery Commission
P.O. Box 16630
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OR2005-11402A

Dear Mr. Grief:

This office issued Open Records Letter No. 2005-11402A (2005) on February 24, 2006. We have examined this ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on February 24, 2006. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 238537.

The Texas Lottery Commission (the "commission") received a request for "documentation showing the total sales for all licensed electronic bingo manufacture[r]s . . . from January 1, 2005, to the present date [referencing] the manufacture[r]s by name." You inform this office that "the total sales figure has been provided," but "referencing the manufacturer by name involves releasing information submitted to the commission from each manufacturer in their quarterly reports." You raise no exceptions to disclosure on behalf of the commission, but state that the request may implicate third party proprietary interests. Accordingly, you indicate and provide documentation showing that, pursuant to section 552.305 of the Government Code, you notified the interested third parties of the request for information and of each company's right to submit arguments explaining why the information concerning it should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 in certain circumstances). We have received correspondence from five third parties: FortuNet, Inc. ("FortuNet"); GameTech International, Inc. ("GameTech"); International Gamco, Inc. ("Gamco"); Pollard Games, Inc., d/b/a American Games ("Pollard"); and Thompson Allstate Bingo Supply, Inc. ("Thompson Allstate"). FortuNet claims that portions of the requested information are excepted from disclosure under sections 552.101, 552.110, and 552.131 of the Government Code. Gamco seeks to withhold from public disclosure its "quarterly reports, supplement and internal backup documentation" under section 552.110 of the Government Code. Pollard objects to the release of portions of the requested information, and raises sections 552.101, 552.104, and 552.110 of the Government Code as exceptions to disclosure.¹ GameTech and Thompson Allstate have no objection to the release of their quarterly reports, but assert that some of the requested information is confidential by law pursuant to section 2001.216(b) of the Occupations Code. Because of the assertions of GameTech, Pollard, and Thompson Allstate, you raise the applicability of section 2001.216(b) to the information at issue.² We have considered the claimed exceptions and reviewed the submitted information.

We note that 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 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, only FortuNet, Gamco, GameTech, Pollard, and Thompson Allstate have submitted comments to this office explaining how release of the requested information would affect each company's proprietary interests. The remaining third parties failed to submit comments to this office explaining how release of the requested information would affect each company's proprietary interests. Therefore, with the exception of FortuNet, Gamco, GameTech, Pollard, and Thompson Allstate, the remaining companies have failed to provide us with any basis to conclude that any such company has a protected proprietary interest in any of the submitted information, and none of the information pertaining to the remaining third parties may be withheld on that basis. See, e.g., *id.* § 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); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

¹Specifically, Pollard objects to the release of (1) the information in paragraphs 1-6 of the Quarterly Report; (2) the information in columns labeled "Licensee;" and (3) the information in columns 1-5 of the Quarterly Report Supplement. We note that the information submitted by the commission does not include any document containing columns labeled "Licensee." This ruling does not address information not submitted to this office by the commission.

²We note that you have, pursuant to section 402.042 of the Government Code, a currently pending request for a formal Attorney General Opinion, RQ-0399-GA, regarding the applicability of section 2001.216(b) of the Occupations Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 2001.216 of the Occupations Code provides as follows:

- (a) The commission may examine the books and records of the holder of or an applicant for a manufacturer's or distributor's license.
- (b) The commission may not disclose information obtained during the examination except as necessary to carry out this chapter.

Occ. Code §2001.216. You assert that it is the commission's interpretation of section 2001.216(b) "that 'information obtained during [an] examination' does not include information submitted in a required quarterly report." You state that it is the commission's "longstanding interpretation" that the confidentiality provision in section 2001.216(b) is applicable "only to the examination of books and records of the license applicant (or renewal applicant) during the performance of an application investigation as required by" particular licensing provisions contained in the Occupations Code. You inform us that the requested information relates to quarterly reports. Further, you state that the commission has statutory authority other than section 2001.216 to require quarterly reports, and that none of the information at issue was obtained pursuant to section 2001.216. Thus, we understand you to indicate that section 2001.216 is inapplicable to the requested information. Therefore, no portion of the information at issue may be withheld under section 552.101 of the Government Code on that basis.

FortuNet argues that portions of the submitted information are confidential under section 382.041 of the Health and Safety Code. Section 382.041 protects certain information that is submitted to the Texas Commission on Environmental Quality. *See* Health & Safety Code §§ 382.003 (defining "Commission" as predecessor agency), 382.041. The information at issue was submitted to the Lottery Commission. Thus, section 382.041 is inapplicable in this instance.

Pollard asserts that information contained in the Quarterly Reports and Report Supplements is protected under constitutional privacy, which is also encompassed by section 552.101. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently; and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected under constitutional privacy is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th

Cir. 1985)). We have considered Pollard's arguments and reviewed the information at issue. We find, however, that Pollard has not shown that any of the information comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. See Open Records Decision Nos. 470, 455, 444, 423 at 2. Furthermore, we note that only individuals, and not corporations, have a right to privacy. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); see Open Records Decision No. 192 (1978) (stating that right of privacy protects feelings and sensibilities of human beings). We therefore conclude that none of the information pertaining to Pollard may be withheld under section 552.101 of the Government Code on the basis of constitutional privacy.

Pollard also claims that information contained in the Quarterly Reports and Report Supplements should be withheld from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body as distinguished from exceptions which are intended to protect the interests of third parties. See Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the commission does not seek to withhold any information pursuant to section 552.104, Pollard's information may not be withheld pursuant to section 552.104 of the Government Code. See Open Records Decision No. 592 (1991) (governmental body may waive section 552.104).

FortuNet, Gamco, and Pollard also claim that their information is excepted from disclosure pursuant to section 552.110 of the Government Code. 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). A "trade secret"

may consist of 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.); Open Records Decision Nos. 552 at 2 (1990), 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 Nos. 319 (1982), 306 (1982), 255 (1980), 232 (1979). This office must accept a claim that information subject to the Act 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, we cannot conclude that section 552.110(a) is applicable 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. 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).

After reviewing the submitted information and the arguments of FortuNet, Gamco, and Pollard, we find that each company has made a *prima facie* case that some of the information at issue is protected as trade secret information. We have marked the customer list information in the submitted documents that the commission must withhold pursuant to section 552.110(a) of the Government Code. However, we determine that FortuNet, Gamco, and Pollard have failed to demonstrate that any portion of the remaining submitted information meets the definition of a trade secret, nor has any of these companies demonstrated the necessary factors to establish a trade secret claim for this information. We therefore determine that no portion of the remaining information is excepted from disclosure under section 552.110(a).

We further find that FortuNet and Gamco have failed to provide specific factual evidence demonstrating that release of the remaining information would result in substantial competitive harm to either company. Accordingly, we determine that none of this information is excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue).

FortuNet also raises section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" and "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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b). Because FortuNet has neither demonstrated that the remaining information qualifies as a trade secret for purposes of section 552.110(a) of the Government Code, nor made the specific factual or evidentiary showing required under section 552.110(b) that the release of the information would result in substantial competitive harm, we also conclude that the commission may not withhold any of the remaining information pursuant to section 552.131(a). Furthermore, we note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. Accordingly, none of the remaining information of FortuNet is excepted under section 552.131(b) of the Government Code.

In summary, we have marked the customer list information that the commission must withhold pursuant to section 552.110(a). The remaining submitted 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); *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 Office of the Attorney General 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/er

Ref: ID# 238537

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