



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 15, 2010

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

OR2010-05388

Dear Mr. Grief:

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# 376064 (TLC # B-12469; 2010-572).

The Texas Lottery Commission (the "commission") received a request for the most recent license renewal application and update filings of K&B Sales, Inc. ("K&B"). You state the commission has released some responsive information to the requestor. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code.¹ You also state release of the submitted information may implicate the proprietary interests of K&B. Accordingly, you notified K&B of the request and of its right to submit arguments to this office as to why its information should not be released. See Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received arguments from K&B. We have considered the submitted arguments and reviewed the submitted information.

¹We note in your brief dated February 17, 2010, you have withdrawn your remaining assertions under the Act.

Initially, we address K&B's argument that, except for two documents, the submitted information is not responsive to the instant request because the information at issue does not constitute update filings. Additionally, Aces Wired, Inc.; Goodtime Action Amusement Partners, L.P.; Aces Wired Amusement Center #5, L.P.; Aces Wired Amusement Center #9, L.P.; Aces Wired Amusement Center #10; and Aces Wired L.L.C. (collectively, "Aces Wired") argue the submitted information which K&B supplied to the commission relating to Aces Wired does not constitute update filings. Chapter 2001 of the Occupations Code governs distributors of bingo equipment and supplies, such as K&B, and requires a distributor of bingo equipment and supplies to hold a distributor's license. *See* Occ. Code § 2001.206 ("distributor may not sell, distribute, or supply bingo equipment or supplies for use in bingo . . . unless the distributor holds a distributor's license"). In response to the commission's investigation of K&B's license renewal application, the commission requested additional information from K&B, as authorized by section 2001.302 of the Occupations Code. *See id.* § 2001.302 (license applicant shall submit any supplemental information requested by commission). We note chapter 2001 does not define the term "update filings" and neither K&B nor Aces Wired states why the information at issue does not constitute an "update filing." A governmental body must make a good-faith effort to relate a request for information to responsive records that are within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). The commission has submitted the information K&B supplied to the commission during its license investigation as responsive to the present request. Accordingly, we find the information at issue is responsive to the request.

Next, Aces Wired seeks to withhold certain information submitted by K&B to the commission during the commission's investigation of K&B's license renewal pertaining to Aces Wired. We note, however, the commission has not submitted this information for our review. Because the commission did not submit such information, this ruling does not address that information and is limited to the information the commission submitted as responsive. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 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. The commission, in response to this office's inquiry pursuant to section 552.303 of the Government Code, and K&B assert section 2001.216 is applicable to portions of the submitted information. We understand it is the commission's "longstanding interpretation" that the confidentiality provision in section 2001.216(b) applies to the information obtained from the books and records of the license applicant (or renewal applicant) during a commission examination pursuant to section 2001.302 of the Occupations Code. The commission states it obtained some of the information at issue pursuant to section 2001.302 for the purposes of investigating K&B's license renewal application. Accordingly, we conclude section 2001.216(b) is applicable to the information we have marked.² Although K&B contends portions of the remaining information are subject to the confidentiality provision of section 2001.216(b), we note section 2001.216(b) only provides for the confidentiality of information from the books and records of a license applicant examined by the commission. We find K&B has failed to demonstrate the remaining information at issue constitutes information from its books and records. Consequently, no portion of the remaining information is subject to section 2001.216 and the commission may not withhold any of the remaining information at issue under section 552.101 on such basis.

Next, we note the remaining information contains fingerprints. Section 552.101 of the Government Code also encompasses chapter 560 of the Government Code which provides a governmental body may not release fingerprints except in certain limited circumstances. See Gov't Code §§ 560.001 (defining "biometric identifier" to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). We have no indication section 560.002 permits the disclosure of the submitted fingerprints. Therefore, the commission must withhold the information we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.³

Aces Wired raises section 552.110 of the Government Code for portions of the remaining information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets; and (b) commercial or financial information, the release of which would cause substantial competitive harm to the person from whom the information was obtained. *Id.* § 552.110(a), (b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has

²As our ruling for this information is dispositive, we do not address K&B's remaining arguments and Aces Wired's arguments against disclosure of some of this information.

³As our ruling for this information is dispositive, we do not address K&B's remaining argument against its disclosure.

adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552 at 2. Section 757 provides that a trade secret is:

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 single or ephemeral events 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); *see also Huffines*, 314 S.W.2d at 776. 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.⁴ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude 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. *Id.*; *see also* ORD 661 at 5.

⁴The following are the six factors that the Restatement gives 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 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 reviewing the information at issue and the submitted arguments, we find Aces Wired has failed to demonstrate its remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Therefore, the remaining information may not be withheld under section 552.110(a). However, we determine Aces Wired has demonstrated release of some of the remaining information would result in substantial damage to its competitive position. Accordingly, the commission must withhold the information we have indicated under section 552.110(b). With respect to the remaining information, we determine Aces Wired has made only conclusory allegations that release of the remaining information would result in substantial damage to its competitive position. Thus, Aces Wired has not demonstrated that substantial competitive injury would result from the release of any of its remaining information. *See* ORD 661 (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). Accordingly, the commission may not withhold the remaining information under section 552.110(b).

Next, we note portions of remaining information are excepted under section 552.136 of the Government Code.⁵ Section 552.136 provides “[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(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *See id.* § 552.136(a) (defining “access device”). Accordingly, the commission must withhold the bank account numbers, bank routing numbers, and charge card numbers we have indicated under section 552.136.

Finally, we note the remaining information contains personal e-mail addresses. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The e-mail addresses we have indicated are not of types specifically excluded by section 552.137(c). Therefore, the commission must withhold the e-mail addresses we have indicated pursuant to section 552.137, unless it receives affirmative consent to their release.

In summary, the commission must withhold (1) the information we have marked in the submitted documents under section 552.101 of the Government Code in conjunction with

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 2001.216(b) of the Occupations Code, (2) the fingerprints we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, (3) the information we have indicated under section 552.110(b) of the Government Code, (4) the bank account, bank routing, and charge card numbers we have indicated under section 552.136 of the Government Code, and (5) the personal e-mail addresses we have indicated under section 552.137 of the Government Code, unless the commission receives consent for their release.⁶ The remaining information must be released.⁷

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

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⁶We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: bank account numbers, bank routing numbers, and charge card numbers under section 552.136 of the Government Code; and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

⁷We note the information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

Ref: ID# 376064

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Stephen Fenoglio
Attorney at Law
508 West 12th Street
Austin, Texas 78701
(w/o enclosures)