

Commissioners:
J. Winston Krause,
Chairman
Cindy Fields
Mark A. Franz
Robert Rivera
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TEXAS LOTTERY COMMISSION

Gary Grief, *Executive Director*

Tom Hanson, *Charitable Bingo Operations Director*

July 9, 2020

Dawn Nettles
P.O. Box 495033
Garland, TX 75049-5033

Ms. Nettles:

The Texas Lottery Commission (TLC) received your June 15, 2020 request to waive any costs the TLC incurs to produce public information you request. In support, you cite the following provisions from the Texas Public Information Act (PIA):¹

- Sections 552.267 and 552.275(i), which provide a governmental body discretion to determine if a waiver or reduction of charges is in the “public interest”; and
- Section 552.275(j), which is not a waiver provision but an exemption from the limits on the amount of time state agency personnel are required to spend producing public information for inspection or duplication by a requestor, or providing copies of public information to a requestor, without recovering its costs attributable to that time. This exemption applies to an individual who, “for a substantial portion of the individual’s livelihood or for substantial financial gain, gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information for and is seeking the information for: ... dissemination by a news medium or communication service provider....”

As discussed below, the TLC declines to approve your request.

Request for discretionary “public interest” waiver of charges under PIA sections 552.267 and 552.275(i). You state that you “disseminate – on a daily basis – information that is of ‘public interest’,” and thus request a waiver of charges under PIA section 552.267, which reads as follows:

Sec. 552.267. WAIVER OR REDUCTION OF CHARGE FOR PROVIDING COPY OF PUBLIC INFORMATION. (a) A governmental body shall provide a copy of public information without charge or at a reduced charge if the governmental body determines that waiver or reduction of the charge is in the public interest because providing the copy of the information primarily benefits the general public.²

¹ Tex. Gov’t Code ch. 552.

² You also cite PIA section 552.275(i), which states that a governmental body that imposes limits on personnel time spent producing public information is not prohibited “from providing a copy of public information without charge or

This statute is permissive, not mandatory. It grants governmental bodies discretion but does not compel a state agency to waive charges. While the statute provides no further guidance, the Texas Attorney General's 2020 *Public Information Handbook* comments on this section, stating at page 52, "The determination of whether providing information is in the 'public interest' rests solely with the governmental body whose records are requested."

The TLC receives a large volume of public information requests (PIRs). For example, in fiscal year 2019 the TLC received a total of 1,472 PIRs. Of that amount, you filed 564, an average of 11 PIRs every week of the year, or 38% of all PIRs. In current fiscal year 2020, from September 1, 2019, through April 27, 2020 (the day you reached the 36-hour limit on agency personnel time set forth in the TLC's rules), the TLC received 644 PIRs. Of that amount, you filed 257, or 39.9% of all PIRs.

In the interest of fairness and providing non-discriminatory service to all requestors, and to avoid the appearance of favoring any particular requestors over others, the TLC's consistent practice has been to not waive charges under section 552.267 for any requestor, regardless of their status.

Accordingly, the TLC declines your request to waive charges under PIA sections 552.267 and 552.275(i).

Request for exemption from the limit on personnel time spent producing public information under PIA section 552.275(j). You further assert that you are exempt from the limits on personnel time the TLC imposes pursuant to PIA section 552.275, stating you are "a qualified member of the 'press'," that you "disseminate ... information that is of 'public interest,'" and that "it is my 'sole livelihood.'"

In October 2019, the TLC implemented section 552.275 by amending rule 403.101.³ This rule establishes a time limit, applicable to all requestors, of 36 hours of TLC personnel time each fiscal year before the TLC will charge the requestor for time spent locating and compiling requested information.⁴ The exemption in Section 552.275(j) states:

This section does not apply if the requestor is an individual who, *for a substantial portion of the individual's livelihood or for substantial financial gain*, gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information for and is seeking the information for:

(1) dissemination by a news medium or communications service provider, including:

(A) an individual who supervises or assists in gathering, preparing, and disseminating the news or information; or

at a reduced rate under Section 552.267 or from waiving a charge for providing a copy of public information under that section."

³ 16 Tex. Admin. Code section 403.101.

⁴ The 36-hour limit resets to zero for each requestor each fiscal year on September 1 and does not include the time of the TLC's Public Information Coordinator.

(B) an individual who is or was a journalist, scholar, or researcher employed by an institution of higher education at the time the person made the request for information....

(Emphasis added.) The factor that triggers this exemption is not whether the requestor is a member of the press, or whether they disseminate information that is of public interest, but whether the requestor engages in any of the listed activities “for a substantial portion of the individual’s livelihood or for substantial financial gain.”

The statute does not define the term “livelihood.” Under Texas law, “Undefined terms in a statute are typically given their ordinary meaning,” unless “a different or more precise definition is apparent from the term’s use in the context of the statute.”⁵ Black’s Law Dictionary defines “livelihood” as “A means of supporting one’s existence, esp. financially.” The Cambridge Dictionary defines “livelihood” as: “(the way someone earns) the money people need to pay for food, a place to live, clothing, *etc.*” Merriam-Webster defines “livelihood” as “means of support or subsistence.”

We also note that the operative language of this exemption is substantially the same as the definition of “journalist” in chapter 22 of the Texas Civil Practice and Remedies Code (known as the “shield law,” which provides journalists a qualified privilege to refuse to disclose sources of information).⁶ Both provisions were enacted by the Texas Legislature in 2009. The enacted PIA exemption language was added to Senate Bill 1629 by a House amendment dated May 27, two weeks after the shield law bill was signed into law by the Governor. Because almost identical language is used in both provisions, and both provisions were enacted in the same legislative session, it is instructive to consider the September 2009 commentary on the shield law definition and “livelihood” requirement from the Texas Bar Journal:

A threshold issue is who qualifies as a “journalist”.... Many members of the news media thought it ill-advised for the legislature to supply a definition. After all, journalism as a profession escapes the licensing or regulatory arm of the government due to the First Amendment. *Another dynamic in defining a journalist is the growing ranks of bloggers and citizen journalists who might seek shield law protection.* The Legislature resolved these tensions with a definition that turns on the traditional function of media organizations as self-supporting disseminators of the news. Under the Texas shield law, a journalist is a person “who for a substantial portion of the person’s livelihood or for substantial financial gain” gathers or publishes news or information that is disseminated by a “news medium.”⁷

⁵ *TGS-NOPEC Geophysical Co. v. Combs*, 340 S. W.3d 432, 439 (Tex. 2011).

⁶ Tex. Civ. Prac. & Rem. Code sections 22.021-22.027 are titled “Journalist’s Qualified Testimonial Privilege in Civil Proceedings.” The definition of “journalist” is set forth in section 22.021(2):

“‘Journalist’ means a person, including a parent, subsidiary, division, or affiliate of a person, who for a substantial portion of the person’s livelihood or for substantial financial gain, gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information that is disseminated by a news medium or communication service provider....”

⁷ Paul C. Watler, *The Texas Journalist Shield Law*, 72 Tex. B.J. 686, 687 (2009).

(Emphasis added.)

We are aware that you have provided sworn deposition testimony,⁸ excerpts of which are attached hereto, stating that you do not charge money or receive other compensation for “The Lotto Report” blog/website. Accordingly, you do not qualify for the exemption under PIA section 552.275(j).

Sincerely,



Deanne Rienstra
Special Counsel

cc: Senator Jane Nelson
Chairman J. Winston Krause
Commissioner Cindy Fields
Commissioner Mark A. Franz
Commissioner Robert Rivera
Commissioner Erik C. Saenz

Attachment

⁸ Oral and Videotaped Deposition of Dawn Nettles in the matter of *Dawn Nettles v. GTECH Corporation and the Texas Lottery Commission.*, Cause No. DC-14-14838 in the 160th Judicial Court of Dallas County (October 19, 2015).

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NO. DC-14-14838

DAWN NETTLES,) IN THE DISTRICT COURT

)

Plaintiff,)

)

VS.) DALLAS COUNTY, TEXAS

)

GTECH CORPORATION and THE)

TEXAS LOTTERY COMMISSION,)

)

Defendants.) 160th JUDICIAL DISTRICT

ORAL AND VIDEOTAPED DEPOSITION OF

DAWN NETTLES

OCTOBER 19, 2015

ORAL AND VIDEOTAPED DEPOSITION OF DAWN NETTLES,
produced as a witness at the instance of the Defendant
GTECH Corporation, and duly sworn, was taken in the
above-styled and numbered cause on October 19, 2015,
from 1:04 p.m. to 4:53 p.m., before Julie G. Davault,
CSR, in and for the State of Texas, reported by machine
shorthand, at the Law Offices of Crouch & Ramey, 2001
Ross Avenue, Suite 4400, Dallas, Texas, pursuant to the
Texas Rules of Civil Procedure and the provisions stated
on the record or attached hereto.

Job No. 2153538

Page 22

1 when email came in. And -- and fax, too, they faxed me
 2 the information, so --
 3 Q. Before there was email, yeah.
 4 A. Yeah.
 5 Q. Yeah.
 6 A. But they had -- but they did not fax the
 7 scratch ticket information that I had to have. That was
 8 --
 9 Q. So they continued to overnight that?
 10 A. They did for awhile --
 11 Q. Up until the Web site?
 12 A. Up until -- up until email. See, they didn't
 13 even have the information on their Web site for a long
 14 time. Eventually, it got to where the Texas Lottery put
 15 on their Web site the information that I needed, so then
 16 I just -- I didn't have to ask them for it at all. It
 17 was on their Web site and kept current every day. It
 18 was called the Value Report.
 19 Q. The --
 20 A. Value Report, is what they named it.
 21 Q. Is what the Lottery Commission named it?
 22 A. Yes.
 23 Q. Do you recall about when that first came out?
 24 A. Back in 1992, '93. GTECH produces the report,
 25 I believe, and provides it to -- or it's through their

Page 23

1 system.
 2 Q. Okay. Going back to when you started The Lotto
 3 Report, I think you said the first edition was July of
 4 1993?
 5 A. Uh-huh. Yes.
 6 Q. And did you have subscribers?
 7 A. No.
 8 Q. Okay. So at any point did you have
 9 subscribers?
 10 A. Yes.
 11 Q. All right. When did you start having the
 12 subscribers?
 13 A. As soon as I put it out.
 14 Q. And was there some fee involved in subscribing
 15 to The Lotto Report?
 16 A. Sure.
 17 Q. Okay. How much -- how much did you charge?
 18 A. At that time it was a dollar-and-a-half.
 19 Q. Per report?
 20 A. Yes.
 21 Q. And how often did it come out?
 22 A. Every other week.
 23 Q. And was -- Tell us about it. What format was
 24 it in? How did you deliver it to subscribers?
 25 A. It sold in retail stores, 7-Elevens, Krogers,

Page 24

1 Diamond Shamrock. It sold in convenience stores where
 2 Lottery products were sold.
 3 Q. And how long did you -- Did -- did the price
 4 always stay \$1.50 per report?
 5 A. No.
 6 Q. Tell us about the various changes in prices.
 7 A. It only changed once to \$2.
 8 Q. All right. Do you recall about when that was?
 9 A. No, sir.
 10 Q. All right. And do you still charge \$2?
 11 A. No, sir.
 12 Q. Okay. When did you stop charging for The Lotto
 13 Report?
 14 A. About two years ago.
 15 Q. And why did you quit then?
 16 A. Because the Texas Lottery went to four draws
 17 per day on Pick 3.
 18 Q. And what difference did that make to you?
 19 A. It made a lot of difference, Ken.
 20 Q. Okay. Well, tell us about it.
 21 A. It's impossible to track four draws per day.
 22 When there's four Pick 3 and four Daily 4 drawings per
 23 day, by the time you put a piece out and after two days
 24 the information is obsolete, so to me it was useless. I
 25 quit. I, personally, even quit playing Pick 3. And I

Page 25

1 never played Daily 4, but --
 2 Q. Okay. So when did you start putting The Lotto
 3 Report on the Web site?
 4 A. Two years ago, roughly.
 5 Q. Okay. So at the time that you stopped
 6 distributing -- distributing it at retail stores about
 7 two years ago, so then you started posting on a Web
 8 site?
 9 A. No, sir.
 10 Q. Okay. Well, tell us about it.
 11 A. In about 2002 or 2003, I pulled out of the
 12 stores and went subscription only. So from that --
 13 whatever year that was, it was sold then mostly
 14 subscription -- by subscription only.
 15 Q. Okay. So you would be -- starting in 2002 or
 16 '3, would you be emailing it to people or mailing it to
 17 people --
 18 A. Both.
 19 Q. Okay. And you still do that -- You did that
 20 until two years ago?
 21 A. That's correct.
 22 Q. All right. So we're sitting here, this is
 23 October of 2015, so you think you quit this in 2013?
 24 A. The exact date would be whenever the Texas
 25 Lottery went to four draws per day.

Page 26

1 Q. All right. And since that time, whenever that
 2 was, approximately two years ago, then you just have
 3 this blog or Web site or what do you -- what -- how do
 4 you refer it?
 5 A. Just The Lotto Report Web site.
 6 Q. Okay. So what happened to your subscription
 7 list?
 8 A. I refunded -- whenever I quit --
 9 Q. Uh-huh.
 10 A. -- I refunded what subscriptions I had. I did
 11 not renew subscriptions. I started in -- I advanced --
 12 I started in advance to prepare to shut down.
 13 Q. So did anyone, other than yourself, ever
 14 contribute to The Lotto Report, to the costs --
 15 A. No.
 16 Q. -- for the overhead? No?
 17 A. I'm thinking.
 18 Q. Okay.
 19 A. I had a -- an initial loan back in '92, '91.
 20 Q. From a bank or --
 21 A. No.
 22 Q. -- from a person?
 23 A. From an -- from an individual. From a personal
 24 friend for startup, very small loan.
 25 Q. And that's the only loan you think you ever

Page 27

1 I had --
 2 A. That's the only one I've ever had.
 3 Q. Okay. So other than people paying subscription
 4 fees or -- or selling it in convenience stores, has
 5 anyone else ever cont -- off -- contributed money or
 6 services in kind or anything?
 7 A. No, sir.
 8 Q. Okay. So it's all come out of your pocket?
 9 A. Yes, sir.
 10 Q. All right. Do you have a distribution -- a
 11 current distribution list for who gets -- for The Lotto
 12 Report?
 13 A. It's no longer distributed.
 14 Q. Okay. So it's just whoever logs onto your Web
 15 site?
 16 A. Oh. Yes.
 17 Q. So you don't have an email blast?
 18 A. No.
 19 Q. No distribution list?
 20 A. No.
 21 Q. Okay.
 22 A. I've -- The information's on my Web site that I
 23 still put out, keep current.
 24 Q. All right. So did you ever have, like, any
 25 email distribution lists or other -- once you quit,

Page 28

1 approximately two years ago, when the -- when the Texas
 2 Lottery went to four draws per day, did you ever have,
 3 like, email blasts --
 4 A. No.
 5 Q. -- to people?
 6 Okay. So you -- do you know who goes onto
 7 your Web site?
 8 A. No.
 9 Q. All right. You've never tried to track that?
 10 A. No.
 11 Q. Do you track the number of hits?
 12 A. No. I did a long time ago, but I have not in
 13 years.
 14 Q. Over the years, how many times do you think you
 15 visited the offices of the Texas Lottery Commission in
 16 Austin?
 17 A. That's a -- This is 2015? 100? 150 times
 18 maybe? That's a wild guess.
 19 Q. Okay. And, I mean, why would you have visited
 20 the Texas Lottery Commission's offices?
 21 A. I attend the commission meetings.
 22 Q. Okay. Is that the only time you've ever gone
 23 is to attend commission meetings?
 24 (Discussion off the record.)
 25 THE WITNESS: No.

Page 29

1 Q. (BY MR. BROUGHTON) Okay. On what other
 2 occasion --
 3 A. I'm sorry. I'm sorry. I'm sorry. Would you
 4 ask that question again?
 5 Q. Sure. Have you ever gone to the Texas Lottery
 6 Commission's offices in Austin for any reason, other
 7 than to attend a commission meeting?
 8 A. Yes.
 9 Q. And tell us about all of those, to the best you
 10 can recall.
 11 A. Well, it's far and few in between. Okay? Off
 12 the top of my head, the one that I remember the greatest
 13 was an appointment at the commission to review some
 14 documents, some surveys that were completed for a rule
 15 change.
 16 Q. And about when was that, do you think?
 17 A. 2001.
 18 Q. Any other times you recall visiting the offices
 19 of the Texas Lottery Commission, other than for a
 20 commission meeting or to review rules back around 2001?
 21 A. Not that I can recall.
 22 Q. Okay. And how often does the commission have
 23 meetings?
 24 A. They used to meet every month.
 25 Q. And would you go to every one of those