STATE OF SOUTH CAROLINA COUNTY OF RICHLAND South Carolina Coin Operators Association, Inc., and Elizabeth Moseley, Plaintiffs, vs. South Carolina Department of Revenue, Defendants.	IN THE COURT OF COMMON PLEAS CASE NO. 97-CP-40-1321 FINAL ORDER

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BARBARA A. SCOTT
C.C.C. & G.S.

The above-captioned matter came before this Court for trial without a jury on July 7, 1998. At the call of the case, the parties informed the Court that the matter before the Court only involved the determination of legal issues and, therefore, requested that they be allowed to submit the matter by way of proposed orders. This Court granted the parties' request. The question in this case is whether the South Carolina Department of Revenue (Department) has the discretion to disclose information contained in quarterly reports that video machine operators are required to file pursuant to S.C. Code Ann Section 12-21-2776 (Supp. 1997).

By South Carolina Information Letter #96-11, dated May 9, 1996, the Department notified the video gaming industry that a question had arisen as to whether the Department should release these quarterly reports to persons who make a Freedom of Information Act request. The Information Letter requested

that any interested party submit in writing information or argument as to why the quarterly reports should not be disclosed. The Plaintiffs initially responded by a letter dated June 12, 1996, setting forth the reasons they believed the quarterly reports could not be disclosed to the public. The Plaintiffs subsequently filed this suit seeking a declaration that the information contained in the quarterly reports cannot be disclosed and a permanent injunction preventing disclosure.

The Plaintiffs have asserted two legal theories as a basis for their contention that the Department is prohibited from disclosing information contained in the quarterly reports. The first is that S.C. Code Ann. Section 30-4-40 (Supp. 1997), which lists matters that are exempt from the disclosure requirements of the South Carolina Freedom of Information Act, prohibits the disclosure of the information in question. The second is that the South Carolina Trade Secrets Act prohibits the information in question from being disclosed.

The Department asserts that the South Carolina Freedom of Information Act could not possibly prevent the disclosure of the information in question since the South Carolina Supreme Court has clearly ruled on more than one occasion that the Act does not create a duty of confidentiality. The Department also asserts that the Trade

Secrets Act does not apply because the Trade Secrets Act only allows this Court to enjoin the disclosure of trade secrets that have been misappropriated and the method by which the Department acquired the information is not a misappropriation as defined by the Act.

This Court agrees with the position taken by the Department and holds that the Department has the discretion whether or not to disclose any information contained in the quarterly reports that video machine operators are required to file pursuant to Section 12-21-2776.

DISCUSSION OF THE LAW

I. The South Carolina Freedom of Information Act.

The South Carolina Supreme Court first addressed the issue of whether the South Carolina Freedom of Information Act established a statutory duty of confidentiality in Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991). In Bellamy, supra, Brittie Bellamy sued the Horry County Council on Aging for disclosing the reasons she was terminated as Executive Director. Bellamy contended that the "personal information" exception contained in Section 30-4-40(a)(2) of the Act prohibited the disclosure. The Supreme Court held:

> ... The FOIA creates an affirmative duty on the part of public bodies to disclose information. The purpose of the Act is to protect the public by providing for the disclosure of information. However, the exemptions from disclosure contained in Sections 30-4-40 and -70 do not create a duty not to disclose. These exemptions,

> at most, simply allow the public agency the discretion to withhold exempted materials from public disclosure. No legislative intent to create a duty of confidentially can be found in the language of the Act. We hold, therefore, that no special duty of confidentially is established by the FOIA.

Bellamy, 408 S.E.2d at 221.

The Supreme Court next addressed the issue in South Carolina Tax Commission v. Gaston Copper Recycling, 316 S.C. 163, 447 S.E.2d 843 (1994). In this case, Gaston Cooper, in protesting the assessment of ad valorem property taxes, submitted a two-volume purchase agreement and a three-volume environmental impact report. The Lexington County Administrator, pursuant to the FOIA, requested all information pertaining to the assessment of the property. The Department filed a Declaratory Judgment action seeking a declaration that it could release the information. Gaston Cooper took the position that the Department was prohibited from disclosing the purchase agreement and environmental impact report because it asserted they came within the "personal information" and "trade secret" exemptions contained in Section 30-4-40(a)(1) and (2). The Supreme Court held:

> Appellants argue the information in question is not subject to disclosure because it falls within an FOIA exemption under S.C. Code Ann. Section 30-4-40(a)(2) (1991). This section provides an exemption for:
>
> > (2) Information of a personal nature where the public

> disclosure thereof would constitute unreasonable invasion of personal privacy, including, but not limited to, information as to gross receipts contained in applications for business licenses.

This Court has held that exemptions to the FOIA found in Section 30-4-40, and specifically subsection (a)(2), create no duty of confidentiality. *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219 (1991). The purpose of the FOIA is to protect the public from secret government activity. **The exemptions impose no duty not to disclose but simply allow the public agency the discretion to withhold exempted material from disclosure. Id. In this case, the public agency (Tax Commission) wishes to exercise its discretion in favor of disclosure and is not seeking to invoke an exemption. Since Section 30-4-40(a)(2) creates no duty of confidentiality, Tax Commission may disclose the information.**

Appellants also contend the exemption for trade secrets found in Section 30-4-40(a)(1) prevents disclosure. Again, under this Court's decision in *Bellamy*, supra, **even if the information qualifies as trade secrets, the exemption creates no duty of confidentiality and Tax Commission may disclose it at its discretion.**

In conclusion, the FOIA exemptions do not prevent disclosure of the information in question. (Emphasis added)

II. The South Carolina Trade Secrets Act.

A. The information in question is not a trade secret.

Section 12-21-2776 basically requires the machine operator to report the amount taken in and paid out by each video game machine and identify the percentage of profit kept by the operator and the percentage of profit paid to the owner of the location. While this financial information may be able to be utilized by an operator's competitor to the operator's disadvantage, it is clearly not the type of information the Act was designed to protect. If it was a trade secret, then all financial information of a company that could be utilized by a competitor would also be a trade secret. This is certainly not what the Legislature intended as can be seen by examining how the Legislature defined the term "trade secret." In defining what is a trade secret, the Legislature employed the following nonexclusive list to serve as an example of the type of information that would qualify as a trade secret:

> ... a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code....

S.C. Code Ann. Section 39-8-20(5)(a) (Supp. 1997).

As is shown by this list, the Act was designed to protect information such as a specific manufacturing process or the design of a product. The Legislature could have easily included a term such as gross receipts in this list if it intended that the Act protect financial information such as the kind at issue in this case. Clearly, the Act was designed to protect such things as the secret formula for Coca-Cola,

not information such as how much Coca-Cola is purchased at the Mini Mart on Assembly Street during any given quarter.

In addition, for the information to be a trade secret, the owner of the information must use reasonable efforts to maintain its secrecy and it cannot be readily ascertainable by the public. Section 39-8-20(5)(i) and (ii). In the present case, any member of the public with the inclination could ascertain how much money is taken in and paid out by a particular machine by simply observing the same. The majority of these machines are generally placed in businesses such as bars, restaurants, and convenience stores where members of the public are invited to come in and spend time. While no member of the public, as a practical matter, would watch a set of machines 24-hours a day for an entire quarter, a person could certainly frequent several different establishments often enough to see if the machines there were being played often.

B. The information in question was not acquired through a misappropriation.

The South Carolina Trade Secrets Act will not prevent the disclosure of the quarterly reports since the Department's method of acquiring the information was not a "misappropriation" within the meaning of the Act. The South Carolina Trade Secrets Act only allows a court to enjoin a misappropriation. S.C. Code Ann. Section 39-8-50 (Supp. 1997) specifically provides:

> (A) **Actual or threatened misappropriation may be enjoined.** Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation. Such reasonable period of time shall take into account the average rate of business growth that would have been gained from nonmisappropriated use of the misappropriated trade secret.
>
> (B) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position before acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.
>
> (C) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order. (Emphasis added)

Therefore, unless the method by which the information in question was acquired by the Department is a misappropriation within the meaning of the South Carolina Trade Secrets Act, a court would be powerless to enjoin its use or disclosure. The reason for the aforesaid is simple. There are many ways that information can be legally acquired such as by reverse engineering. In reverse engineering, a company can actually take apart and examine a competitor's

product and draft specifications based on the characteristics and performance of the product. The company can then deliver the specifications to independent engineers which have no experience in dealing with the competitor's product and request that the engineers build a product which meets the specifications. If the engineers are successful, the Trade Secrets Act would not prevent the company from marketing and selling the product because the information was acquired through legal means; i.e., reverse engineering.

In the present case, the quarterly reports are required by statute. Nowhere in the Trade Secrets Act does it provide that information required by statute to be disclosed to the government is a misappropriation. A misappropriation is defined by the South Carolina Trade Secrets Act as:

> (a) acquisition of a trade secret of another by a person by **improper means;**
>
> (b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by **improper means;** or
>
> (c) disclosure or use of a trade secret of another without express or implied consent by a person who:
>
> (i) used **improper means** to acquire knowledge of the trade secret; or
>
> (ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
>
> (A) derived from or through a person who had utilized

improper means to acquire it;

(B) acquired by mistake or under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake. (Emphasis added)

Section 39-8-20.

There are seven separate acts that will come within the definition of a misappropriation. Five of them require that the information be acquired by improper means and, therefore, do not apply to the present factual situation. Section 39-8-20(2)(a), (b), (c)(I), and (c)(ii)(A). According to the Trade Secrets Act:

"Improper means" include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, duties imposed by the common law, statute, contract, license, protective order, or other court or administrative order, or espionage through electronic or other means.

Section 39-8-20(1).

The fifth act involves information that was obtained

"from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use." Section 39-8-20(2)(c)(ii)(C). Since the Department acquired the information in question directly from the operators, this definition does not apply.

The sixth act involves information that was obtained by accident or mistake and, therefore, is also inapplicable. Section 39-8-20(2)(c)(iii).

The final act involves information that was "acquired by mistake or under circumstances giving rise to a duty to maintain its secrecy or limit its use." If the General Assembly had wished for the information collected by Section 12-21-2776 to be kept secret, it could have easily so specified in the statute. The General Assembly also could have included reports filed pursuant to Chapter 21 in the provisions of the Secrecy Act. S.C. Code Ann. Section 12-54-240 (Supp. 1997) governs what information must be kept secret by the Department. It only includes reports and returns required to be filed by Chapters 6 (income), 8 (withholding), 11 (income of banks), 13 (income of building & loans), 16 (estate), 20 (corporate), and 36 (sales) of the code. The reporting requirement in this case is contained in Chapter 21 which is entitled Stamp And Business License Tax. This Court must assume that the Legislature's failure to specifically require that the information in question be kept secret was

intentional. Clearly, the Department has no statutory duty to keep the information in question confidential.

The Plaintiffs have attempted to create a misappropriation by the Department by contending that the quarterly report form utilized by the Department collects more information than is authorized by Section 12-21-2776. The information complained of by the Plaintiffs, however, is either a matter of administrative convenience or simply involves adding or subtracting information required to be reported by Section 12-21-2776. The Plaintiffs have complained that Section 12-21-2776 requires a machine operator to report 13 items of information, whereas the Department's form requires an operator to report 18 items of information. Plaintiffs' Complaint paragraphs 10-12.

Section 12-21-2776(B) specifically provides:

> Each machine owner, operator, or licensed establishment must establish and implement cash controls and shall report to the department on a quarterly basis the following information for each machine:
> (1) name and address of location of the machine;
> (2) denomination, whether five cents, twenty-five cents, etc., of game;
> (3) the name of the game;
> (4) the name of the individual collecting money from the machine or the owner of the machine;
> (5) the date of collection;
> (6) the date of previous collection;
> (7) income number at commencement of reporting period;
> (8) income number at the end of the

reporting period;
(9) beginning payout number;
(10) ending payout number;
(11) payout to players;
(12) gross profit;
(13) the percentage of net profits divided between owner and location.

The first items complained of by the Plaintiffs are (a) the operator's license number; (b) the retail sales tax license number of the establishment where the machine is located; (c) the license number of the machine; (d) the serial number of the machine, and (e) a contact person and phone number. None of these items is confidential in nature and certainly would not come within the protection of the Trade Secrets Act. They are included in the form simply as a matter of convenience to the Department. The first three items above are all license numbers that are issued by the Department. This information is kept and maintained in the Department's computer database. Having the operator include these identifying numbers that were issued by the Department in a report that is submitted to the Department certainly does not exceed the mandate of Section 12-21-2776. Furthermore, Section 12-21-2776 requires that every machine operator file a separate quarterly report "for each machine." It is implicit in the statute that each machine must be identified by some method. The license and serial numbers of the machine accomplish this task.

The remaining items are specifically required by

Section 12-21-2776(B) or simply involve the addition or subtraction of items the operator is required to report. These items are (a) income for the quarter; (b) payout for the quarter; (c) net profit; (d) net profit for the location, and (e) meter adjustments.

Section 12-21-2776(B) specifically provides that for each machine the operator must report:

> (7) income number at commencement of reporting period;
> (8) income number at the end of the reporting period;
> (9) beginning payout number;
> (10) ending payout number;
> (11) payout to players;
> (12) gross profit;
> (13) the percentage of net profits divided between owner and location.

The income for the quarter is obtained by subtracting the "income number at the end of the reporting period" (Section 12-21-2776(B)(8)) from the "income number at commencement of reporting period"(Section 12-21-2776(B)(7)). The payouts for the quarter are specifically required by Section 12-21-2776(B)(11). It is also obtained by subtracting the "ending payout number" (Section 12-21-2776(B)(10)) from the "beginning payout number" (Section 12-21-2776(B)(9)). The net profit for the location is specifically required by Section 12-21-2776(B)(13). Net profit is obtained by adding the net profit to the location and the net profit to the operator. Meter adjustments are the total of any expenses related to the

machine that is taken directly from the machine's income. This can be obtained by subtracting the net profit (Section 12-21-2776(B)(13)) from the gross profit (Section 12-21-2776(B)(12)).

CONCLUSION

This Court holds that the South Carolina Department of Revenue has the discretion whether or not to disclose any information contained in the quarterly reports that video machine operators are required to file pursuant to Section 12-21-2776.

Based on the foregoing, IT IS

ORDERED that the Plaintiffs' request for a permanent injunction is denied. IT IS,

FURTHER ORDERED that the verdict in this case be entered in the favor of the South Carolina Department of Revenue and the Clerk of Court shall strike this case from the trial docket.

AND IT IS SO ORDERED!

L. Henry McKellar

Judge L. Henry McKellar

Cola, South Carolina
March 5, 1998