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July 26, 1983

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Mr. Sam Kelley
Commissioner
Office of Consumer Credit
Commissioner
1011 San Jacinto Boulevard
Austin, Texas 78768

Open Records Decision No. 392

Re: Whether material collected in investigation by Consumer Credit Commissioner is available to the public under the Open Records Act

Dear Mr. Kelley:

You ask for our decision as to whether material collected in investigation conducted by the Consumer Credit Commissioner concerning a loan transaction is available to the public under the Open Records Act, article 6252-17a, V.T.C.S. You assert that the requested information is excepted from required public disclosure by sections 3(a)(1), 3(a)(3), 3(a)(11), and 3(a)(12) of the Open Records Act. We will address each of your contentions in turn.

Section 3(a)(1) of the act excepts from public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Specifically, you contend that the information is excepted by section 1.5(a) of the Rules of Practice and Procedure of the Office of Consumer Credit Commissioner which provides as follows:

In addition to information, the disclosure of which is prohibited by statute, the Office of Consumer Credit Commissioner will not, except where material and necessary in formal proceedings, disclose information contained in the investigation and examination reports of its staff, staff recommendations and interoffice communications, or any other matter relating to investigation, administration, and enforcement which in the judgment of the Commissioner is private or confidential and is classified by the Commissioner to be a part of the confidential files and records of the Office of Consumer Credit Commissioner.

Citing Texas Liquor Control Board v. Attic Club, Inc., 457 S.W.2d 41 (Tex. 1970) and Trapp v. Shell Oil Company, 198 S.W.2d 424 (Tex. 1946)

1946), you claim that the rule promulgated by the Office of Consumer Credit Commissioner should be considered under the same principles as if it were an act of the legislature. We disagree.

The principle upon which you rely requires that the agency, when promulgating the rule, act within its delegated authority. We can find no statute, nor have you referred us to one, which confers such broad authority on the Office of Consumer Credit Commissioner. See V.T.C.S. art. 5069 et seq. This office has repeatedly held that, absent specific authority, a governmental body may not promulgate a rule designating information confidential so as to bring it within the ambit of section 3(a)(1). See Open Records Decision Nos. 216 (1978); 173, 152 (1977). As the Texas Supreme Court declared in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 677 (Tex. 1976):

While a rule may have the force and effect of a statute in other contexts, we do not believe that a governmental agency may bring its information within exception 3(a)(1) by the promulgation of a rule. To imply such authority merely from general rule-making powers would be to allow the agency to circumvent the very purpose of the Open Records Act. Absent a more specific grant of authority from the Legislature to make such a rule, the rule must yield to the statute. (Footnotes omitted).

See also Open Records Decision No. 29 (1974). We therefore conclude that the requested materials are not excepted from required public disclosure by section 3(a)(1) of the Open Records Act.

You also contend that the requested materials are excepted from disclosure by section 3(a)(3) of the act which excepts:

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

You inform us that the subject of the investigation, a finance company, is presently a defendant in pending litigation filed by the persons whose earlier initial complaint filed with the Office of Consumer Credit Commissioner prompted the investigation. You inform

us that the suit was filed subsequent to a settlement of the complaint filed with your office.

You have made no claim that litigation to which the state is, or may be, a party is pending or is reasonably anticipated. The only litigation pending is that between the persons who filed the complaint with your office and the company which is the subject of the complaint and subsequent investigation. Section 3(a)(3) is applicable only where the litigation involves or is expected to involve the governmental body claiming the exception. Open Records Decision No. 132 (1976). Because you have advanced no evidence in support of a claim that litigation to which the state is or may be a party is pending or is reasonably anticipated, we conclude that section 3(a)(3) may not properly be invoked to except the requested materials from public disclosure.

You also claim that the requested materials are excepted by section 3(a)(12) which excepts from public disclosure:

information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions, and/or securities, as that term is defined in the Texas Securities Act. (Footnote omitted).

There is no question that the company which was the subject of the investigation is a "financial institution" for purposes of the Open Records Act. See V.T.C.S. art. 1528g (definition of "financial institution" contained in the Business Development Corporation Act); Open Records Decision No. 158 (1977) (concluding that a group hospital service corporation is not the kind of insurance company which the legislature intended to include in section 3(a)(12)). We do not conclude, however, that the requested material is "information contained in or related to examination, operating, or condition reports" and thus falls within the ambit of the exception.

"Examination, operating, or condition reports" refers to reports filed variously, e.g., by insurance companies and banks, which disclose the financial status and dealings of each company so filing. See, e.g., Insurance Code art. 20A.27; V.T.C.S. art. 342-210. See also Open Records Decision No. 28 (1974). In Open Records Decision No. 187 (1978), this office concluded that property development plans submitted to the credit union department were excepted from public disclosure by section 3(a)(12), because the plans constituted a "detailed presentation of the credit union's condition and operation" and required approval by the credit union department before the plans could be adopted and implemented. Therein, this office declared that "[w]e believe that section 3(a)(12) was intended to promote and

protect such complete production of sensitive information by financial institutions to regulatory agencies as has occurred here." (Emphasis added). See, e.g., First Federal Savings and Loan Association of Fayetteville v. Federal Home Loan Bank Board, 426 F.Supp. 454, 458 (W.D. Ark. 1977); Kaye v. Burns, 411 F.Supp. 897, 904 (S.D. N.Y. 1976) (applying similar exception in Freedom of Information Act, 5 U.S.C. §552(b)(8)).

The requested materials do not consist of the kind of broad, detailed compilation of information setting forth the complete financial status of the company being investigated. They consist of the records of the company's transactions with the persons filing complaints with your office. See Open Records Decision No. 240 (1980). See also Open Records Decision No. 194 (1978) (license application containing net assets possessed by a pawn shop does not fall within ambit of section 3(a)(12)). The information at issue here was obtained pursuant to article 5069-2.03, V.T.C.S., which provides the following in pertinent part:

(1) Upon receipt of written complaint or other reasonable cause to believe that any provision of Subtitles Two or Three of this Title are being violated by any person, the Consumer Credit Commissioner may request such person to furnish information in regard to a specific loan or retail transaction or business practice alleged to be in violation of Subtitles Two or Three of this Title.

(2) If any such person shall fail to comply with such a request the Consumer Credit Commissioner shall have the authority to conduct an investigation to determine whether the provisions of Subtitles Two or Three of this Title are being violated.

(3) In the course of any investigation looking to the enforcement or administration of any provision of Subtitles Two or Three of this Title, the Consumer Credit Commissioner may require by subpoena or summons, issued by the Consumer Credit Commissioner addressed to any peace officer within this State, the attendance and testimony of witnesses, and the production of books, accounts, papers, correspondence, or records (excepting such as are absolutely necessary for the continued course of business which shall not be removed from the office or place of business) which such books, accounts, papers, correspondence, or records the Consumer Credit Commissioner shall have the right to examine or cause to be examined, at the office,

or place of business, and to require copies of such portions thereof as may be deemed necessary touching the matter in question, which copies shall be verified by affidavit of such concern or an officer of such concern, and shall, when certified by the Consumer Credit Commissioner, be admissible in evidence in any investigation or hearing under Subtitles Two and Three of this Title or in an appeal to the District Court as provided by Subtitles Two and Three of this Title and for this purpose the Consumer Credit Commissioner may sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence. In case of disobedience of any subpoena, or of the contumacy of any witness appearing before the commissioner, the Consumer Credit Commissioner may invoke the aid of the district court within whose jurisdiction any witness may be found, and such court may thereupon issue an order requiring the person subpoenaed to obey the subpoena or give evidence, or produce books, accounts, correspondence, records and other documents touching the matter in question. Upon the filing of such application to enforce such subpoena, which application shall be treated in the same manner as a motion in a civil suit pending in said court, the court shall forthwith set such application for hearing and shall cause a notice of the filing of such application and of such hearing to be served upon the party to whom such subpoena is directed. Such notice may be served by any peace officer in the State of Texas. Any failure to obey such order of the court may be punished by such court as contempt thereof. (Emphasis added).

There is no provision in article 5069-2.03 permitting or requiring information submitted to your office pursuant to such an investigation to remain confidential. However, article 5069-3.08, V.T.C.S., requiring your office to periodically examine all of the transactions and records of each licensee loan company does contain a confidentiality provision. Article 5069-3.08 provides the following:

At such times as the Commissioner shall deem necessary, the Commissioner, or his duly authorized representative shall make an examination of the place of business of each licensee and shall inquire into and examine the loans, transactions, books, accounts, papers, correspondence, and records of such licensee insofar as they pertain

to the business regulated by this Chapter. In the course of such examination, the Commissioner or his duly authorized representative shall have free access to the office, place of business, files, safes and vaults of such licensee, and shall have the right to make copies of such books, accounts, papers, correspondence and records. The Commissioner or his duly authorized representative may, during the course of such examination, administer oaths and examine any person under oath upon any subject pertinent to any matter about which the Commissioner is authorized or required by this Chapter to consider, investigate, or secure information. Any licensee who shall fail or refuse to let the Commissioner or his duly authorized representative examine or make copies of such books, or other relevant documents shall thereby be deemed in violation of this Chapter and such failure or refusal shall constitute grounds for the suspension or revocation of such license. The information obtained in the course of such examination shall be confidential. Each licensee shall pay to the Commissioner an amount assessed by the Commissioner to cover the direct and indirect cost of such examination and a proportionate share of general administrative expense, and the total cost so assessed and charged a licensee in any one calendar year shall not exceed Five Hundred Dollars for each licensed office. (Emphasis added).

Subsection (3) of article 5069-2.03, V.T.C.S., confers subpoena power upon the commissioner both when he conducts an investigation pursuant to article 5069-2.03 and when he conducts a complete examination for all licensees pursuant to article 5069-3.08. The confidentiality provision, however, is expressly applicable only to an article 5069-2.08 examination. We therefore conclude that the requested materials are not excepted from public disclosure by section 3(a)(12).

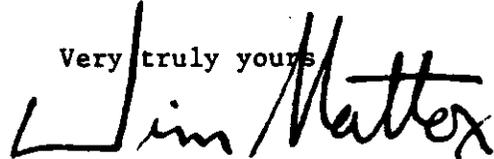
Finally, you claim that the requested materials are excepted from public disclosure by section 3(a)(11) which excepts:

inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency.

Section 3(a)(11) excepts from public disclosure only advice, opinions and recommendations. Open Records Decision Nos. 335, 334, 331 (1982). Section 3(a)(11) is designed to protect advice and opinion on policy

matters and to encourage open and frank discussion regarding administrative action. Open Records Decision Nos. 344, 335, 308 (1982). It does not act to except severable factual information. Open Record Decision Nos. 231, 230, 225 (1979). We agree that portions of the investigative file do contain advice, opinion or recommendation, and we have marked such passages accordingly. The remainder of the requested materials is not excepted from public disclosure.

Very truly yours



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