



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 15, 1993

Ms. Catherine A. Ghiglieri
Commissioner
Texas Department of Banking
2601 N. Lamar Boulevard
Austin, Texas 78705-4294

OR93-568

Dear Ms. Ghiglieri:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 19565.

The Texas Department of Banking (the "department") has received a request for certain examination reports prepared by the department concerning the Mount Olivet Cemetery Association ("MOCA"). You have submitted for our review separate examination reports concerning (1) the perpetual care cemetery operations of MOCA and (2) its operations as a provider of prepaid funeral services. You claim that certain marked information contained within these examination reports is excepted from disclosure by sections 552.101, 552.104, 552.110, and 552.112 (former sections 3(a)(1), 3(a)(4), 3(a)(10), 3(a)(12), V.T.C.S., article 6252-17a) of the Open Records Act.¹

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." First, you contend that the requested information is made confidential by article 342-705, V.T.C.S. Article 342-705 provides that financial institutions shall not be required to recognize the request by a third party to examine certain financial information without a subpoena or an order for production of records by a court. Article 342-705 does not apply to information in the possession of a

¹We note that V.T.C.S. article 6252-17a was repealed by the 73d Legislature. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

governmental body. Furthermore, for purposes of this article, a "financial institution" is defined as "a state or national bank, state or federal savings and loan association, or state or federal savings bank" V.T.C.S. art. 342-705, § 4 (as amended, Acts 1993, 73d Leg., ch. 1050, § 9, at 4519). MOCA clearly does not fall within the coverage of this provision. Therefore, the requested information is not confidential under article 342-705.

Next, you claim that the requested information is made confidential by article 342-210, V.T.C.S., because it constitutes financial information that the department has obtained from a "trust company." Article 342-210 provides in part that:

all information obtained, either directly or indirectly, by the Banking Department relative to *the financial condition of any bank or bank holding company* other than call reports and profit and loss statements, whether obtained through examination or otherwise, except published statements, and all files and records of said Department relative thereto shall be confidential [Emphasis added.]

Article 342-1102, section 1, provides that

Unless otherwise provided in this chapter, a trust company is subject to the provisions of Chapters I, II, III, IV, V, VIII, and IX of this code [which include article 342-210] as if the trust company were a state bank

MOCA is not a bank or bank holding company. Apparently, MOCA encompasses a number of subsidiary or otherwise related entities that provide various funeral-related services. You have submitted for our review three separate examination reports. Two of the these reports, which were prepared by the Perpetual Care Cemetery Branch of the department's Special Audits Division pursuant to chapter 712 of the Health and Safety Code, concern MOCA's perpetual care cemetery operations. The other report, which was prepared by the Prepaid Funeral Contract Branch of the department's Special Audits Division pursuant to article 548b, V.T.C.S., concerns MOCA's activities as a holder of a permit to sell prepaid funeral benefits.

Before beginning operation, a perpetual care cemetery is required to incorporate and set up a trust fund to be used for cemetery upkeep. See Health & Safety Code §§ 712.003-.004 (as amended, Acts 1993, 73d Leg., ch. 634, §§ 26-28, at 2398-99). Providers of prepaid funeral benefits must obtain a permit from the department; with the exception of certain sums that the seller may retain, all other funds collected from customers must be deposited in an interest-bearing or trust account. See V.T.C.S. art. 548b, §§ 3, 5(a)(2) (as amended, Acts 1993, 73d Leg., ch. 808, § 1, at 3217, 3220). According to the examination reports, MOCA exercises some trust powers over the funds

it has set up in connection with its various operations. An entity does not qualify as a trust company, however, simply because it exercises some trust powers or deposits money in a trust account. Rather, trust companies regulated by the department must be incorporated in accordance with the Banking Code and must meet certain other criteria. See V.T.C.S. art. 342-1101, § 1, art. 342-1108 (trust company must maintain certain level of paid-in capital); see also 7 T.A.C. §§ 10.1-10.2, 10.6 (banking department regulations concerning trust company charters and paid-in capital). You do not claim that MOCA has incorporated as a trust company in accordance with article 342-1101, and the information you have provided us also gives no indication that MOCA has been chartered as a trust company. Consequently, we conclude that the requested information is not confidential under articles 342-210 and 342-1102.

We note, however, that effective September 1, 1993, the legislature amended article 548b, section 8(c), V.T.C.S., to provide that

[a]ll information obtained, either directly or indirectly, by the Department *relative to the financial condition of any seller* whether obtained through examination or otherwise, except published statements, and all files and records of the Department relative thereto shall be confidential . . .

Acts 1993, 73d Leg., ch. 808, § 1, at 3229 (emphasis added). A "seller" is defined as "a person selling, accepting funds or premiums for, or soliciting contracts for prepaid funeral benefits or contracts or policies of insurance to fund prepaid funeral benefits in this state." *Id.* at 3215 (adding article 548b, § 1(b)(10)). In turn, the term "prepaid funeral benefits" is defined as

prearranged or prepaid funeral or cemetery services or funeral merchandise, including caskets, grave vaults, and *all other articles of merchandise incidental to a funeral service. The term does not include a grave lot, grave space, grave marker, monument, tombstone, crypt, niche, or mausoleum*

Id. (adding article 548b, § 1(b)(9)) (emphasis added).

As noted above, one of the examination reports you have submitted for our review examines MOCA in its capacity as a seller of prepaid funeral benefits as defined by article 548b, section 1(b)(9). Most of the information you have marked in this report constitutes information "relative to the financial condition of" MOCA as a seller of prepaid funeral benefits because it reveals either specific financial information about MOCA or general information about its overall financial stability. This information is made confidential by article 548b, section 8(c), V.T.C.S. Some of the information you have marked, however, relates more generally to MOCA's business practices, such as

descriptions of the types of employee expenses incurred by MOCA, and does not reveal specific financial information or general information about its overall financial stability. We do not believe that such information is made confidential by article 548b, section 8(c), V.T.C.S. We have marked the information in the prepaid funeral benefit report that must be withheld from public disclosure under article 548b, section 8(c).

The other two reports you have submitted for our review concern MOCA's perpetual care cemetery operations. Article 548b, section 8(c) applies only to sellers of "prepaid funeral benefits"; the definition of this term specifically excludes grave lots, grave spaces, crypts, and niches.² Consequently, this provision does not apply to MOCA's perpetual care cemetery operations, and the information you have marked in the examination reports regarding these operations is not made confidential by article 548b, section 8(c).³

Next, we consider whether the remaining information is excepted from required public disclosure by section 552.112, which excepts

² We note that Chapter 712 of the Health and Safety Code, which governs perpetual care cemeteries, contains no confidentiality provision analogous to article 548b, section 8(c). In addition, section 712.041, as amended, specifically provides that every perpetual care cemetery shall make certain financial information "available to the public upon request." Acts 1993, 73d Leg., ch. 634, § 41, at 2403.

³Section 552.101 also excepts from disclosure information that is protected by common-law privacy. Information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing, and it is of no legitimate concern to the public. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In a letter submitted to this office, MOCA suggests that disclosure of information in one of the examination reports concerning expenses incurred by particular employees would implicate the privacy interests of those employees. We have reviewed the relevant portions of the examination reports; on its face, none of the information contained in these reports appears to be highly intimate or embarrassing. Moreover, because the department alleges that MOCA violated various statutory provisions when it paid the expenses at issue, the public has a legitimate interest in this information.

According to correspondence between MOCA and the department, MOCA has contended that the "apparent personal benefits" provided to MOCA executives are in fact part of the compensation paid to those executives. This office has ruled that "financial information relating to an individual" is excepted from disclosure by common-law privacy. Open Records Decision No. 373 (1983) at 3. As noted above, however, those portions of the expense listings that are not made confidential by article 548b, section 8(c), do not reveal any specific financial information.

MOCA also argues that the examination reports contain inaccurate information that "would place MOCA in a false light in the public eye" if released. In Open Records Decision No. 579 (1990), this office specifically held that former section 3(a)(1) does not incorporate the common-law tort of false light privacy. Rather, this provision excepts only private facts in accordance with the *Industrial Foundation* common-law privacy test. *See id.* at 7. Consequently, because the information at issue here is not highly intimate or embarrassing and is of legitimate public concern, we conclude that none of the requested information is protected by privacy doctrine.

(a) . . . information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both.

(b) In this section, "securities" has the meaning assigned by The Securities Act.

This exception does not apply to any examination report simply because it was prepared by an agency that regulates financial institutions. Rather, the entity examined must be a financial institution. *See* Open Records Decision No. 158 (1977) at 4-5.

The Open Records Act does not define the term "financial institution." In past rulings, this office has looked to article 1528g, section 1(3), V.T.C.S., for guidance on this issue. *See* Open Records Decision Nos. 392 (1983); 158. This provision defines a "financial institution" as

any banking corporation or *trust company*, building and loan association, governmental agency, insurance company, or related corporation, partnership, foundation, or *other institution engaged primarily in lending or investing funds*. (Emphasis added.)

As discussed above, we have concluded that MOCA is not a trust company. The key question, then, is whether MOCA is another type of "institution engaged primarily in lending or investing funds." The department states that "[p]repaid funeral permit holders hold and invest the funeral trust funds"; MOCA also argues that it "holds and invests trust funds derived from revenue from prepaid funeral funds." MOCA does not, however, "specialize in the handling and investment of funds." *See* Open Records Decision No. 158 at 6. MOCA's primary purposes are to sell and maintain perpetual care cemetery lots and to sell prepaid funeral services. Its customers receive either goods or services in return for payment made to MOCA; they do not receive any monetary return. *See id.* at 6-7. Although MOCA places the money it receives into trust funds and may in some instances exercise some degree of management power over the trust funds, these activities are incidental to its primary goals. We conclude that MOCA is not a financial institution because it is not engaged *primarily* in lending or investing funds; therefore, the requested information may not be withheld from disclosure under section 552.112.

Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." Section 552.104 is designed to protect the interests of the governmental body as in a competitive bidding situation for a contract or benefit. Open Records Decision No. 592 (1991) at 8. It is not designed to protect the interests of private parties submitting information to a governmental body. *Id.* at 8-9. The department does

not contend that releasing the requested information will affect its interests. A governmental body must show some actual or specific competitive harm in a particular competitive situation. Open Records Decision No. 541 (1990) at 4. You do not claim the requested information is related to a competitive bidding situation. Accordingly, you may not withhold the requested information under section 552.104 of the Government Code.

Finally, you claim that the marked information contained in the examination reports you have submitted for our review is excepted from public disclosure by section 552.110, which excepts "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Pursuant to section 552.305(b) of the Government Code, this office notified MOCA of the third party request for information from the department and offered it an opportunity to address the availability of the requested information. In response, MOCA does not contend that the requested information constitutes a trade secret. Rather, relying on Open Records Decision Nos. 496 (1988) and 309 (1982), it argues that the examination reports contain "false information and inaccurate conclusions," disclosure of which "would harm its competitive position for the reason that public dissemination of the untrue conclusions could lead to reluctance on the part of the general public to purchase [services] from MOCA, a reluctance which could very easily be exploited by MOCA's competitors."

In Open Records Decision No. 592 at 7, however, this office held that in order for information to be excepted by section 552.110 as "commercial or financial information," the information must be privileged or confidential under the common or statutory law of Texas.⁴ As discussed above, except for the information we have marked in the prepaid funeral benefit examination report, the remaining information is not made confidential by any statute or by any common-law doctrine.⁵ Accordingly, the requested information is not excepted from disclosure by section 552.110 and, except as noted above, must be released in its entirety.

⁴Open Records Decision No. 592 expressly overruled Open Records Decision Nos. 107 (1975), 309, "and their progeny." Open Records Decision No. 592 at 7. This line of decisions, including Open Records Decision No. 496, had held that commercial or financial information was excepted from disclosure under former section 3(a)(10) if disclosure of the information would either (1) "impair the government's ability to obtain necessary information in the future"; or (2) "cause substantial harm to the competitive position of the person from whom the information was obtained." See Open Records Decision No. 496 at 3-4; Open Records Decision No. 309 at 2.

⁵Section 552.110 also encompasses the common-law doctrine of trade secret. As noted above, however, neither the department nor MOCA has provided us with any information that would allow us to assess the applicability of this doctrine to the information at issue here. See Open Records Decision Nos. 609 (1992); 592 at 2-4.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Angela M. Stepherson
Assistant Attorney General
Open Government Section

AMS/MRC/rho

Ref: ID# 19565
ID# 20039
ID# 20072
ID# 20092
ID# 22214

Enclosures: Marked documents

cc: Mr. Vince Patton
WFAA-TV Reporter
Communications Center
606 Young Street
Dallas, Texas 75202-4810
(w/o enclosures)

Mr. Thomas J. Williams
Bishop, Payne, Williams & Werley, L.L.P.
500 West Seventh Street, Suite 1800
Fort Worth, Texas 76102-4782
(w/o enclosures)