



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2010

Ms. Laurie B. Hobbs
Assistant General Counsel
Office of Consumer Credit Commissioner
2601 North Lamar Boulevard
Austin, Texas 78705

OR2010-00340

Dear Ms. Hobbs:

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# 366597 (OR-10-029).

The Office of Consumer Credit Commissioner (the "commissioner") received a request for applications made pursuant to the document fee change request for new car dealers located in El Paso County.¹ You claim the requested information is excepted from disclosure under sections 552.101, 552.110, 552.111, and 552.137 of the Government Code. You also state the submitted information may contain the proprietary information of third parties subject to exception under the Act. Accordingly, you state, and provide documentation showing, that you have notified the interested third parties of the request for information and of their right to submit arguments to this office as to why the requested information should not be released.² See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990)

¹ We note the requestor contacted the commissioner to clarify his request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

²The third parties that received notice pursuant to section 552.305 are the following: Earnhardt El Paso Motors LP; Bravo Southwest LP, LLLP; Casa Ford Inc.; Casa Nissan Inc.; Dick Poe Motors LP; Dick Poe Dodge LP; Dick Poe Imports LP; Poe Automotive LP; Viscount Properties Operators LP; Airway Properties Operators LP; Massey Automotive LP; Mission Chevrolet LTD; Rudolph Chevrolet LLC; Rudolph Imports LLC; Shamaley Ford I LP; Shamaley Pontiac-Buick-GMC LP; Expressway Autos LLC; Midway Autos LLC; Driveway Autos LLC; Gateway Autos LLC; Paso Del Norte Motors LP; Motorway Autos 1 LP.

(statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from several of the third parties (the "third parties") and from the Texas Automobile Dealers Association ("TADA"), who submits arguments on behalf of all of the third parties. We have considered the submitted arguments and reviewed the submitted information.

TADA argues the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 348.514 of the Finance Code. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential, including section 348.514 of the Finance Code, which provides in part:

(a) At the times the commissioner considers necessary, the commissioner or the commissioner's representative shall:

(1) examine each place of business of each license holder; and

(2) investigate the license holder's transactions and records, including books, accounts, papers, and correspondence, to the extent the transactions and records pertain to the business regulated under this chapter.

...

(d) All information relating to the examination or investigation process is confidential, including:

(1) information obtained from the license holder;

(2) the examination report;

(3) instructions and attachments; and

(4) correspondence between the license holder and the commissioner or the commissioner's representative relating to an examination or investigation of the licence holder.

Fin. Code § 348.514(a), (d). TADA asserts that the submitted information is confidential under section 348.514. TADA argues that the submitted information was obtained from license holders in relation to examinations and investigations by the commissioner. However, the submitted information pertains to documentary fee change requests. Having considered TADA's arguments and reviewed the submitted information, we conclude that TADA has not sufficiently demonstrated that the submitted information relates to any

examination or investigation administered by the commissioner. Therefore, none of the submitted information is confidential under section 348.514 of the Finance Code, and the commissioner may not withhold any of the submitted information on that basis under section 552.101 of the Government Code. *See also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

Next, we address the commissioner's, TADA's, and the third parties' arguments under section 552.110 of the Government Code. Although the commissioner argues the submitted information is excepted from disclosure under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we will only address TADA's and the third parties' arguments under section 552.110. TADA and the third parties claim the submitted information is excepted from disclosure under section 552.110(b) of the Government Code. 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.* § 552.110(b); *see also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). After reviewing the submitted arguments and the information at issue, we find that the third parties and TADA have established that the portions of the submitted information, which we have marked, constitute commercial and financial information, the release of which would cause the companies substantial competitive harm. Accordingly, the commissioner must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find that TADA and the third parties have only made conclusory allegations that release of the remaining information would result in substantial damage to the third parties' competitive positions. *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). Thus, TADA and the third parties have not demonstrated that substantial competitive injury would result from the release of this information. *See* ORD 661 at 5-6. Accordingly, we determine the commissioner must only withhold the information we have marked under section 552.110 of the Government Code.³

³As our ruling on this issue is dispositive, we do not address the third parties' remaining arguments against disclosure of this information, or the commissioner's argument under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, TADA raises section 552.112 of the Government Code for the remaining information. Section 552.112(a) excepts from disclosure “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.” Gov’t Code § 552.112. An entity must be a “financial institution” for its examination, operating, or condition reports to be excepted by section 552.112; it is not sufficient that the entity is regulated by an agency that regulates or supervises financial institutions. Open Records Decision No. 158 at 4-5 (1977). TADA contends the remaining information relates to operating or condition reports prepared for the commissioner. TADA has not demonstrated, however, and it does not otherwise appear to this office that the remaining information relates to a “financial institution” for the purpose of section 552.112. *See* Bus. Org. Code § 23.051(2) (defining “financial institution”); ORD 158 (overruled by *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied), to the extent it held insurance companies are “financial institutions” for purposes of section 552.112 based on the statutory predecessor to Bus. Org. Code § 23.051(2)). Therefore, no portion of the remaining information may be withheld under section 552.112 of the Government Code.

Next, some of the third parties and the commissioner raise section 552.137 of the Government Code for portions of the remaining information. Section 552.137 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). Gov’t Code § 552.137(a)-(c). The e-mail addresses the commissioner has marked are not of a type specifically excluded by section 552.137(c). *See id.* § 552.137(c). The commissioner states that it has not received consent for their release. Therefore, the commissioner must withhold the marked e-mail addresses in accordance with section 552.137 of the Government Code.⁴

Next, we address the commissioner’s claims that the remaining information is excepted from disclosure. We understand the commissioner to assert the remaining information is generally confidential. As stated previously, section 552.101 of the Government Code excepted from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Although the commissioner generally objects to release of portions of the remaining information due to “anti-trust issues,” the commissioner has not directed our attention to any law that makes any portion of the remaining information confidential under section 552.101. *See e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the commissioner may not withhold any of the remaining information under section 552.101 of the Government Code.

⁴We 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 an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

The commissioner also claims the remaining information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

The commissioner seeks to withhold the remaining information under section 552.111 of the Government Code. The commissioner asserts the remaining information could reveal information pertaining to the commissioner's policies regarding fee filings. However, upon review, we find the commissioner has failed to establish the information at issue constitutes advice, opinion, and recommendation concerning policymaking. Therefore, the commissioner may not withhold any portion of the remaining information under section 552.111 of the Government Code.

In summary, the commissioner must withhold the information we have marked pursuant to sections 552.110 and 552.137 of the Government Code. The remaining information must be released to the requestor.

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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/cc

Ref: ID# 366597

Enc. Submitted documents

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