



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 7, 2010

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

OR2010-13530

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# 392778 (OCCC File #: OR-10-197).

The Office of Consumer Credit Commissioner (the "commissioner") received a request for information pertaining to a named business and the requestor's complaint. We understand you are withholding fingerprints pursuant to Open Records Decision 684 (2009).¹ You state the commissioner is releasing some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.110, 552.111, 552.130, 552.136, and 552.147 of the Government Code. You also indicate that release of the submitted information may implicate the privacy or proprietary interests of third parties.² Accordingly, you inform us, and provide documentation showing, that you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code §§ 552.304 (interested party may submit comments stating why information should or should not be released), .305(d)

¹We 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 fingerprints under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, without the necessity of requesting an attorney general decision.

²The third parties are as follows: JR&R Auto Sales; Burrell Printing Co., Inc.; Auto Dealers Supply House; and Dealer Supplies.

(permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any correspondence from the notified third parties. Although the commissioner has marked portions of the submitted information under section 552.110 of the Government Code, that exception is designed to protect the proprietary interests of third parties, not the interests of a governmental body. As we have not received any arguments from any third parties, we have no basis for concluding that any portion of the submitted information constitutes the proprietary information of the third parties. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the commissioner may not withhold any of the submitted information based on section 552.110 of the Government Code or the proprietary interests of the third parties.

Section 552.101 of the Government Code 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 14.154 of the Finance Code, which provides in part:

- (a) Criminal history record information received by the [commissioner] is confidential and is for the exclusive use of the [commissioner].
- (b) Except on court order or as provided by Section 14.155(a), the information may not be released or otherwise disclosed to another person.

Fin. Code § 14.154(a)-(b); *see also* Gov't Code §§ 411.095(a) (authorizing commissioner to obtain from Texas Department of Public Safety criminal history record information relating to applicant for or holder of license under Fin. Code ch. 342, ch. 348, or ch. 371), .082(2) (defining "criminal history record information" for purposes of Gov't Code ch. 411, subch. F). The commissioner indicates that marked portions of Attachment B constitute criminal history record information that was received by the commissioner. The commissioner also states that the marked information is not subject to release in this instance under section 14.154(b). Based on these representations and our review of the information in question, we conclude that the marked information is confidential under section 14.154

of the Finance Code and must be withheld on that basis under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses 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). Section 348.501(a) of the Finance Code provides that a person may not act as a "holder" under chapter 348 unless the person is an authorized lender or a credit union or holds a license issued under this chapter. *Id.* § 348.501(a); *see also id.* § 348.001(3) (defining "holder" for purposes of Fin. Code ch. 348). The commissioner claims that Attachment C, which consists of documents pertaining to the requestor's complaint, is confidential pursuant to section 348.514(d) of the Finance Code. You argue that Attachment C "relates to the investigation process" and falls into the categories of information enumerated in section 348.514(d). However, you also inform us that the individual/business the commissioner is investigating "is not [a] . . . licensee, but . . . has filed a license application that is currently pending." By its own terms, section 348.514 only applies to investigations into a license holder. *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). Having considered your arguments and reviewed the submitted information, we conclude that the commissioner has failed to demonstrate the applicability of section 348.514(d) to the investigation at issue. Therefore, the commissioner may not withhold Attachment C on that basis under section 552.101 of the Government Code.

The commissioner claims that the employer identification number ("EIN") and taxpayer number it has marked in the remaining information are confidential under section 6103(a) of title 26 of the United States Code, which is also encompassed by section 552.101 of the Government Code. Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders "tax return information" confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). "Tax return information" is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. *See* 26 U.S.C. § 6103(b). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). We note that this office has determined EINs do not fall under the definition of "tax return information," and the commissioner does not direct this office to any statute that otherwise makes the EIN or taxpayer number it has marked confidential. Accordingly, we find the EIN and taxpayer number you have marked may not be withheld under section 6103(a) of title 26 of the United States Code in conjunction with section 552.101 of the Government Code.

The commissioner also asserts some of the submitted information may be excepted from disclosure under section 552.101 of the Government Code on the basis of federal copyright law. However, copyright law does not make information confidential for purposes of section 552.101. *See* Open Records Decision No. 660 at 5 (1999). A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1978). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. We note that blank forms may not be copyrighted. 37 C.F.R. § 202.1(c). In conclusion, the commissioner may not withhold any of the information it has marked under section 552.101 in conjunction with copyright law, but any information that is protected by copyright may only be released in accordance with copyright law.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See*

Indus. Found. v. Tex. Indus. Accident Bd., 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing and of no legitimate public interest. See Open Records Decision Nos. 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note that some of the information you have marked under common-law privacy consists of personal financial information pertaining to the requestor. The requestor has a special right of access to information implicating her own privacy interests, and it may not be withheld from her under section 552.101 in conjunction with common-law privacy. See Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles). Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the commissioner must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we conclude that the remaining information you have marked is not intimate or embarrassing and is of legitimate public interest. Thus, this information is not protected by common-law privacy and may not be withheld under section 552.101 on that basis.

Next, you have marked three pages in Attachment C as excepted under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." *Id.* §552.111. This exception encompasses the deliberative process privilege. 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, 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 ORD 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. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state that the remaining information you have marked under section 552.111 consists of advice, opinions, and recommendations reflecting the policymaking processes of the commissioner with respect to “enforcing Texas credit laws and licensing qualified lenders.” We note that one of the documents you marked under section 552.111 consists of a letter from the commissioner to the individual being investigated. Accordingly, we find that you have failed to demonstrate that this document is an internal communication of the commissioner consisting of advice, recommendation, and opinion reflecting the policymaking processes of the commissioner. Further, we find that the remaining documents you have marked consist of purely factual information. Accordingly, the commissioner may not withhold any of the information it marked under section 552.111 of the Government Code. As you raise no further exceptions against the disclosure of the information you marked under section 552.111, it must be released to the requestor.

Section 552.130 excepts from disclosure “information [that] relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state[.]”³ Gov’t Code § 552.130(a)(1)-(2). We note you have marked Texas motor vehicle record information pertaining to the requestor. Because section 552.130 protects privacy interests, the requestor has a right of access to her own Texas motor vehicle record information under section 552.023 and it may not be withheld from her under section 552.130. *See id.* § 552.023(b). We also note that you have marked some Texas driver’s license numbers and copies of Texas driver’s licenses under section 552.130 and pursuant to Open Records Decision No. 684. *See* ORD 684. Upon review, we agree that the commissioner may withhold the Texas driver’s license numbers and copies Texas driver’s licenses you have marked pursuant to Open Records Decision No. 684, without seeking a decision from our office. Additionally, we find, with the exception of the information we have marked for release, the commissioner must withhold the remaining Texas motor vehicle record information you have marked, as well as the information we have marked, under section 552.130 of the Government Code.

Next, you claim the information you have marked is excepted under section 552.136 of the Government Code, which states “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b), *see*

³Although you raise section 552.101 in conjunction with chapter 730 of the Transportation Code for the Texas motor vehicle record information in the submitted records, section 552.130 of the Government Code is the appropriate exception in this instance.

id. § 552.136(a) (defining “access device number”). Upon review, we find the commissioner must withhold the bank account and bank routing numbers we have marked under section 552.136 of the Government Code. However, the remaining information you have marked under section 552.136 does not consist of a credit card, debit card, charge card, or access device number, and it may not be withheld based on section 552.136.

We note the remaining information contains a personal e-mail address subject to section 552.137 of the Government Code.⁴ Section 552.137 of the Government Code 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). *See id.* § 552.137(a)-(c). The e-mail address in the remaining information is not of a type specifically excluded by section 552.137(c). As such, the e-mail address we have marked must be withheld under section 552.137, unless the owner of the e-mail address affirmatively consents to its disclosure.

You indicate you are withholding social security numbers under section 552.147 of the Government Code and Open Records Decision No. 684. Section 552.147 provides “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147. Although you indicate you are also withholding social security numbers pursuant to Open Records Decision No. 684, that previous determination does not address social security numbers and they may not be withheld on that basis. However, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. *Id.* § 552.147(b). We note, however, that you have marked the requestor’s social security number as information to be withheld. The requestor has a right of access to her own social security number and it may not be withheld from her pursuant to section 552.147. *See generally id.* § 552.023(b). The commissioner may withhold the social security numbers not pertaining to the requestor under section 552.147 of the Government Code. As you raise no further exceptions to the release of the requestor’s social security number, it must be released to her.

In summary, the commissioner must withhold 1) the information you have marked under section 552.101 of the Government Code in conjunction with section 14.154 of the Finance Code, 2) the information we have marked under section 552.101 in conjunction with common-law privacy, 3) with the exception of the information we have marked for release, the remaining Texas motor vehicle record information you have marked, as well as the information we have marked, under section 552.130 of the Government Code, 4) the information we have marked under section 552.136 of the Government Code, and 5) the information we have marked under section 552.137 of the Government Code, unless the

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

owner of the e-mail address affirmatively consents to its disclosure.⁵ The commissioner may withhold the social security numbers not pertaining to the requestor under section 552.147 of the Government Code. The remaining information must be released in accordance with copyright law.⁶

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,


Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/eb

Ref: ID# 392778

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note that Open Records Decision No. 684 (2009) also authorizes withholding of Texas driver's license numbers, license plate numbers, and copies of Texas driver's licenses under section 552.130 of the Government Code, bank account and bank routing numbers under section 552.136 of the Government Code, and e-mail addresses of members of the public under section 552.137 of the Government Code without the necessity of requesting an attorney general decision.

⁶We note that the requestor has a special right of access to some of the information being released in this instance. Gov't Code § 552.023 (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if the commissioner receives another request for this information from a different requestor, the commissioner must again seek a ruling from this office.