



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2014

Mr. Chris Sterner
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2014-14532

Dear Mr. Sterner:

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# 533231 (OOG ID Nos. 153-14 and 171-14).

The Office of the Governor (the "governor's office") received two requests for information pertaining to Toyota Motor North America Inc. ("Toyota"), including Toyota's Texas Enterprise Fund application and related communications, certain incentive agreements, and communications pertaining to "efforts to lure [Toyota] to relocate" its headquarters. You state the governor's office will release some information. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.104, 552.107, and 552.111 of the Government Code. Additionally, you state release of this information may implicate the proprietary interests of Toyota. Accordingly, you state you notified Toyota of the requests for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See Gov't Code* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (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 an attorney on behalf of Toyota. We have considered the submitted arguments and reviewed the submitted information, portions of which consist of representative samples.¹

¹We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note some of the submitted information was the subject of previous requests for information, in response to which this office issued Open Records Letter No. 2014-11906 (2014). In Open Records Letter No. 2014-11906, we concluded the governor's office may withhold the submitted information under section 552.104 of the Government Code. There is no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the governor's office may continue to rely on Open Records Letter No. 2014-11906 as a previous determination and withhold or release the identical information in accordance with that ruling.² See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). Next, we consider the remaining arguments against the disclosure of the submitted information that is not subject to that prior ruling.

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 section encompasses information protected by other statutes, such as section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" 26 U.S.C. § 6103(b)(2)(A). 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). The Forms 851 we indicated and their attachments, are confidential under section 6103(a) of title 26 of the United States Code, and the governor's office must withhold this information pursuant to section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 301.081 of the Labor Code. Section 301.081 governs the release of employment information held by the Texas

²As our ruling is dispositive, we need not address your arguments against disclosure of this information.

Workforce Commission (the "commission"). Section 301.081 provides in pertinent part as follows:

(a) Each employing unit shall keep employment records containing information as prescribed by the commission and as necessary for the proper administration of this title. The records are open to inspection and may be copied by the commission or an authorized representative of the commission at any reasonable time and as often as necessary.

(b) The commission may require from an employing unit sworn or unsworn reports regarding persons employed by the employing unit as necessary for the effective administration of this title.

(c) Employment information obtained or otherwise secured under this section may not be published and is not open to public inspection, other than to a public employee in the performance of public duties, except as the commission considers necessary for the proper administration of this title or as provided by commission rule and consistent with federal law.

Labor Code § 301.081(a)-(c). You state the information you marked consists of certain employment information provided to the governor's office by the commission pursuant to interagency transfer doctrine, as well as records derived from the commission. Section 301.081(c) states employment information maintained by the commission may be released to a public employee in the performance of public duties. *Id.* § 301.081(c). Pursuant to the interagency transfer doctrine, records that are confidential in the hands of the originating governmental body remain confidential when transferred to another governmental body. *See* Open Records Decision Nos. 674 at 4 (2001), 667 at 4 (2000); *see also* Attorney General Opinion H-836 (1976) (governmental bodies have need to maintain unrestricted flow of information, to effectuate state policy that governmental bodies cooperate in the efficient and economical administration of statutory duties). Accordingly, the information you marked is confidential under section 301.081 of the Labor Code and must be withheld in conjunction with section 552.101 of the Government Code. *See* Open Records Decision No. 599 at 4 (1992) (concluding predecessor statute to section 301.081 made confidential total number of employees of employing unit provided to commission in quarterly unemployment tax reports).

Section 552.110(b) of the Government Code 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.*; *see also* Open Records Decision No. 661 at 5 (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).

In advancing its arguments, we understand Toyota to rely, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only the interest of Toyota in the information at issue.

Upon review, we find Toyota has demonstrated portions of its information consist of commercial or financial information, the release of which would cause substantial competitive harm. Therefore, the governor's must withhold this information, which we have indicated, under section 552.110(b) of the Government Code.³

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], 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."⁴ Gov't Code § 552.136(b); see *id.* § 552.136(a) (defining "access device"). Upon review, the governor's office must withhold the information we marked under section 552.136 of the Government Code.

In summary, the governor's office may continue to rely on Open Records Letter Nos. 2014-529720 as a previous determination and withhold or release the identical information in accordance with that ruling. The governor's office must withhold (1) the

³As our ruling is dispositive, we need not address Toyota's remaining argument against disclosure of this information.

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).

information we indicated under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; (2) the information you marked under section 552.101 of the Government Code in conjunction with section 301.081 of the Labor Code; (3) the information we indicated under section 552.110(b) of the Government Code; and (4) the information we marked under section 552.136 of the Government Code. The governor's office must release the remaining information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,


Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 533231

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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(w/o enclosures)