



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 8, 2004

Mr. Brett Bray
Division Director
Texas Department of Transportation
P.O. Box 2293
Austin, Texas 78768

OR2004-2856

Dear Mr. Bray:

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#198952.

The Department of Transportation (the "department") received a request for all documents in its files, obtained or created within the last seven years, concerning a licensee doing business as Classic Jaguar (USA), Inc. You advise that you are withholding Texas driver's license numbers, dealer plate numbers, and social security numbers appearing on dealer license documents in reliance on the previous determinations issued by this office in Open Records Letter Nos. 2001-4775 (2001) and 2001-6050 (2001). *See* Open Records Decision No. 673 at 7-8 (2001)(establishing criteria for previous determinations). You state that you do not wish to withhold any information other than that allowed pursuant to the previous determinations addressed above, but ask whether portions of the requested information are excepted under section 552.101 of the Government Code in conjunction with the doctrine of common law privacy. Pursuant to section 552.305 of the Government Code, you notified Classic Jaguar of this request for information, of the fact that the instant request for information may implicate its proprietary interests, and of its right to submit arguments to this office explaining why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body

to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). Classic Jaguar submitted a letter to this office within ten business days after its receipt of your letter and claims that financial and personal information, including all personal and commercial bank records, balances and copies of checks, inventory values, property deeds and property leases should be excepted from disclosure under section 552.110 of the Government Code.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial 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(a), (b). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a person's trade secret claim under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one

submits an argument that rebuts the claim as a matter of law.¹ See Open Records Decision No. 552 at 5 (1990).

An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. Cf. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. See Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

After consideration of Classic Jaguar's arguments and our review of the submitted information, we find that Classic Jaguar has failed to adequately demonstrate that any portion of the information constitutes trade secret information under section 552.110(a) or commercial or financial information the release of which would cause Classic Jaguar substantial competitive harm for purposes of section 552.110(b). Accordingly, we conclude that the department may not withhold any portion of the submitted information related to Classic Jaguar under section 552.110 of the Government Code.

Next, we consider whether any of the requested information is excepted from disclosure under section 552.101 in conjunction with common law privacy. Specifically, you ask whether ownership percentages, inventory values, warranty deeds, telephone verification

¹ The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts, § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

information, property leases and copyrighted information included in the submitted information are considered confidential.

Certain types of personal financial information are protected by common law privacy under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Information must be withheld from disclosure under section 552.101 in conjunction with common law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Prior decisions of this office have determined that financial information relating only to an individual ordinarily satisfies the first element of the common law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. See, e.g., Open Records Decision Nos. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from disclosure by common-law privacy to be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis).

Regarding the submitted contract for deed, it is unclear to this office whether the buyer and seller are acting as individuals or as representatives of corporations. If the buyer or the seller is an individual or sole proprietorship, then the portions of the contract for deed that we have marked must be withheld from disclosure under section 552.101 in conjunction with common law privacy. If both the buyer and the seller represent corporations, then the marked information is not private under section 552.101 and must be released. See generally Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); see also *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). In either event, the department must release the remaining contents of the contract for deed. The submitted lease agreement is between Classic Jaguar, Inc. and another party. Although Classic Jaguar has no right to privacy regarding the financial information contained in the lease, the other party to the lease, if he is acting as an individual, does have such a right. Therefore, we have marked the portions of the lease agreement that the department must withhold from disclosure under section 552.101 in conjunction with common law privacy if the lessor is acting as an individual. We find that, because the licensee is a corporation and not an individual, the

remaining information at issue is not highly intimate or embarrassing for purposes of common law privacy and is therefore not confidential.

Next, the submitted information contains account numbers. Section 552.136 of the Government Code states that “[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. The department must, therefore, withhold the account numbers we have marked under section 552.136.

Finally, we address your responsibilities regarding copyrighted materials. You state that the submitted documents contain information, which you have marked, that may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, the department must withhold the dealer plate numbers and social security numbers for which it has been granted previous determinations. The department must withhold the marked personal financial information contained in the contract for deed if, in fact, either the buyer or the seller was acting as an individual, under section 552.101 in conjunction with common law privacy. Further, the department must withhold the marked personal financial information contained in the lease agreement under section 552.101 in conjunction with common law privacy if the lessor is acting as an individual. Finally, the department must withhold the account numbers we have marked under section 552.136. The remainder of the submitted information must be released in accordance with copyright law. Finally, the department requests that this office grant a previous determination allowing it to withhold ownership percentages, inventory values, property deeds, telephone verifications, property leases and copyrighted information. We decline to do so at this time.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Grace", written over a horizontal line.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/lmt

Ref: ID#198952

Enc. Submitted documents

c: Mr. Ahmad Keshavarz
106 E. 6th Street, Suite 700
Austin, Texas 78701-3660
(w/o enclosures)