



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 28, 2006

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

OR2006-15125

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# 267880.

The Office of Consumer Credit Commissioner (the "commissioner") received a request for information relating to Allstar Imports, Inc., dba Legend Mazda ("Legend"). You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.112, and 552.130 of the Government Code. You also believe that this request for information implicates the proprietary interests of Legend. You notified Legend of this request for information and of its right to submit arguments to this office as to why the requested information should not be released.<sup>1</sup> We received correspondence from an attorney for Legend. We have considered all the submitted arguments and have reviewed the information you submitted.

We first note that you also seek to withhold other information contained in the submitted documents, including federal employer identification numbers, e-mail addresses, social security numbers, insurance ID and/or policy numbers, account numbers, Texas driver's licenses, and vehicle identification numbers, under sections 552.101, 552.130, 552.136, 552.137, and 552.147 of the Government Code. You also inform us, however, that the requestor agreed to exclude those items of information from the scope of his request. Thus, because the requestor does not seek access to the excluded information, that information is

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<sup>1</sup>See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

not responsive to this request and need not be released. This decision does not address your exceptions to the disclosure of the excluded information.

Next, we must address the commission's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App. – Austin 1990, no writ).

You inform us that the commission received the instant request for information on September 18, 2006. Based on that date of receipt, the commission's ten-business-day deadline under section 552.301(b) was October 2, 2006. The commission requested this decision on October 20, 2006. You inform us that between the date of the commissioner's receipt of the request and the date of your request for this decision, the commissioner communicated with the requestor for the purpose of narrowing the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of narrowing or clarifying request for information). We note that a governmental body's communications with a requestor under section 552.222(b) can toll its deadlines under section 552.301. *See* Open Records Decision No. 663 at 4-5 (1999). In this instance, however, you have not demonstrated that your communications with the requestor were sufficient to bring your request for this decision within your ten-business-day deadline under section 552.301(b). We therefore conclude that the commissioner did not comply with section 552.301 of the Government Code in requesting this decision. Consequently, the submitted information is presumed to be public under section 552.302.

This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Although you claim an exception to disclosure under section 552.112 of the Government Code, that section is a discretionary exception that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.-Austin 1999, pet. denied) (Gov't Code § 552.112 is discretionary exception that may be waived); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, a claim under section 552.112 does not provide a compelling reason for non-disclosure under section 552.302, and the commissioner may not withhold any of the submitted information under section 552.112. However, the applicability of sections 552.101 and 552.130 of the Government Code can

provide compelling reasons for non-disclosure, and therefore we will consider your claims under those exceptions. Likewise, we will consider Legend's arguments.

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. Both the commissioner and Legend contend that some of the submitted information is confidential under 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 chapter 342, 348, or 371 of Finance Code), 411.082(2) (defining "criminal history record information" for purposes of Gov't Code ch. 411 subch. F). The commissioner indicates that marked portions of Attachment J 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.

The commissioner and Legend also join in raising section 552.101 in conjunction with 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.
- (b) The license holder shall
  - (1) give the commissioner or the commissioner's representative free access to the license holder's office, place of business, files, safes, and vaults; and

(2) allow the commissioner or the commissioner's representative to make a copy of an item that may be investigated under Subsection (a)(2).

...

(d) Information obtained under this section is confidential.

Fin. Code § 348.514(a)-(b), (d). The commissioner and Legend assert that the information submitted as Attachment G and certain dates marked in Attachment H are confidential under section 348.514. The commissioner states that Attachment G is a report of an examination of Legend pursuant to section 348.514 and that the dates marked in Attachment H are the dates of the examination. Having considered the parties' arguments and reviewed the information in question, we conclude that some of the information in Attachment G constitutes "[i]nformation obtained under [section 348.514.]" *Id.* § 348.514(d). The commissioner must withhold that information, which we have marked, under section 552.101 of the Government Code in conjunction with section 348.514 of the Finance Code. We also conclude, however, that neither the commissioner nor Legend has sufficiently demonstrated that either any of the remaining information in Attachment G or the marked dates in Attachment H fall within the scope of section 348.514(d). Therefore, none of that information is confidential under section 348.514 of the Finance Code, and the commissioner may not withhold any of the remaining 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).

Both the commissioner and Legend also raise section 552.101 in conjunction with the common-law right to privacy. Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The common-law right to privacy encompasses certain types of personal financial information. This office has determined that financial information that relates 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* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally 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).

We have marked the personal financial information contained in the submitted documents that the commissioner must withhold under section 552.101 in conjunction with common-law privacy. Although the commissioner has marked other information that she also contends is private, we conclude that the rest of the information in question is not protected by common-law privacy and may not be withheld on that basis under section 552.101.

Both the commissioner and Legend also raise section 552.130 of the Government Code, which exempts from public disclosure information that relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130. We have marked Texas motor vehicle title information that the commissioner must withhold under section 552.130. Although Legend also contends the identities of owners of motor vehicles are protected by this exception, we conclude that none of the remaining information at issue is excepted from disclosure under section 552.130.

Next, we consider Legend's additional arguments against disclosure. We note that Legend also asserts the applicability of section 552.112 of the Government Code. However, this section protects the interests of a governmental body, such as the commissioner, rather than those of a third party, such as Legend. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d at 776. Because the commissioner waived this exception in failing to comply with section 552.301, the commissioner may not withhold any of the submitted information under section 552.112.

Legend also invokes section 51.914 of the Education Code, which provides as follows:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under Chapter 552, Government Code, or otherwise:

- (1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee[.]

(2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties; or

(3) the plans, specifications, blueprints, and designs, including related *proprietary information*, of a scientific research and development facility that is jointly financed by the federal government and a local government or state agency, including an institution of higher education, *if the facility is designed and built for the purposes of promoting scientific research and development and increasing the economic development and diversification of this state.*

Educ. Code § 51.914; *see also* Open Records Decision No. 497 at 6 (1988) (interpreting statutory predecessor to Educ. Code § 51.914). Legend has not explained how or why section 51.914 would be applicable to any of the information at issue here. Therefore, the commissioner may not withhold any of the submitted information on the basis of section 51.914 of the Education Code under section 552.101 of the Government Code.

Legend also raises section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret 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). If the governmental body takes no position on the application of the “trade secrets” aspect of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid 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.<sup>2</sup> *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) 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. *See* 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).

Legend contends that the submitted documents contain customer information that constitutes a trade secret under section 552.110(a). Legend also argues that the documents contain commercial or financial information that is protected by section 552.110(b).<sup>3</sup> Having considered these arguments, we conclude that Legend has not established a *prima facie* claim that any of the remaining information at issue qualifies as a trade secret under section 552.110(a). We also conclude that Legend has not made the specific factual showing required by section 552.110(b) that release of any of the remaining information at issue

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<sup>2</sup>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).

<sup>3</sup>We note that Legend relies under section 552.110(b) on the test announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), concerning the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal entity. *See Nat’l Parks*, 498 F.2d 765. Although this office applied the *National Parks* test at one time to the statutory predecessor to section 552.110, the Third Court of Appeals overturned that standard in holding that *National Parks* was not a judicial decision for purposes of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766. Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information at issue would cause the business enterprise that submitted the information substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (discussing Seventy-sixth Legislature’s enactment of Gov’t Code § 552.110(b)).

would cause Legend substantial competitive harm. We therefore conclude that the commissioner may not withhold any of the remaining information under section 552.110.

Lastly, we note that some of the submitted information is protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary: (1) the commissioner must withhold the marked criminal history record information under section 552.101 of the Government Code in conjunction with section 14.154 of the Finance Code; (2) the commissioner must withhold the information that we have marked in Attachment G under section 552.101 in conjunction with section 348.514 of the Finance Code; (3) the commissioner must withhold the marked personal financial information under section 552.101 in conjunction with common-law privacy; and (4) the marked Texas motor vehicle title information must be withheld under section 552.130 of the Government Code. The rest of the submitted information must be released. Information that is protected by copyright must be released in accordance with copyright law.

You also ask this office to issue a previous determination that would authorize the commissioner to withhold certain types of information from the public without the necessity of again requesting an attorney general decision under the Act. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). We decline to issue such a decision 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

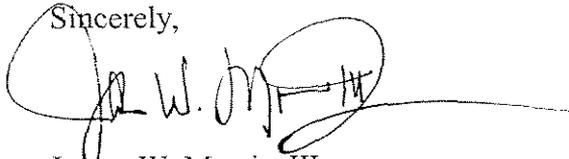
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor 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 Office of the Attorney General 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. 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 "James W. Morris, III", with a long horizontal line extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/jww

Ref: ID# 267880

Enc: Submitted documents

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