



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 25, 2010

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

OR2010-07545

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# 380479 (OCCC File #: OR-10-121).

The Office of Consumer Credit Commissioner (the "commissioner") received a request for the maximum auto dealer document fees submitted to the commissioner. You claim that the submitted information is excepted from disclosure under section 552.110 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 (the "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.¹ 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 several of the third parties and from the Texas Automobile Dealers Association ("TADA") and the Texas Independent Automobile Dealers Association, which submit arguments on behalf of all of the third parties. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments submitted by the

¹We note that, pursuant to section 552.305, the commissioner notified the 1,343 motor vehicle dealers that submitted documentary fee requests to the commissioner.

requestor. Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the commissioner informs us that a portion of the submitted information was the subject of two previous requests, as a result of which this office issued Open Records Letter Nos. 2010-00340 (2010) and 2010-03257 (2010). In those rulings, we determined, in part, the commissioner must withhold the commercial and financial information we marked relating to specified auto dealers under section 552.110(b) of the Government Code. In this instance, however, the requestor does not seek any commercial or financial information associated with any particular auto dealer. Thus, we find that the circumstances have changed, and the commissioner may not rely on Open Records Letter Nos. 2010-00340 and 2010-03257 as previous determinations in this instance. *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 that information is or is not excepted from disclosure). Accordingly, we will consider the submitted arguments for all of the submitted information.

Next, we note that some of the information the third parties seek to withhold was not submitted by the commissioner to this office for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted by the commissioner. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). However, we will address the arguments against the disclosure of the information submitted by the commissioner.

Some of the third parties claim the submitted information is confidential pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."² *Id.* § 552.101. This section encompasses the common-law right of privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *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 or 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

²We note this office has concluded section 552.101 does not encompass discovery privileges or other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2000), 575 at 2 (1990).

under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Common-law privacy protects the privacy interests of individuals, but not those of corporations or other types of business organizations. See 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 *U. S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *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). Accordingly, the third party business entities have no privacy interests in the submitted maximum auto dealer document fees. Further, the submitted information does not contain personal financial information related to any identified individual. Thus, no portion of the submitted information may be withheld under section 552.101 in conjunction with common-law privacy.

TADA argues the submitted information is excepted from public disclosure under rule 507 of the Texas Rules of Evidence and rule 192.6 of the Texas Rules of Civil Procedure. We note this office generally does not address discovery and evidentiary rules that may or may not be applicable to information submitted to our office by a governmental body. See Open Records Decision No. 416 (1984) (finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). However, the Texas Supreme Court has ruled that the Texas Rules of Civil Procedure and the Texas Rules of Evidence are “other law” that make information confidential for the purposes of section 552.022. See Gov’t Code § 552.022 (enumerating eighteen categories of information not excepted from required disclosure unless expressly confidential under other law); see also *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). In this instance, the submitted information does not fall into any of the categories of information made expressly public by section 552.022 of the Government Code. Therefore, the Texas Rules of Evidence and the Texas Rules of Civil Procedure are not applicable. Accordingly, we conclude that the commissioner may not withhold any portion of the submitted information pursuant to rule 507 of the Texas Rules of Evidence or rule 192.6 of the Texas Rules of Civil Procedure.

One of the third parties raises section 552.102(a) of the Government Code for the submitted information. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). Section 552.102(a) protects information relating to public officials and employees. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ *ref’d n.r.e.*) (addressing statutory predecessor). In this instance, the information at issue is related to private auto dealers, not public officials or employees. Therefore, the commissioner may not withhold any portion of the submitted information under section 552.102(a) of the Government Code.

Next, we consider the commissioner's, TADA's, and the third parties' arguments under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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). 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.

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

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 single or ephemeral events 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 Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a

³The following are the six factors that the Restatement gives 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 others 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).

claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. See ORD 552 at 5. 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. Open Records Decision No. 402 (1983).

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).

TADA and the third parties argue that the submitted information constitutes trade secret information protected under section 552.110(a). Upon review of the submitted information and arguments, we determine TADA and the third parties have failed to demonstrate any portion of the submitted information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the commissioner may not withhold any of the submitted information on the basis of section 552.110(a) of the Government Code.

TADA and the third parties also contend that the submitted information at issue constitutes commercial and financial information, the release of which would cause the third parties substantial competitive harm. However, we note the submitted information consists of a list of the maximum auto dealer document fees submitted to the commissioner that does not correspond with any identifying information of any auto dealer. TADA and some of the third parties argue that the requestor has already received a list of the auto dealers’ names and addresses from a previous request. They contend that if the maximum auto dealer document fee amounts are released in the same order as the previously disclosed names and addresses, then the two lists could be read together and would give the requestor access to information that was previously withheld. We note, however, the Act does not allow information to be withheld from a requestor based on deductions that can be made from the released information that could reveal otherwise confidential information. See *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex. 1995). Further, additional auto dealers’ maximum document fees have been added to the list. Accordingly, we find TADA and the third parties have failed to prove how the list of the maximum auto dealer document fees will cause any of the third parties substantial competitive harm. Thus, the commissioner may not withhold the submitted information under section 552.110(b) of the Government Code. As no further arguments against disclosure are raised, the submitted 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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eeg

Ref: ID# 380479

Enc. Submitted documents

c: Requestor

(w/o enclosures)

Ms. Susan G. White
Counsel for several 3rd parties
Sapp, White & Freeman, P.C.
809 West Avenue
Austin, Texas 78701
(w/o enclosures)

Ms. Monica D. Cunningham
Counsel for Viscount Properties Operators LP
Kemp Smith LLP
816 Congress Avenue, Suite 1150
Austin, Texas 78701
(w/o enclosures)

Mr. William E. Sullivan Jr.
WILPWR, LLC
2213 Old Jackboro Highway
Wichita Falls, Texas 76301
(w/o enclosures)

Mr. Don Lacefield
Nichols Trailer Ranch #1, LTD
2764 I-30
Mesquite, Texas 75150
(w/o enclosures)

Ms. Karen Phillips
Texas Automobile Dealers Association
1108 Lavaca, Suite 800
Austin, Texas 78701
(w/o enclosures)

Mr. Christopher Wall
Counsel for Keating Automotive Group
Roberts, Roberts, Odefery & White
P.O. Box 9
Port Lavaca, Texas 77979
(w/o enclosures)

Mr. James E. Potts
Counsel for CarMax Auto Superstore and Westlex Corporation
Hughes Watters Askanase LLP
333 Clay, 29th Floor
Houston, Texas 77002
(w/o enclosures)

Mr. James W. Essman
Counsel for Lithia Motors
Shafer, Davis, O'Leary & Stoker
P. O. Drawer 1552
Odessa, Texas 79760
(w/o enclosures)

Mr. Greg Chaney
Chacon Autos, Ltd
1400 S. E. Military Drive
San Antonio, Texas 78214
(w/o enclosures)

Mr. Jeff Martin
Texas Independent Automobile Dealers Association
P.O. Box 127
Round Rock, Texas 78681
(w/o enclosures)

Ms. Margie Brinson
Brinson
2970 Highway 31 East
Athens, Texas 75752
(w/o enclosures)

Mr. Jefferson B. Davis
Counsel for Tipton Ford, Inc.
Clardy Davis & Knowles, LLP
P.O. Box 635426
Nacogdoches, Texas 75961
(w/o enclosures)