



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 18, 2013

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

OR2013-01094

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# 476473.

The Office of Consumer Credit Commissioner (the "commissioner") received a request for Schedule B forms for all licensed and provisionally licensed credit access businesses, including, when not mentioned on the form, the name of the associated licensed or provisionally licensed credit access business.¹ Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified the credit access businesses and third party lenders whose information is at issue of the request for information and of their right to submit arguments to this office as to why the submitted information 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 representatives of numerous credit access businesses and third party lenders, including the Consumer Service Alliance of Texas, which is representing numerous

¹We note the commissioner sought and received clarification of the information requested. *See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request).*

credit access businesses and third party lenders (collectively, "the third parties").² We have also received comments from the requestor and from the Texas Observer. *See* Gov't Code § 552.304 (interested third party may submit written comments stating why information should or should not be released.) We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the commissioner has marked a portion of the submitted information as not responsive to the present request. We note the marked information is contained in an attachment to the responsive Schedule B form. Upon review, we find the marked information is part of the responsive Schedule B form and therefore is responsive to the present request.

Next, we note 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the remaining third parties explaining why their information should not be released. Additionally, although we received comments from other third parties, these third parties did not raise any exceptions to disclosure or submit any arguments explaining why their information should not be released. Therefore, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in the submitted information. *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 information at issue on the basis of any proprietary interest any of the remaining third parties may have in it.

Next, some of the third parties claim the present request is an improper request because it requires the commissioner to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request for information. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Furthermore, the Act does not require a governmental body to make available information that did not exist when the request was received, nor does it require a governmental body to compile information or prepare new information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*); Open Records Decision No. 452 at 3 (1986). However, a governmental body must make a good-faith effort to relate a request to information that is

²We note although one credit access business raises sections 552.113 and 552.131 of the Government Code, it has not submitted any arguments in support of those exceptions. Accordingly, we do not address the applicability of those exceptions to the information at issue. *See* Gov't Code §§ 552.301, .302.

within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, the request for information does not ask the commissioner to answer questions; rather, the request requires the commissioner to locate specified information in its possession. Because the commissioner has submitted information for our review, we believe the commissioner has made a good-faith effort to submit information responsive to the request. Therefore, we will consider the third parties' arguments to withhold the submitted information.

Next, we address the third parties' expectations of confidentiality. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

We also note some of the third parties seek to withhold information that the commissioner has not submitted for our review. This ruling does not address information beyond what the commissioner has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the commissioner submitted as responsive to the request for information. *See id.*

Some of the third parties argue the names and addresses of the third party lenders are confidential under common-law privacy. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (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 at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. We note that common-law privacy protects the interests of individuals, not those of corporate and other business entities. *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 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). We further note that the names, addresses,

and telephone numbers of members of the public are generally not excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 551 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy). Upon review, we find no portion of the submitted information is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the commissioner may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, some of the third parties argue the names and addresses of the third party lenders are confidential under constitutional privacy. Section 552.101 of the Government Code also encompasses constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See* Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find the third parties have failed to demonstrate how any portion of the submitted information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the commissioner may not withhold any of the submitted information at issue under section 552.101 on the basis of constitutional privacy.

Next, some of the third parties claim their information is excepted under section 552.110 of the Government Code, which protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. 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 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. *See* 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.*; *see also* ORD 661 at 5-6 (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).

Upon review, we find that two of the third party lenders have established that their customer information constitutes a trade secret. We find release of the information we have marked would reveal these third party lenders’ customer information. Therefore, the commissioner must withhold this information, which we have marked, under section 552.110(a) of the

³The 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).

Government Code. However, none of the third parties have demonstrated that any of portion of the remaining 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 remaining information under section 552.110(a).

Upon review of the third parties' arguments and the information at issue, we find the third parties have made only conclusory allegations that the release of their information would result in substantial damage to their competitive position. Thus, the third parties have not demonstrated that substantial competitive injury would result from the release of any of their information. *See* ORD 661. Accordingly, none of the remaining information may be withheld under section 552.110(b).

Some of the third parties assert the submitted information is excepted from disclosure pursuant to section 552.112 of the Government Code. Section 552.112 excepts from public disclosure "information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." Gov't Code § 552.112. Section 552.112 protects the interests of a governmental body, rather than the interests of third parties. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied) (section 552.112 is permissive exception that governmental body may waive in its discretion). Therefore, because the commissioner does not raise section 552.112, this section is not applicable to the requested information.

We note the remaining information contains e-mail addresses subject to section 552.137 of the Government Code.⁴ Section 552.137 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 addresses we have marked are not of a type specifically excluded by section 552.137(c). Accordingly, the commissioner must withhold the e-mail addresses we have marked under section 552.137 unless their owners affirmatively consent to disclosure.⁵

In summary, the commissioner must withhold the information we have marked under section 552.110(a) of the Government Code, and the e-mail addresses we have marked under

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

⁵We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

section 552.137 of the Government Code, unless the owners consent to their release. The remaining information must be released.

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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/ag

Ref: ID# 476473

Enc. Submitted documents

- c: Requestor
(w/o enclosures)
- c: All Third Parties
(w/o enclosures)
- c: 112 Third Parties
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