



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 7, 2014

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

OR2014-11572

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# 528728 (OCCC File No. OR-14-191).

The Office of Consumer Credit Commissioner (the "OCCC") received a request for information pertaining to a specified type of complaint made by consumers since July 1, 2013.¹ The OCCC informs us it will redact account numbers in accordance with section 552.136 of the Government Code and personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² The OCCC states it will provide some of the requested information to the requestor upon payment for copies, but claims some of the submitted information is excepted from

¹The OCCC sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specified categories of information, including an access device number under section 552.136 of the Government Code and 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. However, on September 1, 2011, the Texas legislature amended section 552.136 to allow a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Thus, the statutory amendments to section 552.136 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to section 552.136(b) in accordance with section 552.136, not Open Records Decision No. 684.

disclosure under sections 552.101, 552.107, and 552.130 of the Government Code. The OCCC also states, and provides documentation showing, it notified interested third parties of the OCCC's receipt 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.³ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 at 3 (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 XCEL Recovery, an interested third party. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-01094 (2013). In response to that ruling, two separate lawsuits were filed against this office: *Consumer Serv. Alliance v. Abbott*, No. D-1-GN-13-00382 (98th Dist. Ct., Travis County, Tex.); and *Cash Zone, LLC d/b/a Cash Biz & Cash Kingdom v. Abbott*, No. D-1-GN-13-00385 (201st Dist. Ct., Travis County, Tex.). Accordingly, we will allow the trial courts to resolve the issue of whether the information at issue in these pending lawsuits must be released to the public.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. See Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. See Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. See TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. See *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. See TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this

³The OCCC notified the following third parties: Ace Credit Access LLC d/b/a Ace Cash Express #1704; Bluffview Funding Group, LLC; Certegy Check Services, Inc.; DC & BB Enterprises Inc. d/b/a/ Check N Title Loan; DDB Investment Company, LLP; NCP Finance Limited Partnership; Red Point Financial Group, LLC; RWI Captial Invstments, LLC #5; Sands Recovery Group, LLC; Southwestern & Pacific Speciality Finances Inc. d/b/a Check N Go; TJD Financial Services Inc. d/b/a The Loan Depot; United Debt Holdings, LLC; and XCEL Recovery.

office of the identities and capacities of the individuals to whom each communication at issue has been made. Finally, the attorney-client privilege applies only to a confidential communication, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You explain Exhibit D consists of confidential communications between an attorney for and employee of the OCCC that were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been maintained. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the OCCC may withhold Exhibit D under section 552.107(1) of the Government Code.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos. 600 (1992), 545 (1990)*. Upon review, we find some of the remaining information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the OCCC must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.⁴ However, we conclude the remaining information is not confidential under common-law privacy, and the OCCC may not withhold it under section 552.101 on that ground.

⁴As our ruling is dispositive, we do not address your other arguments to withhold this information.

Some of the remaining information is excepted from disclosure under section 552.136 of the Government Code.⁵ Section 552.136 of the Government Code provides the following:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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(a)-(b). The OCCC must withhold the account numbers we have marked under section 552.136 of the Government Code.

Finally, 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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). We note XCEL Recovery did not provide arguments in its correspondence to this office objecting to the release of any of the information at issue under the Act. In addition, as of the date of this letter, none of the remaining third parties has submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding any portion of the remaining information constitutes proprietary information of any third party, and the OCCC may not withhold any portion of the remaining information on that basis. *See* 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.

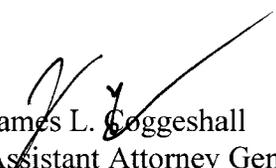
To conclude, the OCCC may withhold Exhibit D under section 552.107 of the Government Code. The OCCC must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and under section 552.136 of the Government Code. The OCCC must release the remaining information.

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 528728

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Xcel Recovery
11702 B Grant Road, #408
Cypress, Texas 77429
(w/o enclosures)

DC & BB Enterprises Inc.
d/b/a/ Check N Title Loan
3821 South Buckner Boulevard
Dallas, Texas 75227
(w/o enclosures)

TJD Financial Services Inc.
d/b/a The Loan Depot
2403 Derby Lane
Madisonville, Texas 77864
(w/o enclosures)

Southwestern & Pacific Speciality
Finances Inc. d/b/a Check N Go
7755 Montgomery Road, Suite 400
Cincinnati, Ohio 45236
(w/o enclosures)

Ace Credit Access LLC
d/b/a Ace Cash Express #1704
1231 Greenway Drive, Suite 600
Irving, Texas 75038
(w/o enclosures)

DDB Investment Company, LP
5003 Highway 6, Suite 5011
Houston, Texas 77084
(w/o enclosures)

NCP Finance Limited Partnership
205 Sugar Camp Circle
Department CNG
Dayton, Ohio 45409
(w/o enclosures)

Sands Recovery Group, LLC
P.O. Box 358
Hamburg, New York 14075
(w/o enclosures)

Bluffview Funding Group, LLC
8340 Meadow Road, Suite 244
Dallas, Texas 75231
(w/o enclosures)

RWI Capital Investment, LLC #5
P.O. Box 5188
Texarkana, Texas 75505-5188
(w/o enclosures)

Red Point Financial Group, LLC
6125 Luther Lane, Suite 241
Dallas, Texas 75225
(w/o enclosures)

United Debt Holdings, LLC
4833 Front Street Unit B, #243
Castle Rock, Colorado 80104
(w/o enclosures)

Certegy Check Services, Inc.
P.O. Box 30046
Tampa, Florida 33630-3046
(w/o enclosures)