



October 15, 2002

Ms. Leah Curtis Morris  
Curtis, Alexander, McCampbell & Morris, P.C.  
P.O. Box 1256  
Greenville, Texas 75403-1256

OR2002-5855

Dear Ms. Morris:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170704.

The Hunt County MHMR (the "HCMHMR"), which you represent, received a request for copies of eight categories of information as follows:

- 1) month by month breakdown of staff headcount with salary grouped by direct care staff and those not direct care staff from January 1, 2001 to present;
- 2) employment contracts, applications, position descriptions, and salary and compensation history pertaining to four specified individuals;
- 3) whether Dr. Rick Davis received a pay raise within the last six months that was approximately 10% of his salary;
- 4) whether Dr. Rick Davis received a cash bonus of approximately \$14,000 within the last six months;
- 5) board meeting minutes discussing Dr. Rick Davis' salary and compensation;
- 6) Fenton Hartwig's salary prior to Mr. Hartwig being laid off in 2001;
- 7) whether Fenton Hartwig's current salary is approximately \$80,000; and
- 8) whether approximately \$100,000 in medical benefits were disbursed for Dr. Debra Hockett.

The requestor also asks HCMHMR several questions in his request. We note that the Public Information Act (the "Act") does not require a governmental body to prepare answers to questions posed by a requestor. *See* Open Records Decision No. 555 at 1-2 (1990) (considering request for answers to fact questions). You state that HCMHMR will provide the requestor with information that is responsive to item five of the request. You also state that HCMHMR does not maintain information that is responsive to item one or portions of item two of the request.<sup>1</sup> You claim that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.102, 552.103, 552.107, and 552.117 of the Government Code. Pursuant to section 552.305(d) of the Government Code, HCMHMR notified four third parties of HCMHMR's receipt of the request and of their right to submit arguments to this office as to why information pertaining to each of them should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* 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 to disclosure under Act in certain circumstances). One of those parties, Dr. Rick Davis, responded to HCMHMR's section 552.305 notice and forwarded comments to our office as to why some of the requested information pertaining to Dr. Davis should not be released to the requestor. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released). We have considered all arguments and have reviewed the submitted information.

You claim that the submitted information is excepted from disclosure in its entirety pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

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<sup>1</sup> We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). HCMHMR maintains the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold from disclosure. In order to meet this burden, HCMHMR must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). HCMHMR must meet both elements of this test in order for the information at issue to be excepted from disclosure under section 552.103. *See id.*

You state that the requestor has filed a lawsuit in small claims court before Justice of the Peace, Precinct 1, Place 2 related to his termination from HCMHMR, that a hearing was held on that matter on August 7, 2002, and that the requestor intends to utilize this information in his civil litigation against HCMHMR. Although we find that HCMHMR has established that litigation was pending when it received this request for information, we also find, however, that HCMHMR has failed to demonstrate how the submitted information is related to that pending litigation. We also are unable to determine how the information is related to the pending litigation based on our own review of the submitted information. *See Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation)*. Therefore, after carefully reviewing your representations and the information at issue, we conclude that HCMHMR may not withhold from disclosure any portion of the submitted information under section 552.103 of the Government Code.

You also claim that the submitted information is excepted from disclosure in its entirety pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information encompassed by the attorney-client privilege. We note that in instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See Open Records Decision No. 574 (1990)*. Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *See Open Records Decision No. 574 at 5 (1990)*. After carefully reviewing your arguments and the submitted information, we find that no portion of the information constitutes either a client confidence or an attorney's legal advice

or opinion provided in furtherance of the rendition of legal services to the client. Accordingly, we conclude that HCMHMR may not withhold from disclosure any portion of the submitted information pursuant to section 552.107(1) of the Government Code.

We note, however, that some social security numbers that are contained within the information at issue may be excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with federal law.<sup>2</sup> The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). HCMHMR has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that these social security numbers are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution HCMHMR, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing these social security numbers, HCMHMR should ensure that the social security numbers were not obtained or are not maintained by HCMHMR pursuant to any provision of law enacted on or after October 1, 1990. We note, however, that the right of privacy is purely personal and lapses at death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). Accordingly, the department may not withhold the deceased doctor's social security number noted in the submitted information under section 552.101 in conjunction with federal law.

You also claim that portions of the information at issue are excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected from disclosure under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected from disclosure under the common-law right to privacy as incorporated by section 552.101. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we address HCMHMR's section 552.101 and 552.102 claims together.

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<sup>2</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information protected from disclosure by other statutes.

We note that information is protected from disclosure under the common-law right to privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *See id.* This office has long held that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from disclosure pursuant to the common-law right to privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 at 5 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Prior decisions of this office have also found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See* Open Records Decision Nos. 600 (1992) (finding personal financial choices concerning insurance and designation of beneficiary of employee's retirement benefits generally confidential), 545 (1990) (common law privacy protects personal financial information), 523 (1989) (information related to individual's mortgage payments, assets, bills, and credit history excepted under the common law right to privacy). However, we note that the right of privacy is purely personal and lapses at death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). On the other hand, if the release of information about a deceased person reveals highly intimate or embarrassing information about living persons, the information must be withheld from disclosure in order to protect the living individuals' privacy. *See* Attorney General Opinion JM-229. Based on our review of your arguments and the remaining information at issue, we find that a portion of this information would implicate an individual's common-law privacy interests. Accordingly, we conclude that HCMHMR must withhold from disclosure the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You also contend that some of the information at issue should be withheld from disclosure on privacy grounds because the release of the information may place someone in a false light. We note that the false-light invasion of privacy was discussed at length in Open Records Decision No. 579 (1990). As noted in that decision, the gravamen of a false-light privacy complaint is not that the information revealed is confidential, but that it is false. Therefore, an exception to the Act focused on the confidentiality of information does not embrace this particular tort doctrine. We further note that the Texas Supreme Court has held that false-light privacy is not an actionable tort in Texas. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). Consequently, we conclude that HCMHMR may not withhold from disclosure any portion of the information at issue under false-light privacy.<sup>3</sup>

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<sup>3</sup> We note, however, that if portions of the information at issue are in fact inaccurate or untrue, there is no reason that HCMHMR may not also release, along with the requested documents, other supplemental information that explains why and to what extent the information is inaccurate or that otherwise clarifies the information contained in the records at issue.

You also claim that portions of the information at issue are excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the official or employee did not request confidentiality in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). After carefully reviewing your arguments and the information at issue, we find that no portion of the information constitutes information that is protected from disclosure under section 552.117. Accordingly, we conclude that HCMHMR may not withhold from disclosure any portion of the information at issue under section 552.117(1) of the Government Code.

We also note that portions of the information at issue are subject to section 552.136 of the Government Code. Section 552.136 makes certain access device numbers confidential and provides in pertinent part:

(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. Accordingly, we conclude that HCMHMR must withhold from disclosure the bank account numbers that we have marked pursuant to section 552.136 of the Government Code.

Finally, we note that the information at issue contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Accordingly, we conclude that HCMHMR must withhold from disclosure the e-mail addresses that we have marked pursuant to section 552.137 of the Government Code, unless the members of the public in question have affirmatively consented to their release.

In summary, some of the social security numbers that are contained within the information at issue may be confidential under federal law. HCMHMR must withhold from disclosure the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. HCMHMR must withhold from disclosure the bank account numbers that we have marked pursuant to section 552.136 of the Government Code. HCMHMR must withhold from disclosure the e-mail addresses that we have marked pursuant to section 552.137 of the Government Code, unless the members of the public in question have affirmatively consented to their release. HCMHMR must release the remaining submitted information to the requestor.

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 Department of Public 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,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/RJB/seg

Ref: ID# 170704

Enc. Marked documents

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(w/o enclosures)