OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

October 16, 2002

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

OR2002-5879

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# 170747.

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

1) evidence of a contract between HCMHMR and Automatic Data Processing, Inc. ("ADP") as referenced in the letter to Ms. Tonia Pollard dated June 5, 2002;

2) evidence of work performed by ADP as specified in the same letter;

3) current status of the Human Resources/Payroll Specialist position as referenced in the same letter;

4) evidence that requestor's specified allegations were discussed with center staff board members and local law enforcement personnel as stated in the letter from the center's attorney dated June 12, 2002;

5) policies and procedures regarding center e-mail usage;

6) activity log of the Personnel Services Schedule database application for April 17, 2002;

7) system event logs of the Primary Domain Controller for the days of April 16, 2002 through April 20, 2002; and

8) telephone activity log for calls originating from Deborah Turner's extension between 1200 and 1400 hours on April 17, 2002.

You state that the information that is responsive to item 5 of the request is available for the requestor's review. You also state that HCMHMR does not maintain information that is responsive to items four and six through eight of the request.[1] 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, 552.117, and 552.137 of the Government Code. You also claim that the release of portions of the remaining requested information may implicate ADP's proprietary interests in the information under sections 552.104, 552.110, and 552.128 of the Government Code.[2] Pursuant to section 552.305(d) of the Government Code, HCMHMR notified an interested third party of HCMHMR's receipt of the request and of its right to submit arguments to this office as to why information pertaining to ADP 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 Public Information Act in certain circumstances). We have considered the exceptions you claim and have reviewed the submitted information. 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).

---

[1] 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).

[2] As HCMHMR did not submit to this office written comments stating the reasons why section 552.104 of the Government Code would allow this information to be withheld from disclosure, we find that HCMHMR has waived this exception to disclosure. *See* Gov't Code §§ 552.301, .302. Further, as we did not receive comments stating the reasons why section 552.128 of the Government Code would allow this information to be withheld from disclosure, we assume that this exception to disclosure is no longer being asserted by HCMHMR.

We note at the outset that 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 that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have received no comments from any third party explaining why any portion of ADP's information should not be released to the requestor. Therefore, we have no basis to conclude that the release of any portion of this information would implicate ADP's proprietary interests under section 552.110. *See* Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that HCMHMR may not withhold from disclosure any portion of ADP's information pursuant to section 552.110 of the Government Code.

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 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 [1st 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 you have failed to demonstrate that any 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.

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. 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.* After carefully reviewing the remaining information at issue, we find that no portion of this information would implicate an individual's common-law privacy interests. Accordingly, we conclude that HCMHMR may not withhold from disclosure any portion of the remaining information at issue pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

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 the information at issue, we find that no portion of it 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.

You claim that the remaining 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 address that we have marked pursuant to section 552.137 of the Government Code, unless the individual to whom this address belongs has affirmatively consented to its release.

In summary, HCMHMR must withhold from disclosure the e-mail address that we have marked pursuant to section 552.137 of the Government Code, unless the member of the public in question has affirmatively consented to its release. HCMHMR must release the remaining submitted information to the requestor in its entirety.

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).

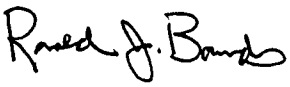
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lt

Ref: ID# 170747

Enc. Marked documents

Mr. Charles G. Galloway
6507 Woodchuck
Greenville, Tx 75402-5574
(w/enclosures)