



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 30, 2011

Mr. Jack E. Skaggs  
Jackson Walker L.L.P.  
100 Congress Avenue, Suite 1100  
Austin, Texas 78701

OR2011-04349

Dear Mr. Skaggs:

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# 413444.

CommUnityCare, which you represent, received a request for records reflecting the salary history, resume, performance evaluations, and disciplinary actions for eleven named individuals and records reflecting the payment of any incentive pay or pay increases for five named individuals at the ARCH/Salvation Army Clinic. You claim that the submitted information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code. You state you have notified the named individuals to whom the requested information relates pursuant to section 552.304 of the Government Code.<sup>1</sup> *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for Attorney General ruling should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you did not submit information pertaining to five of the named individuals in the request. To the extent any information responsive to this portion of the request existed on the date CommUnityCare received the request, we assume CommUnityCare has released it. If CommUnityCare has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we must address CommUnityCare's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to

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<sup>1</sup>As of the date of this letter, we have not received any arguments from the named individuals regarding the information at issue.

section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A). CommUnityCare states it received the present request for information on January 13, 2011. Although you state CommUnityCare was closed for business on January 17, 2011, you do not inform us CommUnityCare was closed for any other business days between January 13, 2011 and February 4, 2011. Accordingly, CommUnityCare's fifteen-business-day deadline under section 552.301(e) was February 4, 2011. However, CommUnityCare did not submit the requested information until February 7, 2011. Consequently, we find the CommUnityCare failed to comply with the requirements of section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing the information is made confidential by another source of law or affects third party interests. *See* ORD 630. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature. This section serves only to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decisions No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Consequently, CommUnityCare may not withhold the submitted information pursuant to section 552.103 of the Government Code. However, you raise section 552.102 of the Government Code for the submitted information. Further, we note some of the submitted information may be subject to sections 552.101, 552.117, 552.130, and 552.137 of the Government Code.<sup>2</sup> Because sections 552.101, 552.102, 552.117, 552.130, and 552.137 can provide compelling reasons for non-disclosure, we will address the applicability of these exceptions to the submitted information.

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<sup>2</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the doctrine of common-law 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 satisfied. *Id.* at 681-82. This office has found an employee's voluntary financial choices are highly intimate and embarrassing for purposes of common-law privacy. See Open Records Decision Nos. 600 (1992) (personal financial information protected by common-law privacy includes designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See ORD 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure); see also Open Records Decision Nos. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy), 523 (1989). Whether financial information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. See Open Records Decision No. 373 (1983). Upon review, we find a portion of the remaining information, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Therefore, CommUnityCare must withhold this information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

You claim the submitted information is excepted from disclosure under section 552.102 of the Government Code. 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). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we have marked the information that must be withheld under section 552.102(a). The remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that the information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note section 552.117(a)(1) encompasses personal cellular telephone and

home facsimile numbers, provided the employee pays for the cellular telephone or facsimile service with his or her personal funds. *See* Open Records Decision No. 506 at 5-6 (1988) (Gov't Code § 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We further note that a post office box number is not a "home address" for purposes of section 552.117.<sup>3</sup> Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, to the extent the employees whose information is at issue timely requested confidentiality under section 552.024, CommUnityCare must withhold the information we have marked under section 552.117(a)(1).<sup>4</sup> Cellular telephone numbers and home facsimile numbers may only be withheld, however, if the employees concerned paid for the cellular telephone or facsimile service with their personal funds. However, if the employees did not timely elect confidentiality under section 552.024, CommUnityCare may not withhold the marked information under section 552.117(a)(1) of the Government Code.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Upon review, CommUnityCare must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

Section 552.137 of the Government Code 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. The e-mail addresses we have marked in the remaining information are not of a type specifically excluded by section 552.137(c). As such, these e-mail addresses must be withheld under section 552.137, unless the owners of the e-mail addresses at issue have affirmatively consented to their release.

In summary, CommUnityCare must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. CommUnityCare must withhold the information we have marked under section 552.102(a)

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<sup>3</sup>*See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed at home) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)).

<sup>4</sup>Regardless of the applicability of section 552.117 of the Government Code, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

of the Government Code. CommUnityCare must withhold the information we have marked under section 552.117(a)(1) of the Government Code to the extent the information pertains to current or former employees who timely requested confidentiality for the information under section 552.024 of the Government Code, including the cellular telephone and home facsimile numbers of employees who paid for the services at issue with their personal funds. CommUnityCare must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. CommUnityCare must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses at issue have affirmatively consented to their release.<sup>5</sup> 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](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/tf

Ref: ID# 413444

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>5</sup>This office issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information, including Texas driver's license numbers under section 552.130 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.