



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 9, 2007

Mr. Denis C. McElroy
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2007-01740

Dear Mr. McElroy:

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# 270899.

The City of Fort Worth (the "city") received a request for (1) the city's and the trustee's pleadings concerning the Bayou investment, (2) the names of employees and corresponding data on schedule A-2 of the city auditor's report of the Employees Retirement Fund, and (3) the account balances and department names for the top twenty participants in the Deferred Retirement Option Provision for the Employees Retirement Fund.¹ You state that you have released the requested pleadings. You claim that the submitted information is excepted from disclosure under section 552.101 Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the common law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate

¹We note that the city received clarification regarding parts one and three of this request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure under common law privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685.

Prior decisions of this office have found that financial information relating to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. Open Records Decision Nos. 545 (1990), 373 (1983). Thus, a public employee's allocation of his salary to a voluntary investment program offered by his employer is a personal investment decision, and information about that decision is excepted from disclosure by common law privacy. Open Records Decision Nos. 600 (1992) (TexFlex benefits), 545 (1990) (deferred compensation plan). However, where a transaction is funded in part by the state, it involves the employee in a transaction with the state and is not protected by privacy. Open Records Decision No. 600. Thus, an employee's participation in a group pension or insurance plan funded by the governmental body is not excepted from disclosure under common law privacy. *Id.*; Open Records Decision No. 480 (1987).

You state that the city's retirement system is a "tax deferred" plan pursuant to section 414(h) of the Internal Revenue Code. You explain that an employee who is eligible for retirement from the city receives a normal retirement benefit that equals a certain percentage of the employee's three highest years of salary. You further explain that an employee eligible for the normal city retirement may retire, continue to work, or elect to participate in the city's deferred retirement option program ("DROP").

You state that if the employee elects to participate in the DROP, the employee's retirement benefit is calculated as of the date of the DROP election, the retirement contributions are paid into the DROP account, and, when the employee retires, the accrued benefit in the DROP account will be paid to the employee as a lump sum. You state that an eligible employee is free to elect to participate in the DROP option, and the election does not affect the amount of the city's contributions to the retirement plan.

We find that an employee's choice of how he receives his retirement benefit, whether it be through the normal retirement scheme or the DROP option, is a personal financial decision that is protected by common law privacy. We note, however, that the requestor did not ask for, nor does the submitted information regarding the account balances and department names for the top twenty participants reveal, DROP participants' identities. Furthermore, we find that the public has a legitimate interest in the DROP account amounts. Therefore, the city may not withhold the account balances and department names for the top twenty participants under section 552.101 in conjunction with common law privacy.

You also claim that releasing the data in schedule A-2 of the city auditor's report of the Employees Retirement Fund in personally identifiable form would violate the privacy of the employees involved. You state that the overtime hours an employee works is factored into determining the employee's "high three" salary and, accordingly, the employee's retirement benefit. You also state that, in some instances, working overtime is a choice and not a requirement. We find that releasing employees' names in conjunction with the data corresponding to the overtime they worked is not intimate or embarrassing, and is of *legitimate interest to the public*. Accordingly, the city may not withhold the data in schedule A-2 under section 552.101 in conjunction with common law privacy. As you raise no other exceptions to disclosure, the submitted information must be released in its entirety 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).

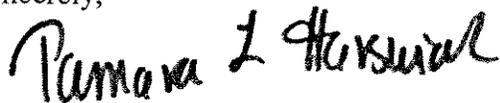
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. 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 Office of the Attorney General 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. 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,

A handwritten signature in black ink that reads "Tamara L. Harswick". The signature is written in a cursive, slightly slanted style.

Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/jww

Ref: ID# 270899

Enc. Submitted documents

c: Ms. Yamil Berard
Forth Worth Star Telegram
400 West Seventh Street
Fort Worth, Texas 76102
(w/o enclosures)