ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 8, 2010

Ms. Cheryl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2010-15403

Dear Ms. Byles:

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# 394661 (Fort Worth PIR No. W002140).

The City of Fort Worth (the "city") received a request for a specified file pertaining to a housing discrimination claim. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.136 of the Government Code. You also indicate that release of the submitted information may implicate the privacy or proprietary interests of a third party, the United States Department of Housing and Urban Development ("HUD"). Accordingly, you inform us, and provide documentation showing, that you notified HUD of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). As of the date of this letter, we have not received comments from HUD explaining why the requested information should not be released. We have considered the exceptions you claim and reviewed the submitted information.

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 section encompasses information that other statutes make confidential. You contend section 115.308(c) of Title 24 of the Code of Federal Regulations prohibits the disclosure of the requested housing discrimination complaint investigation file. Section 115.308(c) applies to state and local fair housing enforcement agencies and provides:

> (c) The agency will permit reasonable public access to its records consistent with the jurisdiction's requirements for release of information. Documents relevant to the agency's participation in the [Fair Housing Assistance Program ("FHAP")] must be made available at the agency's office during

> normal working hours (except that documents with respect to ongoing fair housing complaint investigations are exempt from public review *consistent with federal and/or state law*).

24 C.F.R. § 115.308(c) (emphasis added). In this instance, the city's Department of Community Relations (the "CRD") is an agency for the purposes of section 115.308(c). *See id.* § 115.307 (providing requirements for participation in the FHAP). Section 115.308(c) states the CRD will permit public access to its records consistent with the jurisdiction's public disclosure requirements. Thus, the CRD's records are subject to the Act's requirements for public disclosure. Section 115.308(c) also states the CRD's ongoing fair housing complaint investigation files are available for public review unless they are otherwise excepted under federal and/or state law. The provision, however, does not make the CRD's ongoing investigation files confidential. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). You state the investigation file at issue is closed with the CRD. You claim the file is confidential in its entirety under section 552a of title 5 of the United States Code, also known as the federal Privacy Act, and section 552(b)(7) of Title 5 of the United States Code, which is a provision of the federal Freedom of Information Act ("FOIA").[1]

The Privacy Act and FOIA apply to an "agency," which is defined as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency[.]" *See* 5 U.S.C. §§ 552(f)(1)[2], 552a(a)(1) (referring to 5 U.S.C. § 552(e) for definition of "agency"). In this instance, the information at issue was created, and is maintained by the city. Our office and the courts have stated FOIA and the Privacy Act only apply to federal agencies and not to state or local agencies. *See St. Michael's Convalescent Hosp. v. State of California*, 643 F.2d 1369, 1373 (9th Cir. 1981) (definition of agency under Privacy Act does not encompass state agencies or bodies); *Shields v. Shetler*, 682 F.Supp. 1172, 1176 (D. Colo. 1988) (Privacy Act does not apply to state agencies or bodies); *Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA); Attorney General Opinion MW-95 (1979) (neither FOIA nor federal Privacy Act applies to records held by state or local governmental bodies in Texas). You assert, in this instance, the Privacy Act applies to the information "because [the CRD] administers the [FHAP] on behalf of [HUD] and the [FHAP] is subject to HUD regulations." The courts have opined, however, that neither the receipt of federal funds nor limited oversight by a federal entity convert state or local

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[1]In your brief, you assert section 552(7)(A) of Title 24 of the United States Code for the information at issue. We note, however, this statute does not exist. Based on the statutory language you quoted, we understand you to assert section 552(b)(7) of Title 5 of the United States Code.

[2]Formerly 5 U.S.C. § 552(e).

governmental bodies into agencies covered by the Privacy Act. *See St. Michael's Convalescent Hosp.*, 643 F.2d at 1373-74; *see also United States v. Orleans*, 425 U.S. 807, 816, 96 S.Ct. 1971, 1976, 48 L.Ed.2d 390 (1976) (federal regulations and contract provisions do not convert acts of local and state governmental bodies into federal governmental acts.).

You additionally argue section 552(b)(7) of FOIA prohibits the release of the complaint investigation file because the city processed the discrimination complaint on HUD's behalf and HUD would be prohibited from releasing the information if HUD had processed the discrimination complaint. This office has stated in numerous decisions information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. *See* Open Records Decision Nos. 561 at 7 n.3 (1990) (federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under the Act), 124 (1976) (fact information held by federal agency excepted under FOIA does not make same information excepted under the Act when held by Texas agency), 59 (1974). Therefore, you have failed to demonstrate the Privacy Act or FOIA apply to the city. Accordingly, no portion of the submitted information may be withheld on these bases.

We note the submitted information contains information that is subject to section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (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 established. *Id.* at 681-82. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also found that personal financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See* Open Records Decision No. 545 (1990) (mortgage payments, assets, bills, and credit history).

In Open Records Decision No. 373 (1983), this office determined that financial information submitted by applicants for federally-funded housing rehabilitation loans and grants was "information deemed confidential" by a common-law right of privacy. The financial information at issue in Open Records Decision No. 373 included sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits,

retirement and state assistance benefits, and credit history. Additionally, in Open Records Decision No. 523 (1989), we held that the credit reports, financial statements, and financial information included in loan files of individual veterans participating in the Veterans Land Program were excepted from disclosure by the common-law right of privacy. Similarly, we thus conclude that financial information relating to an applicant for housing assistance satisfies the first requirement of common-law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

The second requirement of the common-law privacy test requires that the information not be of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 668. While the public generally has some interest in knowing whether public funds expended for housing assistance are being given to qualified applicants, we believe that ordinarily this interest will not be sufficient to justify the invasion of the applicant's privacy that would result from disclosure of information concerning his or her financial status. *See* ORD 373 (although any record maintained by governmental body is arguably of legitimate public interest, if only relation of individual to governmental body is as applicant for housing rehabilitation grant, second requirement of common-law privacy test not met). In particular cases, a requestor may demonstrate the existence of a public interest that will overcome the second requirement of the common-law privacy test. However, whether there is a public interest in this information sufficient to justify its disclosure must be decided on a case-by-case basis. *See* ORDs 523, 373.

Open Records Decision Nos. 373 and 523 draw a distinction between the confidential "background financial information furnished to a public body about an individual" and "the basic facts regarding a particular financial transaction between the individual and the public body." Open Records Decision Nos. 523, 385 (1983). Subsequent decisions of this office analyze questions about the confidentiality of background financial information consistently with Open Records Decision No. 373. *See* Open Records Decision Nos. 600 (personal financial information not relating to the financial transaction between an individual and a governmental body is protected), 545 (employee's participation in deferred compensation plan private), 523, 481 (1987) (individual financial information concerning applicant for public employment is closed), 480 (1987) (names of students receiving loans and amounts received from Texas Guaranteed Student Loan Corporation are public); *see also* Attorney General Opinions H-1070 (1977), H-15 (1973) (laws requiring financial disclosure by public officials and candidates for office do not invade their privacy rights); *but see* Open Records Decision Nos. 602 at 5 (1992) (records related to salaries of those employees for whom the city pays a portion are subject to the Act). We note, however, this office has concluded the names and present addresses of current or former residents of a public housing development are not protected from disclosure under the common-law right to privacy. *See* Open Records Decision No. 318 (1982). Likewise, the amounts paid by a housing authority on behalf of eligible tenants are not protected from disclosure under privacy interests. *See* Open Records Decision No. 268 (1981); *see also* Open Records Decision Nos. 600 at 9-10, 545, 489 (1987), 480 (1987). Upon review, we find portions of the submitted information, which we

have marked, are intimate or embarrassing and not of legitimate public interest. The city must withhold this information under section 552.101 in conjunction with common-law privacy.

The remaining information contains checking account numbers and routing numbers. Section 552.136 of the Government Code states "[n]otwithstanding 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(b); *see also id.* § 552.136(a) (defining "access device"). We find the checking account numbers you have marked in addition to the information we have marked constitute access device numbers for purposes of section 552.136. Thus, the city must withhold the checking account numbers you have marked and the information we have marked under section 552.136 of the Government Code. You have not explained, however, how the remaining information you have marked, which consists of check numbers, constitutes an access device number for purposes of section 552.136. Thus you have failed to demonstrate the applicability of section 552.136 of the Government Code to this information and it may not be withheld on that basis.

We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1978). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the city must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the checking account numbers you have marked and information we have marked under section 552.136 of the Government Code.[3] The remaining information must be released, but any information protected by copyright must be released in accordance with copyright law.[4]

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[3]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and bank routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

[4]We note the requestor has a special right of access to some of the information being released in this instance. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Because such information may be confidential with respect to the general public, if the department receives another request for this information from a person other than this requestor or her authorized representative, it should again seek a ruling from this office. *See* Gov't Code §§ 552.301, .302.

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, 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,

Jonathan Miles

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/eeg

Ref: ID# 394661

Enc. Submitted documents

c: Requestor
(w/o enclosures)