ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 22, 2010

Mr. Gary Lawson
Strasburger
901 Main Street, Suite 4400
Dallas, Texas 75202-3794

OR2010-17602

Dear Mr. Lawson:

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# 400642.

The Fort Worth Employees' Retirement Fund (the "fund"), which you represent, received a request for consent agendas for 2010. You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.102 of the Government Code. 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. Section 552.101 encompasses information protected by common-law privacy. 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." *See id.* § 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 the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we will address the fund's common-law privacy claims under sections 552.101 and 552.102(a) of the Government Code together.

In *Industrial Foundation*, the Texas Supreme Court stated information is excepted from disclosure 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. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office has found 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) (designation of beneficiary of employee's retirement benefits, direct deposit authorization, and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 523 (1989). However, information concerning financial transactions between an employee and a public employer is generally of legitimate public interest. *Id.* Therefore, financial information relating to retirement benefits must be disclosed if it reflects the employee's mandatory contributions to a retirement program. *See* ORD 600 (1992). On the other hand, information is excepted from disclosure if it relates to a voluntary investment the employee made in an option benefits plan offered by the agency. *Id.*

You state the fund is a governmental pension plan established to provide retirement benefits for employees of the City of Fort Worth (the "city"). You state city employees now have the option to participate in the fund's deferred retirement option program ("DROP") or an alternative pension feature. You explain a city employee is eligible to participate in DROP if the employee has twenty years of credited pension service with the city. You further inform us an employee who has reached retirement age may elect to enter DROP. You explain this election affects the employee's accrual of service credit should the employee continue to be employed by the city, and results in the credit of annuity payments into a notional account on a monthly basis. You further explain these deposits become payable at actual retirement. You explain the alternative pension feature is similar to the DROP feature except a notional account is not created. Rather, you state the employee continues to accrue benefits under the applicable formula but specifies the amount of the lump sum to be received. You state in these circumstances, the monthly pension is actuarily reduced to reflect the value of the lump sum.

You explain whether a member elects to participate in the DROP program or receive a portion of the retirement pension in the form of an alternative reduced annuity and lump sum are purely personal investment decisions made by the individual members. Thus, you argue this information and the member's beneficiary designation constitute personal financial information that is protected by common-law privacy. Upon review, we agree the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the fund must withhold the information we have marked within the submitted documents under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.102 of the Government Code. We note common-law privacy protects the interests of individuals, not those of corporate and other business

entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). Further, the individuals to whom portions of the remaining information you have marked pertain have been de-identified, and thus these individuals' privacy interests have been protected. Thus, we find you have not demonstrated how the remaining information you have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the remaining information you have marked may not be withheld under section 552.101 in conjunction with common-law privacy or section 552.102. As you raise no additional exceptions to disclosure, 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, 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,

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/tp

Ref: ID# 400642

Enc. Submitted documents

c: Requestor
(w/o enclosures)