



July 30, 2002

Mr. Edward H. Perry  
Assistant City Attorney  
City of Dallas  
1500 Marilla, Room 7BN  
Dallas, Texas 75201

Mr. A.D. ("Gus") Fields  
Lawson, Fields, McCue, Lee & Campbell  
14135 Midway Road, Suite 250  
Addison, Texas 75001

OR2002-4165

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166352.

The City of Dallas Police and Fire Pension System (the "system") received a request for amounts in the top five Deferred Retirement Option Plan ("DROP") accounts along with the account holders' names, positions, years on the job, salaries, and monthly benefits; amount of the top three DROP lump sums taken by retirees along with the account holders' names, positions, years on the job, salaries, and monthly benefits; and the average DROP account figure.<sup>1</sup> You state that the requestor subsequently clarified her request to include information relating to both the system's regular pension plan and the system's supplemental pension plan. You indicate that the average DROP account figure has been released to the requestor. However, you contend that the remainder of the requested information is 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.

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<sup>1</sup>You did not submit information revealing the positions or salaries of the relevant account holders. To the extent the system maintains such information, we assume it has released the information to the requestor. If the system has not released the salary and position information, it must do so now. See Gov't Code §§ 552.021, .221, .301, .302.

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 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 under the doctrine of common-law privacy as incorporated by section 552.101 of the act. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that 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. *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 (1992). 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 system maintains a regular pension plan for most City of Dallas (the “city”) police officers and fire fighters (“members”). In addition, certain high level officials participate in the supplemental pension plan, which incorporates the regular plan but “provides benefits based only on the portion of an employee’s benefits that are above the wages included in computing a Member’s benefits under the Regular Plan.” You further state that the city and the members contribute to the regular pension plan. When a member reaches retirement age, the member may “elect to stop accruing additional annuity benefits and commence having a monthly amount equal to the pension they would have received if they had retired on the date of election credited to a separate DROP account.” When the member retires, the member may choose to receive his or her annuity and DROP account in either a lump sum or installments. You indicate that a member is free to elect to participate in the DROP option, and the election does not affect the city’s contribution to the pension

plan. Therefore, you contend that the requested information relating to specific DROP accounts is excepted from disclosure under sections 552.101 and 552.102 of the Government Code in conjunction with common-law privacy because the member's choice to participate in the DROP option and the amount that is placed in the DROP account relate to a highly personal financial decision.

We agree that information revealing whether a specific member elected to participate in the DROP option consists of a highly intimate decision in which the public has no interest. Therefore, we find that you must withhold the identities of the individual members who elected the DROP option under section 552.101 and section 552.102 in conjunction with common-law privacy. However, we find that information regarding the member's years of pension service is not highly intimate or embarrassing information. Furthermore, the public has a legitimate interest in the DROP account amounts, the lump sum payment amounts, and the monthly benefit amounts. *See* Open Records Decision Nos. 600 (1992), 480 (1987). Therefore, the remaining information is not confidential under common-law privacy and must be released.

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); *Tex. 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 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,



Nathan E. Bowden  
Assistant Attorney General  
Open Records Division

NEB/sdk

Ref: ID# 166352

Enc: Submitted documents

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(w/o enclosures)