

CAUSE NO. _____

DALLAS POLICE AND FIRE
PENSION SYSTEM,

Plaintiff,

vs.

ATTORNEY GENERAL OF TEXAS,

Defendant.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

_____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION FOR DECLARATORY JUDGMENT

The Dallas Police and Fire Pension System ("Plaintiff" or the "System") hereby brings and files the following Original Petition for Declaratory Judgment pursuant to Section 552.324 of the Texas Government Code seeking declaratory relief regarding Open Records Letter No. OR2012-13949 rendered by the Attorney General of Texas ("Defendant" or "Attorney General") wherein Defendant ruled, *inter alia*, that the System must release confidential information to the public.

I. DISCOVERY

1. Plaintiff intends that discovery be conducted under level two pursuant to Texas Rule of Civil Procedure 190.3.

II. PARTIES

2. Plaintiff, the Dallas Police and Fire Pension System, is a Texas governmental pension plan existing under the laws of the State of Texas and is located at 4100 Harry Hines Boulevard, Suite 100, Dallas, Texas 75219.

3. Defendant, Attorney General, is a state agency and may be served with process at 300 West 15th Street, 8th floor, Austin, Texas 78701.

III. VENUE AND JURISDICTION

4. Venue and jurisdiction are proper in Travis County pursuant to Section 552.324(b) of the Texas Government Code.

IV. FACTUAL BACKGROUND

5. The System was created under Vernon's Civil Statutes Art. 6243a-1. The Board of Trustees of the System is charged with the duty, among others, under Section 4.07(c) with "...the ultimate responsibility for the investment of funds" and under 4.07(a) "...for the sole benefit of the pension system." It is a well-recognized principal of law that the duty of such trustees is the highest known in the law. Today, many pension funds of the largest state and municipal entities, including the System, contain various classes of real estate held in a variety of manners. For example, some may be held directly while others may be investments made through private equity vehicles and still other realty may simply be held for sale or rented to individuals or other businesses. The confidentiality of certain information pertaining to the leasing and sales prices and lease and sales concessions are key to both the value that can be achieved in the rental and sales of such real estate. The disclosures requested and approved by the Office of the Attorney General would harm the trust assets and undermine the ability of the System as well as all Texas public pension funds to serve the best interests of their members and would undermine the fiduciary duties of their boards of trustees. Further, revealing certain of the information requested as to the identity of persons who have rented certain truly unique, one-of-a-kind luxury properties, would not just discourage some renters but would likely cause these unique properties to go completely vacant.

The System must operate within a very select and highly competitive rental and sales market in this instance of luxury housing. These real estate investments and the competition that is per force authorized by law must be respected, and the System must be afforded the right to claim the competitive advantages afforded by the subject exemptions in the law. Making such information public would destroy many hundreds of millions of dollars of property values that belong to the trusts that provide retirement, disability and death benefit protections to our governmental employees and their families.

6. By letter dated June 11, 2012, the System received a request for categories of information, in some instances seeking records over more than a six-year period, regarding certain properties owned by KLH IV, LP, an entity that is wholly owned by the System. (See June 11, 2012 McGonigle, "Knudson" Request, attached as **Exhibit 1**.) More specifically, the System is the sole member of GP Western Housing LLC, a limited liability company, the General Partner of KLH IV, LP as well as the sole limited partner of KLH IV, LP.

7. Certain information responsive to the Knudson Request pertains to real estate contracts as well as real estate marketing and pricing strategies of investments owned by KLH IV, LP, which, if made public, would materially adversely affect the value of that real estate and would violate privacy interests of renters, who had no reason to expect or anticipate that their personal information would be made public.

8. In accordance with Section 552.301(a) of the Texas Government Code, the System, on June 25, 2012, as supplemented by separate letter dated July 2, 2012, timely requested an Attorney General ruling regarding exemptions under Texas

Government Code Chapter 552 as to certain Confidential Information otherwise responsive to the Request. (Exemption Request attached as **Exhibit 2** and incorporated herein for all purposes pursuant to Texas Rule of Civil Procedure 59.)

9. In doing so, the System sought to prevent disclosure of documents containing information considered exempt from disclosure pursuant to the following sections of Texas Government Code, set forth below as presented to the Office of the Attorney General in the cover letter and/or attachments:

- A. Section 552.101. EXCEPTION: CONFIDENTIAL INFORMATION
- B. Section 552.104. EXCEPTION: INFORMATION RELATED TO COMPETITION OR BIDDING.
- C. Section 552.105. EXCEPTION: INFORMATION RELATED TO LOCATION OR PRICE OF PROPERTY
- D. Section 552.107. EXCEPTION: CERTAIN LEGAL MATTERS.
- E. Section 52.110. EXCEPTION: CONFIDENTIALITY OF TRADE SECRETS; CONFIDENTIALITY OF CERTAIN COMMERCIAL OR FINANCIAL INFORMATION
- F. Section 552.143. CONFIDENTIALITY OF CERTAIN INVESTMENT INFORMATION.

10. On September 4, 2012, the Attorney General issued an opinion (OR2012-13949) in which the Attorney General concluded that, *inter alia*, highly personal information of third-parties that is of no legitimate public concern as well as the System's highly confidential and competitive information must be released. Nevertheless, the System received a favorable ruling on some but not all of the

documents submitted and is in the process of collecting and producing information regarding types of documents that it does not contest by way of this lawsuit.

11. The System now seeks protection for some documents exempt pursuant to Government Code Sections 552.101, .104, .105, .107, .110, and .143.

12. Requestor was properly notified of the System's request to the Attorney General and will be notified of the present suit according to Section 552.325(b) of the Government Code. The System will continue to withhold the disputed documents pending the outcome of this case. See TEX. GOV'T CODE § 552.353(c).

V. REQUEST FOR DECLARATORY RELIEF

13. Plaintiff requests, under section 552.324 of the Public Information Act and the Uniform Declaratory Judgment Act, Chapter 37, Texas Civil Practice and Remedies Code, that the Court grant declaratory relief from compliance with part of Open Records Letter No. OR2012-13949 on the basis in part that Defendant inconsistently applied and thus erred in application of the exceptions under Government Code Sections 552.101, .104, .105, .107, .110, and .143. to certain documents. Further, the System contends that portions of the requested information are exempt as a matter of law, either constitutional, statutory, or by judicial decision. Moreover, some of the documents contain information protected by the common law rights of privacy.

14. Contrary to the exceptions from disclosure set forth in Sections 552.101, .105, and .110, Defendant held that information containing highly private information of no public concern must be released. Portions of the requested information contain the names and home addresses of private citizens who have in the past rented certain properties owned by the System's investment entities and held for rental and sale. The

persons renting the properties had the reasonable expectation that their intimate transactions and privacy, including their names, home addresses and the amounts they paid to rent such properties, would not become public fodder. There is no legitimate public interest in the names, home addresses and amounts paid by such individuals for vacation rentals. TEX. GOV'T CODE §§ 552.101, .110.

15. Portions of the requested information contain confidential and proprietary financial information and trade secrets of a realty management company, which provided this information to the System. Disclosure of customer lists and leasing prices that were provided by the realty management company would cause substantial competitive harm to the realty management company and would violate privacy interests of individual renters to the extent that any responsive information was provided to the System. This information is protected from disclosure under Texas Government Code § 552.110.

16. Moreover, revealing names of renters of luxury homes (in addition to violating their privacy interests) would also chill these persons and other future possible renters from renting from any entity related to the System and would thereby destroy the value of the property to the System by putting it at a grave competitive disadvantage to other property owners with which these properties compete. TEX. GOV'T CODE § 552.105.

17. Further, both common law and constitutional level privacy rights are implicated where private citizens have conducted business with an entity owned by the System. See *Whalen v. Roe*, 429 U.S. 589 (1977); *Ramie v. City of Hedwig Village, Texas*, 765 F. 2d 490, 492 (5th Cir. 1985). Because there are no special circumstances

that would make these private matters a matter of legitimate public concern, the information is excepted from disclosure. See *Indus. Found. of the South v. Tex. Indus. Accident Bd.*, 540 S.W. 2d 668 (Tex. 1976)

18. Additionally, Defendant erred in ordering the System to produce documents excepted from disclosure pursuant to Section 552.107, which protects information that comes within the attorney-client privilege, as well as information excluded from disclosure under Texas Rule of Evidence 503. See Tex. Att'y Gen. ORD2012-00071 (2012); see also *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (holding that the Texas Rules of Evidence are "other law" within the meaning of Section 552.022).

19. Defendant further erred in directing the System to produce information containing the prices at which KLH IV, LP, leases individual properties counter to the edicts of Section 552.110's protection of the confidentiality of certain commercial and financial information. Such information, if made public, would cause harm to the System's legitimate marketplace interest in the leasing of the properties by placing the System's assets at a substantial competitive disadvantage. In fact, disclosure of such information would, in effect, provide competitors with a guide for directly competing with the System. Further, such disclosure would discourage potential renters who do not want their personal information released to the public. Accordingly, the information is protected from disclosure under Section 552.110.

20. Moreover, Defendant erred in holding the System must produce information excepted from disclosure under Section 552.104. As set forth in paragraphs 5, 6 and 7, the requested information is related to the real estate owned by an entity

owned by the System, and the release of the information would substantially harm the System's marketplace interest if the rental and pricing information was released. See Tex. Att'y Gen. ORD-373 (1983).

21. Finally, Defendant erroneously held that the System must disclose information otherwise protected under Section 552.143. Section 552.143(a) provides that information that is not listed in Section 552.0225(b) prepared or provided by a private investment fund and held by a governmental body is confidential and excepted from the requirements of Section 552.021. In addition, Section 552.143(c) provides that: all information that is not listed in Section 552.0225(b)(2)-(9), (11), or (13)-(16) regarding a governmental body's direct purchase, holding, or disposal of restricted securities is confidential and excepted from the requirements of Section 552.021. The requested information involves KLH IV, LP and GP Western Housing LLC, the General Partner of KLH IV, LP, each of which are investment entities owned by the System and other than the information required to be disclosed as noted above in Section 552.0225(b)(2)-(9), (11), or (13)-(16), the rest of the requested information must be withheld. Defendant erroneously held that the System failed to argue the applicability of this provision, which is one that cannot be waived as a matter of law. However, a common sense reading of the provision and the System's letters to the Defendant make clear that this section applies and provides protections.

22. Alternatively, the System would show and seeks a declaration that some of the information requested regards the property or privacy interests of other persons and thus need not have been raised previously. See TEX. GOV'T CODE § 552.326(b)(2).

23. To the extent that Defendant seeks to preclude the System from arguing the applicability of provisions of law that provide protection due to a technical difficulty in timing of the arguments being raised, the System would argue that such procedural requirements (such as found in See TEX. GOV'T CODE § 552.326(a)) are violative of the Texas Constitution, Article I, Section 19 (due process of law) and would seek a declaration of same.

VI. REQUEST FOR ATTORNEYS FEES

24. Defendant's ruling has forced the System to retain the services of an attorney in order to file suit. Under the Public Information Act, governmental entities that prevail in a suit against the Attorney General may be awarded attorneys' fees. See TEX. GOV'T CODE § 552.323(b). The System is a governmental entity and requests that it be awarded such fees. Additionally, the System is entitled to fees pursuant to Texas Civil Practices & Remedies Code § 37.009.

VII. CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, the System respectfully requests it have judgment as follows: (1) a declaration granting relief from complying with Open Records Letter No. OR2012-13949 as it pertains to information protected from disclosure pursuant to Texas Government Code Sections 552.101, .104, .105, .107, .110, and .143 as well as information exempt as a matter of law, either constitutional (and specifically including See TEX. GOV'T CODE § 552.326(a), statutory, or by judicial decision; (2) costs of court and attorneys fees; and (3) such other relief to which the System may show itself justly entitled.

Respectfully submitted,



GARY B. LAWSON

State Bar No. 12058490

A.D. "GUS" FIELDS

State Bar No. 00788956

KATIE ANDERSON

State Bar No. 0078963

MELODY K. SMITH

State Bar No. 24066111

STRASBURGER & PRICE, LLP

901 Main Street, Suite 4400

Dallas, Texas 75202-3794

(214) 651-4300

(214) 651-4330 Fax

ATTORNEYS FOR PLAINTIFF