DAN MORALES
ATTORNEY GENERAL

Office of the Attorney General
State of Texas

March 26, 1991

Mr. James L. Dougherty, Jr.
City Attorney
City of West University Place
3800 University Blvd.
Houston, Texas 77005

Open Records Decision No. 585

Re: Whether a list of applicants for city manager compiled by a private search firm is subject to disclosure under the Open Records Act, article 6252-17a, V.T.C.S., when the contract provides that ownership and control of the list remains with the search firm (RQ-2070)

Dear Mr. Dougherty:

The city of West University Place has received a request for a complete list of applicants for the position of city manager. In response, the city has taken the position that the list is not "public information" for purposes of the Open Records Act, article 6252-17a, V.T.C.S., because the city does not have a right of access to that information.

The Open Records Act defines "public information" as all information "collected, assembled, or maintained by or for governmental bodies, except in those situations where the governmental body does not have either a right of access to or ownership of the information, pursuant to law or ordinance or in connection with the transaction of official business." V.T.C.S. art. 6252-17a, § 3(a). In support of your argument that the city does not have a right of access to the names of persons who applied for the position of city manager, you have submitted a copy of an agreement in which the city agreed to pay a private corporation to provide services in connection with the selection of a city manager. Under the terms of that agreement, the corporation and the city were to work together to develop recruitment criteria. The corporation was to prepare and place advertisements in appropriate publications and then to screen and review applications. After screening the applications, the corporation was to present to the city a list of recommended finalists. The agreement contains no provisions regarding confidentiality of information. You state, however, the corporation "carefully explained" to the city before the contract was made that the initial list of applicants

would be assembled by the corporation and kept in confidence. The purpose for this procedure, you explain, was to permit the corporation to offer confidentiality to prospective applicants. Even if these facts gave rise to a contract between the city and the corporation that names of applicants would be unavailable to the city, such a contractual provision would be void and unenforceable.

A board in charge of the affairs of a municipality may appoint agents to discharge ministerial duties, but it may not delegate to others the discharge of duties that call for the exercise of discretion. Horne Zoological Arena Co. v. City of Dallas, 45 S.W.2d 714, 715 (Tex. Civ. App.--Waco 1931, no writ). A contract that purports to grant such a right is *ultra vires* and unenforceable.[1] Moore v. City of Beaumont, 195 S.W.2d 968, 978 (Tex. Civ. App.--Beaumont 1946), *aff'd* 202 S.W.2d 448 (Tex. 1947). Consequently, to the extent that the contract between the city of West University Place and the private corporation could be interpreted to give the corporation authority to exercise discretion on behalf of the city in regard to the selection of a city manager, it would be unenforceable. Because the city cannot delegate the exercise of discretion, it follows that the city cannot forfeit its right of access to the information necessary to exercise its discretion.

Further, a city cannot grant to an agent powers that the city itself does not possess. *See* McKaughan v. Baldwin, 153 S.W. 660 (Tex. Civ. App.--Austin 1913, no writ). *See* Open Records Decision No. 518 (1989). Thus, the corporation may withhold the information from public disclosure only if the city may do so. A governmental body cannot promise to keep information confidential if the Open Records Act requires that the information be available to the public. Attorney General Opinion H-258 (1974); Open Records Decision No. 55A (1975). You argue that the list would be excepted from required public disclosure under sections 3(a)(1), 3(a)(2), 3(a)(4), 3(a)(10), and 3(a)(11) of the Open Records Act. We disagree. Absent a specific statutory provision making the names of applicants confidential, names of applicants for public employment are not excepted from public disclosure under any provision of the Open Records Act. Open Records

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[1]*See* Crosby v. P. L. Marquess & Co., 226 S.W.2d 461 (Tex. Civ. App.-- Beaumont 1950, writ ref'd n.r.e.) (school district's contract with appraisal company held valid since company's work was not to be done to exclusion of district's tax assessor and collector); Moore v. City of Beaumont, *supra* (determination that city land was unneeded and should be sold involved exercise of discretion and could not be delegated); Horne Zoological Arena Co. v. City of Dallas, *supra* (because selection of zoo animals involves exercise of discretion, park board could not delegate selection of animals to parks director).

Decision No. 257 (1980); *see* V.T.C.S. art. 6252-17a, § 3(a)(23) (exception for names of applicants for position of chief executive officer of institutions of higher education). Therefore, the names of applicants for the position of city manager must be made available to the requestor.

We emphasize that this is not a situation in which the city sought access to information that the corporation had gathered independently. The corporation would not have been able to assemble a list of applicants for the position of city manager of the city of West University Place were it not for the contract between the city and the corporation. To the extent that Open Records Decision Nos. 558 (1990), 499 (1988), 462 (1987), and 437 (1986) suggest that a governmental body can waive its right of access to information gathered on behalf of a governmental body, they are overruled.

SUMMARY

A city may not authorize its agents to keep information confidential if the city has no authority to do so. Absent a specific statutory provision, names of applicants for public employment are not excepted from disclosure under the Open Records Act.

Very truly yours,

Dan Morales

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