



October 31, 2002

Ms. Phyllis Waldrep Cranz
General Counsel
Fort Worth Transportation Authority
1600 East Lancaster Avenue
Forth Worth, Texas 76102-6720

OR2002-6204

Dear Ms. Cranz:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170839.

The Fort Worth Transportation Authority ("FWTA") received a request "on January 14 and 15, 2002" for information relating to Joseph Simonetti and J.C. Simonetti & Associates, Inc. You state that "[w]e did not have any such document or documents in our files nor access to them and answered accordingly." You furnish us a copy of a complaint filed by the requestor with the Tarrant County District Attorney on July 24, 2002, in relation to the instant request and a report by Mr. Simonetti about revenue operations at FWTA. Both you and McDonald Transit Associates, Inc. and McDonald Transit, Inc. ("MTA/MTI"), the private parties who provide transit management services under contract to FWTA and whose proprietary interests may be implicated in the report, assert that the report at issue is not public information. Alternatively, MTA/MTI asserts that the report represents proprietary information. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released). We have considered your and MTA/MTI's arguments regarding this report and reviewed the submitted information.

Initially, we acknowledge that the Public Information Act ("Act") does not apply to private persons or businesses merely because they provide goods or services under a contract with a governmental body. *See* Open Records Decision No. 1 (1973). However, if a private person or business holds information "for a governmental body and the governmental body owns the information or has a right of access to it," then that information will be subject to the Act pursuant to section 552.002(a)(2) of the Government Code.

FWTA states that it "has never requested, contracted for, accepted, paid for, nor had in its possession or control any of the documents complained of by [the requestor]." The Act does

not ordinarily require a governmental body to obtain information that is not in its possession. *See, e.g.*, Open Records Decision Nos. 445 (1986), 317 (1982). In some instances, however, the Act does apply to information collected or maintained by third party consultants or contractors of governmental bodies. *See, e.g.*, Open Records Decision No. 462 (1987). Where a third body has prepared information on behalf of a governmental body, the information is subject to the Act, even though it is not in the governmental body's custody. *See, e.g.*, Open Records Decision No. 558 (1990). In determining whether FWTA owns the report or has a right of access to it, we need not characterize the relationship between FWTA and MTA/MTI; rather, we look to the provisions of the agreement governing access to the requested information. *See* Open Records Decision No. 462 at 4-5 (1987).

We note that the contract between FWTA and MTA/MTI states that “the purpose of this Contract is to obtain and provide professional management and operation services to the FWTA for its public transportation system.” Additionally, section 3.11 of the contract provides that “MTA shall also make available to FWTA all of its and MTI’s books and records which relate directly or indirectly to the public transportation system of FWTA[.]” Because the requested report comes within the purview of MTA/MTI’s contractual duties and, moreover, relates directly or indirectly to the public transportation system of FWTA, we find that FWTA has a right of access to the report.

Nonetheless, MTA/MTI asserts that the requested report was prepared “upon its own initiative and solely at its own expense” and that MTA selected FWTA’s farebox system for study in the report although MTA “could have utilized the system of any one of a number of its clients.” We note, however, that the report entitled “Revenue Operations Review at the Fort Worth Transportation Authority” states on its cover that “[t]his is a Confidential Document and is restricted to McDonald Transit Associates, Inc. and the Fort Worth Transportation Authority.” We further note that MTA states in the submitted court documents filed in relation to this matter that

[i]n connection with its service in Fort Worth, MTA retained, at its own expense, a farebox security expert named Joe Simonetti to review, evaluate, and make suggestions concerning security issues related to the use of GFI Genfare fareboxes revenue collection system.

MTA’s Motion to Quash Notice of Intent to Take Oral Deposition with Subpoena Duces Tecum at 1, *In re Agent Systems, Inc* (Bankr. N.D. Tex. Feb. 22, 2002) (emphasis added). The report shows that the expert conducted a review of FWTA’s system and that it was done for FWTA’s benefit. We therefore conclude that the report at issue was prepared for FWTA. Because we find that FWTA has a right of access to the report and that the report was prepared for FWTA, we conclude that the report is public information per section 552.002 of the Government Code.

It is well established that a governmental body has a good faith duty to relate a request to information held by it. *See, e.g.*, Open Records Decision No. 561 at 8 (1990). On

January 24, 2002, FWTA timely replied to the requestor that it had none of the information which the requestor sought. We, however, find that the report at issue is public information. Thus, FWTA should have either produced the responsive information or, in the alternative, provided the requestor with a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general about whether the information falls within an exception to public disclosure. *See* Gov't Code § 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ); *see also* Open Records Decision No. 319 (1982). The proprietary interests of third parties provide such a compelling reason. *See, e.g.*, Open Records Decision No. 150 (1977). We note that a governmental body may rely on an interested third party to raise and explain applicability of exceptions to the Act in certain circumstances. *See, e.g.*, Open Records Decision No. 542 (1990).

MTA/MTI asserts that the report represents "proprietary information" but does not raise and explain the applicability of any exceptions to the Act in conjunction with this assertion. As we have been given no grounds on which to conclude otherwise, we find that the report must be released to the requestor in its entirety. If you believe that this information is confidential and may not lawfully be released, you must challenge this ruling in court as outlined below.

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); *Texas Department of Public 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,



Jon Tate Self
Assistant Attorney General
Open Records Division

JTS/seg

Ref: ID# 170839

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