



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 4, 2007

Ms. Kristen L. Fouts
County Attorney
Haskell County
P.O. Box 551
Haskell, Texas 79521-0551

OR2007-11445

Dear Ms. Fouts:

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# 288336.

Haskell County (the "county") received a request for four categories of information relating to the Rolling Plains Regional Jail and Detention Center (the "center") and a named inmate of the center. You state that some of the requested information will be released. You assert that *information responsive to item one of the request is not subject to disclosure under the Act*. You have submitted information that you claim is excepted from disclosure under section 552.103 of the Government Code. You also believe that this request for information may implicate the interests of Emerald Correctional Management, L.L.C. ("Emerald"). You notified Emerald of this request for information and of its right to submit arguments to this office as to why the requested information should not be released.¹ We also received arguments from Emerald. We have considered all of the submitted arguments and have reviewed the submitted information. We also have considered the comments that we received from the requestor.²

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

²See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address your arguments with regard to the information that you contend is not subject to the Act. The Act is applicable to “public information.” See Gov’t Code § 552.021. Section 552.002 of the Act provides that “public information” consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov’t Code § 552.002(a). Thus, virtually all of the information that is in a governmental body’s physical possession constitutes public information that is subject to the Act. *Id.* § 552.022(a)(1); see also Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); see also Open Records Decision No. 462 at 4 (1987). A governmental body must make a good-faith effort to relate a request for information to information that is within its possession or control. See Open Records Decision No. 561 at 8-9 (1990). However, a governmental body need not answer factual questions, conduct legal research, release information that did not exist when it received the request, or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.— San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990). Likewise, a governmental body is not required to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds that information on behalf of the governmental body that received the request for it. See Open Records Decision Nos. 534 at 2-3 (1989), 518 at 2-3 (1989).

You state that Emerald operates, maintains, and manages the center under a written agreement with the county and the City of Haskell (the “city”).³ You inform us that the county has possession of a small amount of information that is responsive to this request. You also state that other information that is or may be responsive to this request is held by Emerald. Both the county and Emerald assert that information relating to inmates assigned to the center by the Wyoming Department of Corrections (“WDOC”) is not prepared by,

³You state that under the agreement, Emerald is an independent contractor. This office has said that whether a party to a contract with a governmental body is an independent contractor and/or an agent is not dispositive of whether information held by the party is subject to the Act. See Open Records Decision No. 462 at 4-5 (1987).

owned by, or prepared for the county.⁴ Emerald further states that WDOC inmate files are returned to WDOC when the inmate is released or transferred from the center, and that the only documents “retained by Emerald concerning [the named inmate] are his medical records . . . and, in this case, internal investigative materials prepared by Emerald.”

This office has previously addressed the agreement between the county and Emerald regarding management of the center. *See* Open Records Letter No. 2006-03677 (2006). In that ruling, we noted that several provisions of the agreement provide for information relating to the center to be made available to the county by Emerald. *See, e.g.*, Articles 3.02 (monthly attendance and enrollment reports), 4.02 (reports and audits required by agreement to be submitted to county with respect to operation of center or inmates therein and as may be required by state or federal law, State of Texas or any agency thereof, United States or any agency thereof, or state or political subdivision of United States contracting with county to place inmates in center), 4.05(d) (current list of employees and positions and staffing patterns), 4.07 (results of annual evaluation of center’s programs and operations), 4.07(a) (plan of correction of deficiencies raised in audit of center), 4.07(d) (audit reports on all audits and/or reviews conducted by other agencies or organizations), 5.07 (health-related policies and programs), 6.02 (initial plan illustrating evaluation and monitoring of operations to ensure compliance with agreement), 8.08 (report and recommended sanction if inmate commits significant violation). Likewise, the agreement provides for the county to have access to certain information maintained by Emerald. *See, e.g.*, Articles 4.07 (Emerald shall provide information needed to assist county and city in completion of certain reports and other data), *id.* (county has right to examine and audit books and records of center).

Thus, although certain information relating to the center may well be created or held by Emerald for its own purposes, the agreement clearly provides for certain types of information to be made available to the county. To the extent that the agreement provides for such information to be made available to the county, we conclude that such information is collected, assembled, or maintained for the county, and the county has a right of access to such information. *See* Gov’t Code § 552.002(a)(2). Thus, such information constitutes public information under section 552.002(a). *Id.*; *see also* *Baytown Sun v. City of Mont Belvieu*, 145 S.W.3d 268, 271 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.) (governmental body that was entitled to inspect books and records of contracting party had right to access to its payroll account records). Therefore, to the extent that such information is responsive to this request, it must be released to the requestor, unless the county has demonstrated that the information falls within an exception to public disclosure. *See* Gov’t Code §§ 552.006, .021, 301, .302. To the extent, however, that responsive information held by Emerald is not collected, assembled, or maintained for the county, and the county neither owns nor has a right of access to the information, such information does not fall within the scope of section 552.002. Any such information is not subject to the Act and need not be released to the requestor. *See also* Open Records Decision Nos. 558 at 2 (1990) (Act not

⁴We note that the obligations of a governmental body under the Act cannot be compromised simply by its decision to enter into a contract. *See* Open Records Decision Nos. 541 at 4 (1990), 514 at 1 (1988).

applicable if governmental body does not have right of access to or ownership of information prepared for it by an outside entity), 445 at 2 (1986) (Act not applicable to information that governmental body never possessed or was entitled to receive).

Next, we address your claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code, which provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁵ Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On

⁵In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). In this instance, you have not demonstrated that the requestor has taken any objective steps toward litigation beyond asking the county “not to dispose, alter, modify, destroy or perform destructive testing on any [information] pertaining to this incident[.]” Thus, we determine that the county has not established that litigation is reasonably anticipated. Accordingly, the county may not withhold the submitted information under section 552.103 of the Government Code.

In summary: (1) to the extent that information held by Emerald is not collected, assembled, or maintained for the county, and the county neither owns nor has a right of access to the information, such information is not subject to the Act and need not be released; (2) to the extent that the agreement provides for information that is responsive to this request to be made available to the county, such information is subject to the Act and must be released; and (3) the submitted information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 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 Office of the Attorney General 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. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 288336

Enc. Submitted documents

c: Mr. Jacob Crawford
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(w/o enclosures)