



The Attorney General of Texas

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Open Records Decision No. 437

Re: Whether information main-
tained by an independent con-
tractor hired by a utility dis-
trict is subject to disclosure
under the Open Records Act

Gentlemen:

Each of you has requested our decision under the Open Records Act, article 6252-17a, V.T.C.S. Because your questions are in some respects related, we shall address them in one decision.

Mr. Little advises that the Aransas County Municipal Utility District No. 1 has received requests for information concerning district bondholders. It wishes to withhold three items: customer lists submitted by each district bond underwriter indicating individuals in the district who obtained bonds therefrom, a list of district bondholders who responded to an announcement of a debt adjustment plan adopted by the district after it had defaulted on a bond payment, and correspondence between the district's attorneys and bondholders contained in an envelope marked "Exhibit F." Mr. Little argues that these items do not constitute "public information" within section 3(a) of the act because they were assembled and have been maintained, not by the utility district's governing board, but by its attorneys. Stated differently, his argument is that information is not "public information" within section 3(a) if it is not actually collected, assembled or maintained by a "governmental body" as defined in the act.

Mr. Brooks advises that the Grant Road Public Utility District has been asked to release records of new residential water turn-ons and new water deposits for residential service. Like Mr. Little, he

argues that these records do not contain "public information" because they were not assembled and have not been maintained by the governing board of the district. He states:

The district has engaged an independent contractor, its operator, to read its meters and to bill and collect for water and sewer service. The district's contract does not require the operator to report changes of the names and addresses under which the district's accounts are maintained. These changes occur randomly as people move in and out. Nor is the independent operator required to produce regular reports of the current list of district customers.

The only information regarding customers regularly received by the district reflects the total dollar amount of monthly billings, gallons pumped, total dollar amount of monthly receipts, and current arrearages. The only specific accounts which are routinely reviewed by the directors are delinquent accounts. The operator does obtain or produce for his own use in billing a monthly customer list. This list is generally prepared for him by an independent computer service, which charges for each list.

Section 3(a) of the act provides that

[a]ll information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business is public information. . . .

We conclude that the information at issue here was "collected, assembled, or maintained by governmental bodies" within this section.

These requests come from utility districts. For section 3(a) purposes, therefore, the relevant part of the definition of "governmental body" contained in the Open Records Act is section 2(1)(E), which makes "the governing board of every special district" such a body.

In assembling and maintaining the information at issue here, Mr. Little acted on behalf of the Aransas County Utility District for section 3(a) purposes. And even though the contractor who collected the information at issue in Mr. Brooks' request is an "independent contractor" for some purposes, we believe he nevertheless acted on behalf of the Grant Road Public Utility District in collecting this

information. See, e.g., Standard Insurance Company v. McKee, 205 S.W.2d 362 (Tex. 1947); Clark v. Texaco, Inc., 382 S.W.2d 953 (Tex. Civ. App. - Dallas 1964, writ ref'd n.r.e.) (one may be an independent contractor for some purpose yet may be an agent in connection with other work or activities). In collecting this information, both Mr. Little and the contractor were in effect carrying out a task which otherwise would have been left to the governmental body itself to carry out and which was delegated to them. Under these circumstances, the information at issue was "collected, assembled, or maintained by [the] governmental bodies [themselves]" for section 3(a) purposes.

The conclusion that this information is within the purview of the act is consistent with prior decisions of this office. We have held that governmental bodies may invoke section 3(a)(11) of the act to withhold advice, opinion and recommendation contained in memoranda submitted by outside consultants. Open Records Decision Nos. 335 (1982); 298, 293 (1981); 192 (1978). The implicit rationale of these decisions is that an outside consultant is, for section 3(a)(11) purposes, part of the governmental body which hired it, as this is the only way in which the "inter-agency or intra-agency" aspect of section 3(a)(11) comes into play. If information generated by an outside consultant is deemed to have been prepared by the governmental body for section 3(a)(11) purposes, information assembled and maintained by an agent of a governmental body must be deemed to be within the act, at least if the governmental body was required by law to collect the information or the information relates to its official business.

Each of you also relies on section 3(a)(3) of the act, which excepts information relating to pending or reasonably anticipated litigation. Open Records Decision No. 416 (1984). This section, however, applies only when litigation concerning a specific matter is pending or reasonably anticipated, not when there is only a mere chance of litigation. Open Records Decision No. 328 (1982). Concrete evidence establishing that litigation is more than mere conjecture must be offered before section 3(a)(3) can apply. Id. Mr. Little asserts that the failure to timely pay the principal and interest on the bonds may give rise to a mandamus action and that defaults in payment of bonded indebtedness have in other instances resulted in civil litigation. Mr. Brooks asserts that the operator's records contain information about customer delinquencies, and that the "district is involved in on-going efforts to collect the delinquencies, which may result in suit." Both claims are entirely too speculative to trigger section 3(a)(3).

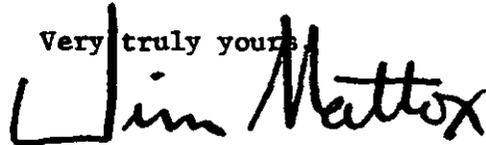
Mr. Little also argues that section 3(a)(1) applies because

[t]he bondholder information is available to the district only by virtue of disclosure in trust of confidential customer lists by investment banking

firms who served as underwriters of district's bonds. Absent authority from the underwriters to disclose such information, the district has a legal duty to retain the confidentiality of such information.

Governmental bodies may not withhold information merely because they have agreed to do so. Open Records Decision Nos. 283 (1981); 133 (1976). But they may withhold commercial or financial information if disclosure would likely either impair their ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. Open Records Decision Nos. 309 (1982); 255 (1980). Mr. Little argues that both results are likely in this instance. Open Records Decision Nos. 306 (1982) and 255 (1980), moreover, hold that customer lists may be withheld. On the basis of these decisions, the district may withhold the customer lists submitted by the underwriters. It may not, however, withhold the district's list of respondents to the debt adjustment plan or the information in Exhibit F, as this list does not link any particular bondholder to any particular underwriter. The correspondence in Exhibit F, moreover, merely advises the bondholders of the debt adjustment plan; it contains no information protected by the attorney-client privilege and may not, therefore, be withheld.

Very truly yours,



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