



**THE ATTORNEY GENERAL
OF TEXAS**

August 2, 1988

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Carl Dossey
City Manager
City of Woodway
P. O. Drawer 10937
Waco, Texas 76702-0937

Ms. Jacque Kruse
City Secretary
City of Addison
P. O. Box 144
Addison, Texas 75001

Open Records Decision No. 499

Re: Whether the working files maintained separately by a private attorney appointed on a contract basis as city attorney are subject to the Texas Open Records Act, article 6252-17a, V.T.C.S. (RQ-1319)

Dear Mr. Dossey and Ms. Kruse:

The city of Woodway and the town of Addison both received requests under the Texas Open Records Act, article 6252-17a, V.T.C.S., for information held by the two attorneys who, respectively, work for Woodway and for Addison. Woodway received a request for:

All information collected, assembled or maintained by David Cherry, City Attorney, City of Woodway, pursuant to law or ordinance or in connection with the transaction of official business of the city of Woodway whether maintained at the City Hall, residence, place of employment or any other location.

Addison received a request for a copy of a contract specifying the rate of compensation for an attorney who is serving as independent investigator for the town and who was hired directly by the town's attorney. Neither Woodway nor Addison initially submitted specific documents for review by this office because both municipalities ask the threshold question of whether information held by "private" attorneys hired by municipalities is subject to the Open Records Act.

Both municipalities describe a similar situation regarding the hiring of their attorneys. The two attorneys

who work for Woodway and Addison, respectively, are attorneys in private practice who maintain their own files in their own private offices. Neither municipality has a written contract hiring its attorney. The attorneys work at-will and are paid on an hourly basis for work actually performed. Woodway's attorney indicates that the city is not entitled to review his files and that the city is entitled only to final products. The city agrees. Addison's attorney claims that records relating to his work for the town "are not government records until, and only if, such information and documents are delivered or made available to the . . . Town of Addison." The town of Addison agrees.

Texas law does not impose a requirement that municipalities appoint an official city attorney or prohibit municipalities from hiring a "private" attorney to perform the duties of a city attorney. See Loard v. Como, 137 S.W.2d 880 (Tex. Civ. App. - Fort Worth 1940, writ ref'd); see also Jones v. City of Uvalde, 79 S.W.2d 341 (Tex. Civ. App. - San Antonio 1935, writ ref'd). Additionally, the law authorizes municipalities to employ private attorneys to aid and assist city attorneys. See Loard v. Como, 137 S.W.2d at 882. Attorneys hired in this manner are not "city officers." Loard v. Como, 137 S.W.2d at 882-83. On the other hand, Woodway indicates that the city council actually appointed its attorney as city attorney pursuant to a city charter provision authorizing the appointment of a city attorney. As the following discussion will show, however, it is unnecessary to determine whether the attorneys hired by Woodway and Addison are city officers, either de facto or de jure.

The Open Records Act does not ordinarily require a governmental body to obtain information that is not in its possession. Open Records Decision Nos. 445 (1986); 317 (1982). In some instances, however, the act applies to information collected or maintained by "outside" consultants or contractors. See Open Records Decision No. 462 (1987). The tests for whether the act applies to information held by outside parties are whether: (1) the information relates to the governmental body's official duties or business; (2) the consultant acts as agent of the governmental body in collecting the information; and (3) the governmental body has or is entitled to access to the information. Open Records Decision No. 462.

As a general rule, information collected by municipalities' attorneys while they are acting as attorneys for

the municipalities will relate to the municipalities' official business. See, e.g., Open Records Decision Nos. 462 (1987); 437 (1986). If they did not, the cities would probably not be authorized to direct their attorneys to engage in the practice in question. Woodway received a request for all information collected or maintained by its attorney in his work for the city.¹ Woodway indicates that its attorney handles a variety of matters "from annexations to traffic court to zoning." Information related to annexation, zoning, and traffic court clearly relates to a municipality's official business. The information at issue in the request received by Addison relates to an investigation of allegations of official misconduct lodged against Addison's officials and employees. This type of investigation clearly relates to the municipality's official business.

The second factor considered in determining whether the Open Records Act applies to documents held by outside parties is whether the consultant acted as an agent for the governmental body. Ordinarily, this factor is determined from the contract or agreement existing between the governmental body and the outside party. See, e.g., Open Records Decision Nos. 462, 445. Neither municipality at issue here has a written contract with its attorney. Consequently, the issue depends on the nature of the attorney-client relationship.

The attorney-client relationship carries a corresponding legal effect of principal and agent. Dow Chemical Company v. Benton, 357 S.W.2d 565, 568 (Tex. 1962); Portnow v. Berg, 593 S.W.2d 843, 845 (Tex. Civ. App. - Houston [1st Dist.] 1980, no writ). An attorney is a special, rather than general, agent with authority confined to but including all that is necessary to fulfill assigned duties. Duval County Ranch Company v. Alamo Lumber Company, 663 S.W.2d 627, 633 (Tex. App. - Amarillo 1983, writ ref'd n.r.e.). As a general rule, absent fraud, the acts of attorneys performing assigned duties bind their clients. Fonseca v. County of Hidalgo, 527 S.W.2d 474, 479 (Tex. Civ. App. - Corpus Christi 1975, writ ref'd n.r.e.).

1. The breadth of this request will be discussed later in this decision.

Woodway contends that its attorney's "relationship with the City of Woodway is analogous to that of an independent contractor . . . [who] serves as legal advisor and attorney." Woodway thus argues that its attorney is not an agent and attempts to distinguish Open Records Decision No. 462.

Open Records Decision No. 462 addressed a claim that a particular attorney-client relationship between a law firm and a state university is not an agency relationship but that of an independent contractor. The decision noted that Texas law recognizes the possibility of one person or entity serving both as independent contractor and as agent in the same contractual relationship. The decision found it unnecessary to determine whether the law firm in question was "entirely an agent or independent contractor" because the agreement between the law firm and the university clearly showed that the firm collected material in an investigation on behalf of the university and that the university was entitled to the information. Additionally, the question of agency based on the attorney-client relationship alone was less clear in Open Record Decision No. 462 than in the case presented by Woodway because in Open Records Decision No. 462, the attorney acted primarily as investigator rather than as legal counsel.

As indicated, the agent-principal relationship existing between attorney and client is a relationship imposed by law, rather than by contract. One of the purposes for the legal imposition of certain agency principles is to protect third parties who must deal with attorneys. The existence of an attorney-client relationship may be implied from the conduct of the parties. Duval County, 663 S.W.2d at 633. A client may restrict an attorney's authority but the restriction must be known to third parties who may be affected by the limitation. See United States v. State of Texas, 523 F.Supp. 703, 712 (E.D. Tex. 1981). Consequently, we believe that Woodway's attorney acts as an agent of Woodway, at least when he performs requested legal services on behalf of the city.

Similarly, we believe Addison's attorney acts as agent for Addison when he performs requested legal services on behalf of the town. Delegation of responsibilities is not ordinarily something an agent has implied authority to do. The Addison council, however, expressly authorized its attorney to engage the services of an independent attorney to perform an investigation for the town.

The third factor in determining whether the Open Records Act applies to information held by outside parties is whether the governmental body has access to or is entitled to access to the information. Woodway and Addison and their respective attorneys assert that the municipalities are entitled only to "final" products.

The law requires that a lawyer deliver "promptly" to a client any funds or property, including papers, to which a client is entitled. Hebisen v. State, 615 S.W.2d 866, 868 (Tex. Civ. App. - Houston [1st Dist.] 1981, no writ); Nolan v. Foreman, 665 F.2d 738, 742 (5th Cir. 1982). In Hebisen, a disciplinary suit against an attorney, the client alleged that the attorney failed to "promptly return papers to his client upon request". Disciplinary Rule 9-102(B)(4) of the Texas State Bar Rules requires that a lawyer:

Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

The Hebisen court held that "other properties" includes such items as a client's "papers and other documents that the [attorney] had in his file." 615 SW.2d at 868 (emphasis added); see also Nolan v. Foreman, 665 F.2d at 742. An attorney may withhold papers from a client only if the attorney claims a lien against the papers for amounts due from the client for professional services. Nolan v. Foreman, 665 F.2d at 743 (citing Smith v. State, 490 S.W.2d 902, 910 (Tex. Civ. App. - Corpus Christi 1972, writ ref'd n.r.e.)); see also Griffith v. Geffen & Jacobsen, P.C., 693 S.W.2d 724, 728 (Tex. App. - Dallas 1985, no writ).

In conclusion, as a general rule, records held by a private attorney that are related to legal services performed by the attorney at the request of a municipality are subject to the Open Records Act. Whether the records must be disclosed depends on whether the records fall within any of the act's specific exceptions to disclosure.

As indicated, Woodway received a request for all of the attorney's records relating to work performed for the city. Woodway indicates that this request is similar to that addressed in Open Records Decision No. 304 (1982). That decision held that a request for "all documents related to a current dispute between El Paso and New Mexico over

water rights" was too broad to determine which records the requestor sought. You also note that Open Records Decision Nos. 87 (1975) and 23 (1974) stand for the proposition that a governmental body need not comply with requests when compliance would impose overly harsh burdens. In Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 687 (Tex. 1976), cert. denied, 430 U.S. 931 (1977), however, the Texas Supreme Court held that the cost of producing public records does not govern whether the records may be withheld.

On the other hand, we agree with Woodway's contention that the act does not prevent the city from having a reasonable amount of time in which to compile the documents in question. See Open Records Decision No. 467 (1987). Moreover, we believe it would be appropriate to verify whether the requestor in fact wishes to see or have copies of all of the attorney's records relating to the city. The requestor must bear the cost of producing these records. See Open Records Decision No. 488 (1988). Because of the voluminous nature of the documents, he may wish to narrow his request. The act authorizes governmental bodies to require requestors to post bond when compliance with a particularly voluminous request would cause undue hardship on the governmental body. Art. 6252-17a, § 11; Industrial Foundation, 540 S.W.2d at 687-88.

Additionally, many of the documents held by Woodway's attorney may be protected from disclosure by the exceptions you claim. In order to determine whether information is subject to a particular exception, this office must review the information. Section 7(b) of the act states that requested information "shall be supplied to the attorney general but shall not be disclosed until a final determination has been made." If the documents are numerous and repetitive, you should submit representative samples. If, however, each document contains substantially different types of information, you must include copies of all of the documents or information. Once Woodway has verified the scope of the request it received, the city should submit for review representative copies of documents it wishes to withhold. The city should indicate which exceptions apply and why.

Addison contends that a vast amount of information collected or maintained by its attorney would be protected by various exceptions of the act (including sections 3(a)(1), 3(a)(3), 3(a)(7), 3(a)(8), and 3(a)(11)). The

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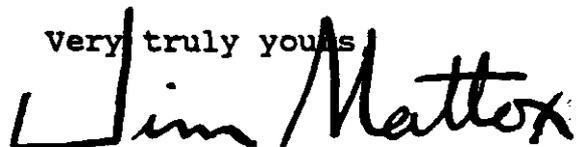
first requestor sought only a copy of a contract or other document specifying the rate of compensation for the attorney serving as independent investigator for Addison. As indicated, the town expressly authorized its attorney to hire this investigator. Although detailed billings for legal work may be withheld from disclosure under section 3(a)(1)'s protection for the attorney-client privilege, see Open Records Decision Nos. 399 (1983); 304 (1982), the amount of billings may not ordinarily be withheld. The town of Addison is likely to be legally liable to the investigator for compensation under agency principles. The amount paid to the investigator along with the attorney's fee for supervising the investigator are no doubt going to be paid by the town out of public funds. The requested information may not be withheld under any of the exceptions the town of Addison has claimed.

On June 7, 1988, Addison received a request for a 1,000 page report received by the investigating attorney hired by the city's attorney. You claim this report is protected from disclosure. This office cannot conclude that any exceptions protect the report without reviewing the report. The town must submit a copy of the report within 10 days of receipt of this decision.

S U M M A R Y

As a general rule, records that are held by a "private" attorney employed by a municipality and that are related to legal services performed by the attorney at the request of the municipality are subject to the Texas Open Records Act, article 6252-17a, V.T.C.S. Whether specific records must be released depends on whether the records fall within any of the act's specific exceptions to disclosure.

Very truly yours



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