



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 29, 1994

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
Institutional Division
P.O. Box 99
Huntsville, Texas 78342-0099

OR94-778

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 26778.

The Texas Department of Criminal Justice, Institutional Division, (the "department") has received a request¹ for certified payroll records for work done on the Emergency Dormitory Unit Project at Beeville, Texas. You claim that the requested information is not subject to the act. In the alternative, you claim that sections 552.101, 552.104, and 552.110 of the Government Code except it from required public disclosure.

As a threshold issue, we address your contention that the requested information is not "public information" subject to the Open Records Act. Gov't Code § 552.021. You contend that the requested information is not subject to the act because "[i]t is private and proprietary information in the possession of a private person" and because "[t]he information is not created for the governmental body, . . . but rather for the benefit of the contractor." Section 552.021 of the Government Code provides in pertinent part:

(a) Information is public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained:

¹The member of the public asked for five categories of information. You did not object to releasing information in the first four categories.

(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 § 552.021. Thus, the Open Records Act will apply to the payroll records if they constitute information "collected, assembled, or maintained" by or for the department within the above provision.

Article 5159a, V.T.C.S., provides that laborers, workmen, and mechanics employed by or on behalf of the state of Texas shall be paid "[n]ot less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed." V.T.C.S. art. 5159a, § 1. The contractor and each subcontractor is required to keep a record of the actual per diem wages paid to each worker employed on the project, and this record "shall be open at all reasonable hours to the inspection of the public body awarding the contract, its officers and agents." *Id.* § 3; *see id.* § 5 (misdemeanor penalty for non-compliance with statute). The department does not have possession of the records, but it may inspect the payroll information pursuant to this provision of article 5159a, V.T.C.S.

The payroll information is not information "collected, assembled, or maintained . . . by" the department within section 552.021(a)(1). We next consider whether it is the kind of public information described by section 552.021(a)(2) of the Government Code: information "collected, assembled, or maintained . . . for a governmental body and the governmental body owns the information or has a right of access to it." The provision now codified as 552.021(a)(2) of the Government Code was added to the Open Records Act in 1989. Acts 1989, 71st Leg., ch. 1248, § 9, at 5023. Open Records Decision No. 558 (1990) interpreted the language now codified as section 552.021(a)(2), stating as follows:

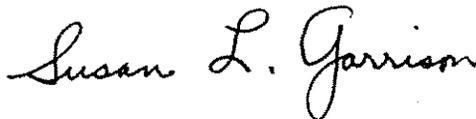
Prior decisions of this office have recognized that a governmental body may contract with a consultant or independent contractor to prepare information for its use in the conduct of official business. See, e.g., Open Records Decision No. 192 (1978). On occasion, the independent contractor has maintained his report and underlying data in his own office, making it available for the governmental body to use without actually having physical custody of the records itself. . . . Where the contractor has prepared information on behalf of a governmental body and makes it available to the governmental body, the information has been held to be subject to the Open Records Act, even though it is not in the governmental body's physical custody. . . .

The language added to section 3(a) [by the 1989 amendment] codifies these prior decisions regarding information prepared for a governmental body.

Open Records Decision No. 558 at 2. In concluding that information held for a university by its consultant was subject to the act, this office stated that "the consultant must have acted as an agent of the university in collecting the information." Open Records Decision No. 462 (1987); *see also* Open Records Decision No. 585 (1991) (discussing agency relationship between governmental body and consultant). In this case, the contractor and subcontractor did not prepare payroll records as agents of the department, but in performance of duties imposed upon them by article 5159a, V.T.C.S.² The state's inspection right does not convert the private company's records into public records subject to chapter 552 of the Government Code. Accordingly, the requested payroll information is not information subject to chapter 552. Of course, if the department makes copies of the contractor's payroll records or takes notes about them in performing its duties under article 5159a, V.T.C.S., those documents will be subject to the Open Records Act.

Because prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Open Government Section

SLG/MAR/rho

Ref.: ID# 26778
ID# 27203

cc: Mr. Richard Levy
Texas AFL-CIO
P.O. Box 12727
Austin, Texas 78711

²A contractor or subcontractor who neglects to keep a record of the names, occupation and actual wages paid to each worker employed by him in connection with the public work, or who refuses to allow access to the records "to any person authorized to inspect same under this Act" is guilty of a misdemeanor. V.T.C.S. art. 5159a, § 5.