



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 8, 1996

Mr. Paul F. Wieneskie
Cribbs & McFarland
P.O. Box 13060
Arlington, Texas 76904-0060

OR96-0490

Dear Mr. Wieneskie:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 38928.

The City of Euless (the "city") received a request for "payroll records with names and per diem wages for all employees working on the Euless Library Project, along with the General Contractor's written statement that the workers are receiving the proper wages." You have provided the requestor information responsive to the second part of the request. You claim, however, that the requested payroll records are not subject to the Open Records Act.

You contend that the requested information is a private business record of the contractor and is not "collected, assembled or maintained . . . for a governmental body." Section 552.002 of the Government Code provides in pertinent part:

(a) In this chapter, "public information" means 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.

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

Section 2258.021(a) of the Government Code 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.” 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; this record “shall be open at all reasonable hours to the inspection of the public body.” *Id.* § 2258.024; *see id.* § 2258.058 (misdemeanor penalty for non-compliance with statute). The city does not have possession of the records, but it may inspect the payroll information pursuant to this provision of section 2258.024 of the Government Code. The payroll information is not information “collected, assembled, or maintained . . . by” the city within section 552.002(a)(1).

We next consider whether it is the kind of public information described by section 552.002(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 552.002(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 552.002(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. . . .

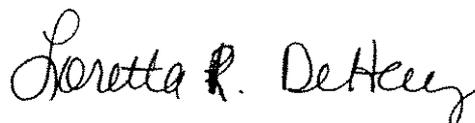
The language added to section 3(a) [by the 1989 amendment] codifies these prior decisions regarding information prepared for a governmental body.

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) at 4; *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 city, but in performance of duties imposed upon them by chapter 2258 of the Government Code. The city’s inspection right does not convert the private company’s records into public records subject to the act.

Accordingly, the requested payroll information is not information subject to the act. The department, therefore, need not provide the records to the requestor. Of course, if the city makes copies of the subcontractor's payroll records or takes notes about them in performing its duties under Chapter 2258 of the Government Code, those documents will be subject to the act.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref: ID# 38928

Enclosure: Submitted document

cc: Mr. Norm Whiteman
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(w/o enclosure)