



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 19, 1998

Mr. W. Daniel Vaughn
McLeod, Alexander, Powel & Apffel
P.O. Box 629
Galveston, Texas 77553

OR98-0483

Dear Mr. Vaughn:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 112563.

The Galveston Park Board (the "board"), which you represent, received a request for "all disbursements and all invoices that generated those disbursements for the years 1990 to the present" pertaining to the board's relationship with Moody Gardens, Inc. The requestor also seeks the "latest IRS Form 990." You explain that the board maintains some of the requested information, but most of it is maintained by Moody Gardens, Inc. You indicate, however, that the board has a right of access to the requested disbursement information. You ask whether you may withhold the requested information under sections 552.101, 552.103, and 552.107 of the Government Code. You also ask several other questions about your responsibility under the Open Records Act. We have considered your arguments and have reviewed the sample attorney fee bills that you have submitted as Exhibit F.

You explain that you have been unable to obtain much of the requested information from Moody Gardens even though the board has a right of access to it. We recognize that the Open Records Act does not ordinarily require a governmental body to obtain information not in its possession. Open Records Decision Nos. 558 (1990), 499 (1988). Section 552.002 of the Government Code, however, defines public information as "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.*" [Emphasis added.]. Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under chapter 552 of the Government Code if a governmental body owns or has a right of access to the information. See Open Records Decision No. 462

(1987); *cf.* Open Records Decision No. 499 (1988) (relevant facts in determining whether information held by consultant is subject to the Open Records Act are: 1) information collected by consultant must relate to the governmental body's official business; 2) consultant must have acted as agent of the governmental body in collecting information; and 3) governmental body must have or be entitled to access to the information). Where a third party has prepared information on behalf of a governmental body, the information is subject to the Open Records Act, even though it is not in the governmental body's custody. Open Records Decision No. 558 (1990) at 2. Because the board has a right of access to the information at issue, it is public information subject to disclosure. Moreover, we do not believe that it is appropriate for the board to send the requestor to the third party in order to obtain the information. The Open Records Act unequivocally mandates the production of public information by the governmental body. *See* Gov't Code §§ 552.021, 552.221(a).

When a governmental body receives a written request for public information that it wishes to withhold, the governmental body must ask for a decision from the attorney general about whether the information falls within one of the exceptions. Gov't Code § 552.301; Open Records Decision No. 435 (1986). Pursuant to section 552.301(b) a governmental body is required to submit to this office (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, and (3) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You have sent only representative copies of specific attorney fee billing information which is apparently maintained by the board. You did not, however, submit much of the requested information to this office for review. Consequently, you have waived the protection of any discretionary exceptions to disclosure for this information. Gov't Code §§ 552.301-302; Open Records Decision Nos. 473 (1987), 630 (1994). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You also ask if the board may make at least two inquiries of the requestor: why he wants the information and for whom he is working. We believe this inquiry to be inappropriate. The Open Records Act prohibits a governmental body from inquiring into a requestor's reasons for requesting information. Gov't Code § 552.222. In addition, a governmental body must treat all requestors for information uniformly. Gov't Code § 552.223. Both you and an attorney who represents Moody Gardens raise a concern that the requestor may be working for the opposing party in pending litigation. By making the request or responding thereto, you suggest that the requestor or the board may be in violation of a court ordered discovery stay in that litigation. You state that the board is not, however, a party to the litigation. Moreover, for purposes of the Open Records Act, the court has neither ordered that information be withheld or that the board should not respond to an open records request. You have shown us no court order which mandates that the information must be withheld. *See* Gov't Code 552.107(2). The board must respond to the open records request without an impermissible inquiry.

We will now examine whether you may withhold the requested attorney fee bills that you have submitted. You first claim that Exhibit F may be withheld under section 552.103. We disagree. Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, *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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

(Emphasis added.). You claim that the requested information relates to a pending lawsuit, *Fertitta Hospitality, L.L.C v. Moody Gardens, Inc., et al.*, No. C-97-423 (S.D. Tex). The board is not now a party to the suit and you have not argued that the board may reasonably anticipate being named a party. You have not established that section 552.103 is applicable in this instance.

Second, you argue that the fee bills may be withheld under the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.*

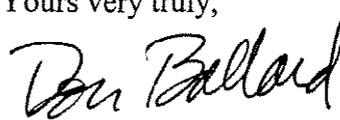
That section 552.107(1) protects only the details of the substance of attorney-client communications means that the exception applies only to information that reveals attorney advice and opinion or client confidences. *See* Open Records Decision No. 574 (1990). In general, documentation of calls made, meetings attended, or memos sent is not protected under this exception. *See* Open Records Decision No. 589 (1991). We have marked the portions of Exhibit F that appear to be client confidences. We are unable to determine and you have not explained how or why the remaining information is protected under section 552.107 as attorney advice and opinion or client confidences. The board may withhold the marked information. The remaining information on the fee bills must be released.

We finally note that there may be some concern over the costs of the requested information. Generally, the charges for providing public information are established by the

General Services Commission. Gov't Code § 552.262. If, however, the estimated cost of providing the copies exceeds \$100, you may require a deposit or bond from the requestor. Gov't Code § 552.263. We suggest that you contact the Open Records Administrator for the General Services Commission to resolve any costs issues. *See* Gov't Code § 552.262; *see also* Gov't Code §§ 552.261-.273.

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,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 112563

Enclosures: Marked documents

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