



November 3, 1999

Mr. Thomas G. Ricks
President
The University of Texas Investment
Management Company
201 West Sixth Street, 2nd Floor
Austin, Texas 78701

Open Records Decision No. 663

Re: Whether the scope of a general request for information submitted to a governmental body includes information not in the possession of the governmental body but created and maintained by private counsel engaged by the governmental body; the scope of a governmental body's responsibilities in requesting clarification or narrowing of a request for information; and related questions (ORQ-32)

Dear Mr. Ricks:

On behalf of the University of Texas Investment Management Company ("UTIMCO"),¹ you ask that we reconsider² Open Records Letter No. 99-1189 (1999) (hereinafter "Ruling 2"), which, in reliance on an earlier ruling to UTIMCO, Open Records Letter No. 98-2908

¹You inform us that UTIMCO is a Texas nonprofit corporation which has contracted with the University of Texas Board of Regents to serve as an investment manager for the assets of the Permanent University Fund and other funds under the control and management of the Board of Regents. Although you argue that UTIMCO is not subject to the Public Information Act ("PIA"), this office has determined that UTIMCO is a governmental body subject to the PIA. *See* Open Records Letter No. 97-1776 (1997).

²The Seventy-sixth Legislature recently passed Senate Bill 1851. Section 20 of Senate Bill 1851 amends section 552.301 of the Government Code by adding subsection (f). Subsection (f), which became effective September 1, 1999, prohibits a governmental body from asking for an attorney general ruling if the governmental body has received a ruling on the precise information at issue and the attorney general or a court determined that the information is public information under the PIA. Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 20, 1999 Tex. Sess. Law Serv. 4500, 4508-09 (Vernon) (to be codified as an amendment to Gov't Code 552.301). However, the request before us is governed by the law in effect on the date UTIMCO requested a decision from this office. *Id.* § 36.

(1998)³ (hereinafter "Ruling 1"), determined that UTIMCO must release to the requestor three memoranda.⁴ Because of the wide scope of the legal issues raised by your request, we agreed to reconsider.

We are informed that the requestor has obtained copies of two of the memoranda at issue, which were written by UTIMCO's private counsel dated April 2, 1998, and April 6, 1998. This opinion, therefore, addresses the required public disclosure of only the third memorandum, a draft document prepared by UTIMCO's private counsel. You first question the conclusion in Ruling 1 that UTIMCO waived its claimed exceptions to disclosure by failing to timely request a decision from this office. Second, you question the legality of Ruling 2's reliance on Ruling 1. As a third argument against disclosure, UTIMCO's private counsel argues that the information is its protected attorney work product.

We conclude that Ruling 2 incorrectly relied on Ruling 1 in concluding that UTIMCO must release to the requestor the memorandum at issue. Further, we conclude that the memorandum is excepted from required public disclosure.

In light of these conclusions, we need not address UTIMCO's first and third arguments for purposes of determining whether the memorandum is subject to required public disclosure. Because we have no information to allow us to conclude otherwise, we assume that UTIMCO has complied with Ruling 1 by releasing the information UTIMCO submitted to this office as responsive to the request in that ruling. However, because the first argument raises significant, recurring questions concerning the timeliness of a request for an attorney general opinion, we nevertheless address the issues raised by that question. *See* Gov't Code § 552.011.

We begin with the question of whether UTIMCO's request for Ruling 1 was timely submitted to this office in accordance with section 552.301 of the Public Information Act ("PIA"). You do not dispute the fact that UTIMCO failed to timely request a ruling in compliance with section 552.301(a), which requires a governmental body to ask for an open records ruling no later than the tenth business day after the date of receipt of a written request, unless this office has previously issued a ruling on the information requested. You argue that, because UTIMCO was seeking clarification of the request from the requestor, UTIMCO's time for submitting a request began to run anew when it received the requestor's response to the request for clarification and that, using this new starting date, UTIMCO

³This office affirmed Open Records Letter No. 98-2908 (1998) in Open Records Letter No. 99-0669 (1999).

⁴Open Records Letter No. 99-1189 (1999) determined that the memoranda dated April 2, 1998, and April 6, 1998, must be disclosed. The ruling also determined that a third undated memorandum must be disclosed if it was created before UTIMCO received the request for information. However, if the third memorandum was created after the request for information giving rise to Open Records Letter No. 98-2908 (1998) was received, the memorandum could be withheld under section 552.107(1) of the Government Code.

timely requested a decision. You rely on Open Records Decision No. 333 (1982) for your position that when a governmental body and a requestor are communicating in good faith to clarify a request the time starts over upon the receipt of the requestor's response to the governmental body's request for clarification.

In Open Records Decision No. 333 (1982), the City of Houston (the "city") received a request for access to blotters maintained by all divisions of the city police department. The city did not initially understand that the requestor was seeking information that could be excepted from required public disclosure if an exception to disclosure was timely raised. Apparently this was so because, in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976), the court held that the city's police blotter at issue was public information. Both the city and the requestor thought that the request could be resolved informally without the need for an attorney general decision. However, confusion and disagreement about the nature of the requested information as public or excepted from disclosure arose. Unlike the blotter in the *Houston Chronicle* case, the city's blotter in Open Records Decision No. 333 contained police contacts. The city did not want to divulge the names of the contacts to the public and believed the contacts on the blotters to be excepted from disclosure under the law enforcement exception. While the city and the requestor engaged in telephone discussions concerning the meaning of the *Houston Chronicle* case, the ten-day deadline expired. The attorney general decision held that because there was legitimate confusion about the nature of the requested information, that is, whether it included information which could be protected from disclosure if an exception was timely raised, *i.e.*, the police contacts, and because the parties believed the request could be resolved informally, the requestor's response to the city's request for clarification, which enabled the city to know with certitude that the requestor sought the names of the confidential police contacts, should be treated as the operative request for purposes of the ten-day deadline.⁵

In UTIMCO's Ruling 1, the requestor sought the following information:

all memoranda, diaries, correspondence, writings, documents, journals, notes, personal notes, phone logs, e-mails and any other information in whatever form — including that stored on PIM's (Manage Pro, e.g., etc.) the "Define" system, computer tapes, hard drives, magnetic media, removable storage or recordings — concerning, involving, mentioning or relating to either INITIATE!! and/or Steve Lisson.

⁵The ten days for seeking an attorney general decision are now ten *business* days rather than calendar days. Gov't Code § 552.301(a).

You say that UTIMCO sought clarification⁶ due to the request's large scope, because UTIMCO was unclear about what was desired, and because UTIMCO does not organize its files to allow a reasonable search for all documents relating to the requestor. Thus, it appears that UTIMCO was concerned that it was presented with a broad request for information and that it would be difficult to locate all of the requested information.

We note that where a governmental body is presented with a broad request for information, it is incumbent upon the governmental body to make a good faith effort to attempt to identify such records as might fit the request and advise the requestor of the types of documents available, so that he may narrow his request to specifics. Open Records Decision No. 31 at 4 (1974). Additionally, we note that the difficulty of complying with a request does not relate to the availability of requested information. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). More importantly, we believe that UTIMCO's situation is distinguishable from the situation in Open Records Decision No. 333 (1982).

As stated above, in Open Records Decision No. 333, the city did not understand the nature of the information requested as information which could be protected from disclosure until the day the city received the clarification. Thus, in Open Records Decision No. 333, the request, as clarified, was treated as a new request, with the commencement of a new deadline. In contrast, you state that "UTIMCO had . . . confusion when confronted by a very broad request referring to all information 'concerning, involving, mentioning or relating'" to the requestor. See Letter from Thomas G. Ricks, President, UTIMCO, to the Honorable John Comyn, Attorney General of Texas (May 12, 1999) (on file with the Office of the Attorney General, Open Records Division). Thus, while UTIMCO considered the request to be broad in scope and difficult with which to comply, UTIMCO apparently never considered the request to be one in which it could release all of the requested information to the requestor without the necessity of seeking an attorney general decision. When UTIMCO received the request, it was on notice that it could raise exceptions to all information covered by the broad request. It appears that at no time did UTIMCO question whether the requestor was seeking only public information and not information that could be excepted from public disclosure. Apparently, UTIMCO communicated with the requestor not because UTIMCO believed that the request could be resolved without the necessity of an attorney general decision, but because UTIMCO wanted the requestor to narrow his request. Furthermore, unlike the situation in Open Records Decision No. 333, the requestor did not respond to the request for clarification with a request for information that was not included in his original request. The clarification process did not result in a request for information not encompassed by the original request and one that, for the first time, required an attorney general decision. Thus, UTIMCO's situation is not the same as the situation in Open Records Decision

⁶The requestor responded to UTIMCO's request for clarification by stating, "You know *exactly* where and what information, both paper and electronic, to provide." (Emphasis in original.)

No. 333 where the clarified request, which included excepted information not sought in the original request, became the operative request.

Moreover, we do not believe that Open Records Decision No. 333 means that, in every situation in which a governmental body seeks clarification or narrowing of a request from a requestor, the requestor's response becomes the operative request. In fact, while the PIA expressly permits a governmental body to seek clarification and narrowing of a request, it is silent as to the effect of such inquiry on the PIA's deadline for requesting a decision. Gov't Code § 552.222(b); *see id.* § 552.301(a); *see also* Open Records Decision No. 23 at 2 (1974) (addressing volume and clarification). We are mindful that the time limitation for seeking an attorney general decision found in section 552.301(a) of the Government Code is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). We believe that the resolution of the question of the effect of a governmental body's seeking clarification of an ambiguous request or narrowing of a request that is broad in scope should acknowledge governmental bodies' legitimate problems in understanding and responding to broad or unclear requests while furthering the PIA's mandate that public information be released in a timely fashion. Governmental bodies that genuinely need clarification of a request should not be placed in a position in which they risk the loss of their statutory time for seeking a decision if they take time to communicate with a requestor. Clarification and narrowing, sought in good faith, should be encouraged.

Thus, we believe that the PIA contemplates a tolling of the ten days during the interval in which a governmental body and a requestor are communicating in good faith to clarify or narrow a request. This does not mean that the clarification or narrowing process results in an additional ten full days from the date the requestor responds to the request for clarity. While governmental bodies should be encouraged to seek clarification and narrowing of a request, they should also be encouraged to do so promptly, that is, as early as possible within the statutory ten-day deadline. Therefore, we conclude that the ten-day deadline is tolled during the process but resumes, upon receipt of the clarification or narrowing response, on the day that the clarification is received. This conclusion governs any future PIA requests requiring a governmental body to seek clarification or narrowing of a request.

In the case at hand, once UTIMCO received the requestor's response, the deadline resumed its approach where it left off when clarification was sought. The requestor's response to UTIMCO's request for narrowing did not result in an additional ten days for UTIMCO to request a decision. Allowing for the narrowing process, which, we believe, in this case, should have included UTIMCO's delineation of the types of documents available so that the requestor could narrow his request, UTIMCO failed to timely submit its request for an attorney general decision for Ruling 1. UTIMCO's raised exceptions for Ruling 1, sections 552.103, 552.107(1), and 552.111, were, therefore, waived. *See* Open Records Decision Nos. 630 (1996), 551 (1990), 515 (1988); *see also Hancock* 797 S.W.2d at 381 (compelling

demonstration standard for overcoming presumption of openness arising from noncompliance with ten-day deadline); Open Records Decision No. 473 (1987) (same).

As we have stated, our conclusion about the effect of seeking clarification or narrowing of a request from a requestor on the PIA's ten-day deadline is not determinative of UTIMCO's duty under the PIA in this instance. This is so, because we assume that UTIMCO released to the requestor the information that was before this office in Ruling 1 and because, as we will explain, we conclude that Ruling 2's reliance on Ruling 1 was in error.

We turn to the question of the legality of Ruling 2's reliance on Ruling 1. Ruling 2 determined that, because the information requested was responsive to the request in Ruling 1, and because Ruling 1 determined that the information was subject to required public disclosure, UTIMCO should have already released the memorandum to the requestor. In other words, Ruling 2 found that Ruling 1's request encompassed the information at issue in Ruling 2. You argue that Ruling 1's request does not encompass the Ruling 2 information.

For purposes of our consideration of UTIMCO's second argument, we will again set out the information the requestor sought in Ruling 1 as follows:

all memoranda, diaries, correspondence, writings, documents, journals, notes, personal notes, phone logs, e-mails and any other information in whatever form — including that stored on PIM's (Manage Pro, e.g., etc.) the "Define" system, computer tapes hard drives, magnetic media, removable storage or recordings — concerning, involving, mentioning or relating to either INITIATE!! and/or Steve Lisson.

In Ruling 2, the requestor sought the following information:

Per the TPIA, please send a copy of or make available for inspection Vinson & Elkins' (plus any other public or private attorney's) records and files on me, INITIATE!!, and their "Lisson/INITIATE!! TORA Request File" or files; include any other related documents and information.

Vinson & Elkins, L.L.P., is UTIMCO's private counsel. You do not question that the records of a governmental body's private attorney are generally subject to the PIA. *See* Open Records Decision No. 462 (1987). Nor do you contend that UTIMCO's private counsel was not acting as its agent in creating the memorandum at issue here. *See* Letter from Patrick F. Thompson, Vinson & Elkins, to the Honorable John Cornyn, Attorney General of Texas (June 18, 1999) (on file with the Office of the Attorney General, Open Records Division).

However, you question whether the draft document in the possession of private counsel was responsive to the first request in two ways. First, UTIMCO's counsel questions whether the

draft document is “public information” subject to the PIA, since counsel says UTIMCO never relied on the draft document. Second, you question whether a request for information about Lisson or INITIATE!! in which the requestor does not specify that he seeks such information held by private counsel includes such information.

UTIMCO’s private counsel questions whether the draft document is “public information” subject to the PIA. Citing Open Records Decision No. 492 (1988), UTIMCO’s counsel argues that the mere fact that UTIMCO has a right of access to the draft document does not make it “public information” responsive to a request directed at UTIMCO for all information relating to Steve Lisson and that, because UTIMCO never relied on the draft document at issue, it is not “public information” subject to the request. Section 552.002(a) of the Government Code defines “public information” subject to the PIA, and reads as follows

(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 has a right of access to it.*

Gov’t Code § 552.002(a) (emphasis added). Open Records Decision No. 492 (1988) concerned a request for data stored in an economic consultant’s computers and that was available to the state comptroller on an as needed basis through telephone link access with the consultant’s computers. The decision determined that, although the comptroller had a right of access to all of the information, only the raw data and projections that were actually accessed and stored or that appeared in the comptroller’s revenue estimates were public information subject to the PIA because they were “collected” by a governmental body within the meaning of section 3(a) of the predecessor statute of the PIA, former V.T.C.S. article 6252-17a. Open Records Decision No. 492 at 4-5 (1988).

However, section 3(a) of the predecessor provision of section 552.002 defined “public information” only as “all information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business,” and did not include the current statute’s language also covering information collected, assembled, or maintained for a governmental body in which the governmental body owns the information or has a right of access to it. Thus, we believe the holding in Open Records Decision No. 492 has been superseded by the amendment to the statute. Counsel states that “UTIMCO does not deny that UTIMCO had ‘access’ to the [draft] document.” See Letter from Patrick F. Thompson, Vinson & Elkins, to the Honorable John Cornyn, Attorney General of Texas (June 18, 1999) (on file with the Office of the Attorney General, Open Records Division). Furthermore, information collected by an attorney acting as counsel for a governmental relates to the governmental body’s official business. Open Records Decision Nos. 499 (1988), 462 (1987). Thus, regardless of whether UTIMCO relied

on the document, we conclude that, as the document relates to UTIMCO's official business, and as UTIMCO had a right of access to the draft document, it is public information within the meaning of section 552.002. *See* Open Records Decision No. 425 (1985).

We next address the question of whether the first request for information about Lisson or INITIATE!! in which the requestor does not specify that he seeks such information held by private counsel includes such information. Having said that information held by attorneys acting as counsel for UTIMCO is generally subject to the PIA, we nevertheless find that, in this case, it is not reasonable to conclude that the first request encompassed private's counsel's information. We do not believe that the first request, which did not specify information held by UTIMCO's outside counsel, served to notify UTIMCO that the requestor was seeking information held not only by UTIMCO, but also by its counsel. A request for information must be clear enough to allow a governmental body to reasonably identify the information being requested. *See* Gov't Code § 552.222(b) (permitting governmental body to clarify request). In this case, it was reasonable for UTIMCO to presume that the requestor sought only information maintained by UTIMCO, because the request did not specify otherwise.

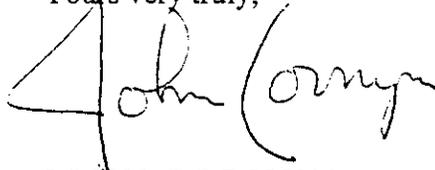
Prior decisions of this office have determined that a governmental body's information held by outside counsel is subject to required public disclosure, but in these decisions, the requestor specified that he sought information collected or maintained by the outside counsel. *See* Open Records Decision Nos. 499 (1988), 462 (1987). In this case, because the first request did not clearly seek information held by UTIMCO's outside counsel, such information is not presumed to be responsive to the request. Further, it is not reasonable to infer that the request encompassed outside counsel's information. Thus, our determination in Ruling 1 that the requested information is subject to public disclosure is not controlling. Consequently, we will consider UTIMCO's argument that the memorandum is excepted from disclosure.

UTIMCO asserts that the memorandum is excepted from disclosure based on sections 552.107(1) and 552.111 of the PIA. Section 552.107(1) protects 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(1) protects privileged information," that is, information that reflects the client's confidential communications to the attorney or the attorney's legal advice or opinions. Open Records Decision No. 574 at 5-7 (1990). The memorandum consists of counsel's legal advice to UTIMCO. Consequently, we conclude that UTIMCO may withhold the requested memorandum from required public disclosure based on section 552.107(1). Ruling 2 is overruled to the extent that it conflicts with this decision.

S U M M A R Y

If a governmental body determines in good faith that it is unclear as to what information is requested, or that the scope of information requested is unduly broad, the governmental body may ask the requestor to clarify or narrow the scope of a request. The time used in clarifying or narrowing the scope of a request does not count as part of the governmental body's statutory allotment of ten business days to request an open records decision under section 552.301 of the Government Code. Even though a governmental body does not rely on its private counsel's advice, information prepared by such counsel in the course of providing legal services to the governmental body and to which the governmental body has a right of access is public information subject to the Public Information Act. However, a request for information must be clear enough to allow the governmental body reasonably to ascertain the information being requested. In this case, a request to UTIMCO that does not specifically mention records that are held by UTIMCO's private counsel does not encompass records held by such counsel. A memorandum consisting of private counsel's legal advice to UTIMCO is excepted from required public disclosure based on section 552.107(1) of the Government Code. Open Records Letter No. 99-1189 (1999) is overruled to the extent that it conflicts with this decision.

Yours very truly,

A handwritten signature in black ink that reads "John Cornyn". The signature is written in a cursive style with a large initial "J" and "C".

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