



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 1, 2008

Mr. John W. Peeler
Coveler & Katz, P.C.
820 Gessner Road, Suite 1710
Houston, Texas 77024-8261

OR2008-05962

Dear Mr. Peeler:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 308989.

The Magnolia Volunteer Fire Department (the "department"), which you represent, received two requests from the same requestor for 1) a copy of the department's financial audits for years ending December 31, 2004 and December 31, 2005 and 2) copies of the work product relating to "*Missing Records and FBI Investigation*" referenced on an invoice from the outside auditor hired by the department. You assert that information responsive to the second request is not subject to disclosure under the Act. You state that the department will release a copy of the audit for 2004 and 2005, excluding the management letter, in response to the first request. You claim that the submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we address your assertion that any work product responsive to the second request is not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Public information is defined as:

[I]nformation 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.

Id. § 552.002(a). Thus, virtually all information in a governmental body's physical possession is public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Likewise, the Act is applicable to information that a governmental body does not physically possess if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see also* Open Records Decision No. 462 at 4 (1987) (Act applies to information collected or maintained by a consultant if the information relates to a governmental body's official duties or business, the consultant acts as agent of the governmental body in collecting the information, and the governmental body has or is entitled to access to the information). However, the Act does not require a governmental body to release information if the governmental body that receives the request has neither possession of the information nor a right of access to it. *See* Open Records Decision Nos. 534 at 2-3 (1989), 518 at 2-3 (1989), 445 at 2 (1986).

You state that an independent auditor conducted an audit for the department pursuant to a written agreement. You argue that any work product responsive to the second request is held by the auditor as an independent contractor and thus is not subject to the Act. However, this office has said that whether a party to a contract with a governmental body is an independent contractor and/or an agent is not dispositive of whether information held by the party is subject to the Act. *See* ORD 462 at 4-5. Furthermore, you claim that the department never took possession of, nor was offered control of or access to, any documentation developed by the auditor that would qualify as work product beyond the actual audit report. However, although the "Audit Engagement Letter" you submitted provides that the audit documentation is the property of the auditor, we note that it also provides that the department must review and approve the auditor's draft financial statements, schedule of expenditures of federal awards, and related notes. Accordingly, we find that the auditor's draft financial statements, schedule of expenditures of federal awards, and related notes are collected, assembled, or maintained for the department, and the department has a right of access to that information. *See* Gov't Code § 552.002(a)(2). Thus, such information constitutes public information under section 552.002(a). *Id.*; *see also* *Baytown Sun v. City of Mont Belvieu*, 145 S.W.3d 268, 271 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (governmental body that was entitled to inspect books and records of contracting party had right of access to its payroll account records). Therefore, to the extent that such information is responsive to the second request, it must be released to the requestor. *See* Gov't Code §§ 552.006, .021, .301, .302. However, any work product beyond the auditor's draft financial statements, schedule of expenditures of federal awards, and related notes is not subject to the Act and need not be released to the requestor. *See also* Open Records Decision Nos. 558 at 2 (1990) (Act not applicable if governmental body does not have right of access

to or ownership of information prepared for it by an outside entity), 445 at 2 (Act not applicable to information that governmental body never possessed or was entitled to receive).

Next, we consider your argument that the submitted management letter is excepted from disclosure under section 552.111 of the Government Code. We note that this letter is subject to section 552.022 of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required public disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by section 552.108[.]

Gov't Code § 552.022(a)(1). You state, and provide documentation showing, that the management letter was included in the department's final audit report. Thus, it is subject to section 552.022(a)(1). Therefore, the department may only withhold the management letter if it is confidential under "other law." Section 552.111 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived.¹ As such, section 552.111 is not "other law" that makes information confidential for the purposes of section 552.022. Accordingly, the department may not withhold the submitted management letter under section 552.111 of the Government Code. As you raise no other exceptions against disclosure, this information must be released.

In summary, the draft financial statements, schedule of expenditures of federal awards, and related notes are subject to the Act, and to the extent this information is responsive to the second request, such information must be released. The submitted management letter must be released to the requestor pursuant to section 552.022(a)(1) of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general); *see also* Open Records Decision No. 473 (1987) (governmental body may waive statutory predecessor to section 552.111). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Katherine M. Kroll
Assistant Attorney General
Open Records Division

KMK/eeg

Ref: ID# 308989

Enc. Submitted documents

c: Mr. Pete Goeddertz
15910 Hartman Road
Magnolia, Texas 77355
(w/o enclosures)