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Opinion Committee

P.O. BOX 511  
EL PASO, TX 79961-0001  
PHONE: 915-594-5500  
FAX: 915-594-5699

April 13, 1993

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FILE # AAE-19810-93  
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Attorney General's Office, State of Texas  
Attorney General's Opinion Committee  
209 West 14th Prince Daniel Building 7th Floor  
Austin, Texas 78701

RE: Request for Attorney General's Open Records Decision on Whether the City of El Paso, Texas, (El Paso Water Utilities Public Service Board), Must Make Available Certain Documents (Including Internal Memorandums and Letters Between the Public Service Board's Staff, Its Attorney, and Its Consulting Engineers, Its Proposed Claims Consultants, the Attorney for Its Consulting Engineer) Concerning Potential Litigation of a Claim Under a Construction Contract

Dear Committee Members:

Please consider this letter with the enclosed documents as the request of the City of El Paso, Texas, El Paso Water Utilities Public Service Board, ("PSB") for an Open Records Decision on whether or not certain documents are exempt from disclosure under various exceptions to the Texas Open Records Act, Article 6252-17(a) [V.A.T.C.S.], ("Act"). This letter is submitted in accordance with §7(a) of the Act.

BACKGROUND

El Paso Water Utilities is a department of the City of El Paso, Texas. The department is controlled and managed by a Board of Trustees known as the Public Service Board, appointed in accordance with Article 1115 of the Texas Civil Statutes [V.A.T.C.S.] and Ordinance 752, as amended, of the City of El Paso.

A dispute has arisen between S.A. Healy Company (Healy), the prime contractor on the PSB's Jonathan W. Rogers Water Treatment Plant (Plant), Bid Number 50-90 (hereinafter referred to as "the Project"). The Plant is a large (40MGD), \$36,000,000.00 water plant, which has been under construction now for about three years. Healy has filed a multi-million dollar draft claim on this Project. This claim is primarily a delay damages claim, but also alleges various other matters, including tortious interference by the owner and its engineer. The PSB is in the process of hiring a professional claims consultant to evaluate and provide litigation support for this claim. Healy is represented by two large law firms, Watt, Tieder and Hoffar of McLean, Virginia and Kemp, Smith, Duncan and Hammond of El Paso.

On March 3, 1993, Healy threatened to sue the PSB's engineers on the Project, Parkhill, Smith and Cooper, Inc., (Parkhill) if they continued to withhold a progress payment. A copy of this letter, to

Dan Knorr of Parkhill, from John B. Tieder, Jr., is enclosed and identified as Exhibit "A". The claim of Healy was filed on December 15, 1992. Healy had indicated at least four months earlier that such a claim would be filed. Parkhill is the only engineer under contract to the PSB on this Project. However, Parkhill has employed a number of subconsultants, including CH2MHill, Robert Navarro and Associates Engineering, Inc. (Navarro), and Sergeant, Hauskins and Beckwith (SHB). None of these subconsultants is under contract to the PSB. It appears that a suit against Parkhill by Healy will be filed within the week. There is also a good possibility that unless this claim can be resolved, that a lawsuit will be filed shortly on the claim against the PSB due to the large amount of the claim and the lack of a mandatory arbitration and dispute resolution clause in the PSB's contract with Healy.

#### OPEN RECORDS REQUESTS

On July 27, 1992, Healy's attorney, William Derrick, of Kemp, Smith, Duncan and Hammond, wrote Mr. Edmund G. Archuleta, the General Manager of the PSB, a letter demanding the production of certain public records on the Project under the Act, which was received on July 28, 1992. This was a broad-based Open Records Request, specifying nineteen different types of information involving literally thousands of pages of documents. A copy of this letter is enclosed and identified as Exhibit "B". Upon receipt of this Open Records Request, in accordance with *Open Records Decisions #561 (1990) and #304 (1982)*, I requested that Mr. Derrick clarify his client's request. A copy of my letter of July 31, 1992 to Mr. Derrick is enclosed and identified as Exhibit "C" along with a copy of Mr. Derrick's letter of August 6, 1992, to me, which is enclosed and identified as Exhibit "D". Due to the large number of documents that were to be examined, the attorneys for both the PSB and Healy agreed to an extension of time with regard to requesting an Attorney General's Opinion, and otherwise worked to negotiate an acceptable response to the request. These negotiations and the response continued through September 1992.

As a result of these negotiations, over 3,000 pages of documents have been copied and provided by the PSB to Healy through their attorney. Healy has also examined thousands of documents on at least three occasions covering an approximately three-day period.

In accordance with *Open Records Decisions #452 (1986), #476 and #465 (1987) and Attorney General Opinion JM-48 (1983)*, I informed Healy, through Mr. Derrick, that the PSB would not provide them access to any documents that came into existence after October 1, 1992, without a new Open Records Request. Although the original request was in July of 1992, since negotiations and correspondence between the parties continued through September 1992, I agreed it was only fair to provide Healy with copies of documents through September 30, 1992. It is my understanding that under the above-mentioned Decisions, the governmental body is under no duty to provide information involving public documents which come into existence after a request has been made and is under no continuing duty to supply information on a periodic basis as it is prepared in the future.

On April 5, 1993, the PSB received Healy's letter outlining its second Open Records Request, dated April 1, 1993. A copy of this letter is enclosed and identified as Exhibit "E". This letter requested all documents in the original request which came into existence after July 27, 1992, including four additional areas of information. Healy also requested correspondence, memorandums, and invoices between Parkhill and its subconsultants, including, without limitation, CH2MHill.

In accordance with my understanding of the Act [*Open Records Decision #561 (1990)*], the PSB has written Healy, through Mr. Derrick, requesting that he clarify his request in an effort to avoid an Attorney General's Opinion on unnecessary matters and to expedite the response to its request. A copy of this letter is enclosed and identified as Exhibit "F". We do not understand Healy's request to include correspondence and internal memos between subconsultants such as CH2MHill, who are not under contract to the PSB, or to encompass correspondence, memoranda and communications regarding Healy's claim and the threatened litigation which we feel would be subject to various exceptions under the Act. However, due to the broad nature of Healy's request and the thousands of pages of documents involved, we are asking for clarification.

#### SPECIFIC EXEMPTIONS FROM DISCLOSURE

The PSB feels that a number of documents, in whole or in part, are excepted from public disclosure under Sections 3(a)3, 3(a)7, 3(a)11, and the other sections of the Texas Open Records Act mentioned below. Since we are again talking about literally thousands of pages of documents, it is impossible at this point in time to provide you with copies of all the documents which may be subject to exceptions from disclosure under the Act. Instead, we have separated the documents into categories (listed below) and given you samples of the types of documents which we believe would be subject to these exceptions, which are enclosed and identified as Exhibit "G". The categories are as follows:

1. Internal memoranda, correspondence and invoices between subconsultants of Parkhill who are not under contract to the PSB. No samples are provided at this time since we do not understand these documents to be within the scope of Healy's request.
2. Documents addressing Healy's claim and various disputes related to it, including "Privileged and Confidential Attorney/Client Communication" memoranda, correspondence and other documents between the PSB's attorney, PSB staff, Parkhill's attorney and the proposed Claims Consultant concerning Healy's claim. The PSB is in the process of hiring a claims consultant to help in evaluating Healy's claim and in providing litigation support in the event of litigation.
3. Personal notes which were subject to the first Open Records Request, but were not discovered until after the time for writing the Attorney General had passed.
4. Internal memoranda, correspondence and reports between various PSB staff members, Parkhill, and its subconsultants concerning construction of the project, including various daily, weekly and monthly inspection reports.

The PSB feels that the following documents, in whole or in part, are excepted from public disclosure under Sections 3(a)3, 3(a)7, 3(a)11, and the other sections of the Texas Open Records Act mentioned below. Specifically, the PSB feels that the following categories of information are excepted under the following criteria:

1. We believe that any information which came into existence after July 27, 1992, is not subject to the original Open Records Request of Healy dated July 27, 1992, under *Open Records Decisions #452 (1986), #476 and #465 (1987) and Attorney General Opinion JM-48 (1983)*.

2. We believe that the two documents which we had labeled as personal notes were not information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business. These include the handwritten note apparently written by a former PSB General Manager, John Hickerson, and a typewritten file note found in the personal files of Parkhill, although both documents were found in the PSB's and Parkhill's offices. *Open Records Decisions #77 and #116 (1975), and #145 (1976)* Even if these documents are not considered to be under the personal note exception, we feel that portions of these documents should be excepted as opinions, recommendations, and advice under Section 3(a)11. We understand that since these documents were discovered after the ten-day period for applying to the Attorney General opinion had expired that they can only be withheld if they fall within a previous determination that they fall within an exception, or that there is a compelling need or demonstration that the information should not be released to the public since it contains materials which would be highly prejudicial to third parties. *Section 7(A) of the Act; Open Records Decision #150 (1977) and #71 (1975)* Since both these documents contain personal opinions regarding third parties which may be highly prejudicial and damaging, we believe these documents are subject to this exception. If you do not agree, we have marked portions of these documents which contain opinions and advice which we believe are excepted under Section 3(a)11 of the Act.
3. In the event that Healy seeks to request correspondence, memoranda and invoices between subconsultants of Parkhill, which are not in Parkhill's files, the PSB deems this is information which the PSB does not either have a right of access to or ownership of, and is therefore not subject to the Act. *Section 3(a) of the Act* We understand that under *Open Records Decision #558 (1990)*, where a private consultant who has contracted with a governmental body to prepare information for it, that such information is deemed to be in the constructive custody of the governmental entity and is therefore subject to the Act. However, the PSB believes that information which is in the offices of private subconsultants who are not under contract to it and which information is not in the files of the consultant (Parkhill) under contract to the PSB, is not subject to disclosure under the Act.
4. In the event Healy seeks documents addressing its claim and various disputes relating thereto, the PSB believes most of the documents, especially those which involve attorney/client communications to the PSB staff, to the engineer, to the engineer's attorney, to the PSB's claims consultant and its attorney, which were written after the claim was filed or with the claim being imminent and with the threat of litigation also being imminent, are excepted from disclosure under Section 3(a)1 of the Act. This section exempts information deemed confidential by law, either constitutional, statute, ordinance, or judicial decision. With the claim now pending and litigation involving some or all the parties imminent, most of this information is deemed to be attorney/work product, party communications or otherwise exempt from discovery in addition to being subject to exceptions under the Act. The samples of documents under this category include my analysis of Healy's claim and my correspondence with Parkhill's attorney which suggest certain defenses and strategies in handling the claim.

I believe the same information is also exempt under Section 3(a)3, which is information relating to litigation to which the State or political subdivision may be a party, or to which an officer or employee of the State or political subdivision is or may be a party. *Open Records Decision #551 (1990)* enables the governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery. We believe Healy's broad-based Open Records Request was intended to utilize the Act as a method to avoid the discovery rules and to obtain information through this route rather than through the discovery route. *Attorney General Opinion JM-1048 (1989)* After responding to the earlier Open Records Request filed by Healy, and providing thousands of documents for review and copying, which information is apparently being used by Healy to file its claim and to prepare for litigation, this second requests appears to be a thinly veiled attempt to avoid the discovery rules in an attempt to bolster Healy's position in litigation. We believe the PSB meets the test that litigation must be pending or reasonably anticipated and the information relates to that litigation. *Heard v. The Houston Post Company*, 684 SW2d 210 (Tex. App. Houston [1st District] 1984) writ ref'd. n.r.e.; and *Open Records Decisions #477 und #478 (1987) and #551 (1990)* Accordingly, we believe that all information that came into existence after the claim was filed by Healy in December, and certainly any information created after the threat of litigation on March 3, 1993, would be exempt from discovery.

Finally, Section 3(a)7 excepts from public disclosure matters which are attorney/client privileged. We believe that the sample documents enclosed fall within this exception. This section prohibits attorneys from divulging confidential information defined not only as material within the attorney/client privilege, but within Rule 503 of the Texas Rules of Evidence.

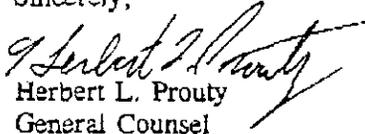
5. Finally, we believe that all the documents mentioned above, and all the remaining categories of documents are subject to the exception under Section 3(a)11, which excepts from disclosure inter- or intra-agency memoranda or correspondence which would not be available by law to a party in litigation. We understand that under this test, that any inter- or intra-agency information which consists of advice, opinions, and/or recommendations that may be used in the deliberative process is exempt. *Open Records Decision #574 (1990)* However, we understand that facts and written observations of facts and events, when such information is severable from the advice, opinions and/or recommendations, may not be withheld under this Section. *Open Records Decision #213 (1978)*; and *EPA v. Mink*, 410 US 73 (1973) Accordingly, samples of those documents which we feel are only protected by this exemption have been attached, and we have indicated through highlighting those sections we feel would be exempt from disclosure. It would then be our intention to provide Healy with those sections of these documents, with the highlighted portions deleted. It is my understanding that the restrictions of 3(a)11 apply to advice, opinions and recommendations by consultants as well as by employees of the agency. *Wu v. National Endowment of Humanities*, 460 F2d 1030 (5th Circuit 1972); cert. den'd. 410 US 926 (1973) and the additional authority found in *Open Records Decisions #429 (1985) and #462 (1987)* The term consultant, I understand, includes persons who are authorized and do in fact act, in an official capacity on behalf of the

governmental body. *Attorney General's Opinion #JM-36 (1981) and Open Records Decisions #283 (1981) and #273 (1981)* Parkhill is employed by the PSB as a consultant on this Project, and the Claims Consultant should be under contract to the PSB by the end of the week. We believe this would apply to any correspondence between the PSB and Parkhill and the Claims Consultant.

Subject to your response and Healy's response to our letter asking for clarification, and upon discovery of additional documents fitting within the categories and exemptions listed herein, we reserve the right to allege additional exemptions to disclosure under the Act. This letter, along with Exhibits "A" through "E" are being sent this day by facsimile. The documents in Exhibit "F" and "G", and other documents as they are discovered, will be sent via Federal Express.

Please render an Open Records Decision with regard to our ability to withhold the listed and enclosed documents based on the above-mentioned sections of the Act. Please do not hesitate to contact me at (915) 594-5507 should you need any further information or wish to discuss this request in more detail.

Sincerely,

  
Herbert L. Prouty  
General Counsel

cc: General Manager  
Deputy General Manager

tsuhorrag.ltr