

Vinson & Elkins

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March 23, 2020

Via Certified Mail

The Honorable Ken Paxton
Attorney General, State of Texas
209 West 14th Street
Austin, Texas 78701
Attn: Open Records Division

Re: Brief in Response to Request for Open Records Decision

ID No.: 825705
Requestor: Michelle Dillon, Human Rights Defense Center
Records Request From: The GEO Group, Inc.
Date of Request: February 6, 2020

Dear Attorney General Paxton:

Vinson & Elkins respectfully submits this brief on behalf of the Human Rights Defense Center (“HRDC”) pursuant to Section 552.031 of the Texas Government Code and in connection with the above-referenced matter.

STATEMENT OF FACTS

For more than twenty-nine years, HRDC’s mission has been public education, advocacy, and outreach in support of basic human rights for incarcerated persons. To accomplish its mission, HRDC gathers information from governmental entities and publishes books, magazines, and websites, which are an important source of news about American prisons. HRDC is a non-profit entity with headquarters in Lake Worth, Florida.

The GEO Group, Inc. (“GEO”) operates jails, prisons, immigration detention centers, and juvenile detention centers in countries across the world. It is a private, for-profit corporation headquartered in Boca Raton, Florida. GEO maintains numerous facilities under contract with the State of Texas to incarcerate individuals remanded to custody under legal authority.

On February 6, 2020, Michelle Dillon submitted a request for records (the “*Records Request*”) to GEO on behalf of HRDC under the Texas Public Information Act (the “*TPIA*” or “*Act*”). The Records Request seeks information regarding claims brought against GEO or its agents in which \$1,000 or more was disbursed from January 1, 2010 to the present. The Records Request was submitted under the recently amended version of the TPIA, which adds “a confinement facility operated under a contract with any division of the Texas Department of Criminal Justice” to the Act’s definition of “governmental body.” Tex. Gov’t Code § 552.003(1)(A)(xii).

GEO submitted its initial Request for an Opinion from the Office of the Attorney General’s Open Records Division on February 24, 2020 (“*GEO’s Request for an Opinion*”). It submitted its Brief in Support of Request for Open Records Decision on March 2, 2020 (“*GEO’s Brief*”). As framed in both submissions, GEO seeks a decision on whether it must produce information about payments made prior to January 1, 2020, the effective date of the recent amendments to the Act.

For the reasons below, GEO must produce all responsive information regarding payments that are “maintained” in its possession, regardless when the payments were made.

ARGUMENTS AND AUTHORITIES

GEO does not dispute that it is a “governmental body” under the current version of the Act. *See* GEO’s Brief at 2. The only question is whether GEO must disclose responsive information which was created before January 1, 2020. GEO must disclose this information because it is “maintained” in GEO’s possession within the meaning of the Act. *See* Tex. Gov’t Code § 552.002(a); *id.* § 552.003(1)(A)(xii).

1. GEO Is a “Governmental Body” Under the Act

GEO is a “governmental body” within the meaning of the Act. To facilitate the “constitutional form of representative government,” the Act requires “governmental bodies” to disclose information sought by the public, unless a statutory exception applies. *See* Tex. Gov’t Code § 552.001. GEO has not invoked any statutory exception to disclosure. *See* GEO’s Brief.

Since January 1, 2020, the statutory definition of “governmental body” has included a “confinement facility operated under a contract with any division of the Texas Department of

Criminal Justice.” C § 552.003(1)(A)(xii). GEO operates confinement facilities under such contracts. GEO’s Brief does not dispute that it is now a “governmental body.” *See* GEO’s Brief.¹

2. GEO “Maintains” “Public Information” Responsive to the Records Requests as Defined by the Act

The TPIA requires governmental bodies – such as GEO – to disclose “public information” in their possession, regardless of when the information was created. “Public information” is defined as “information that is written, produced, collected, assembled, or *maintained* under a law or ordinance or in connection with the transaction of official business . . . by a governmental body.” Tex. Gov’t Code § 552.002(a) (emphasis added). By defining “public information” to include information “maintained” by a governmental body, the statute dispels any notion that the information’s date of creation controls whether it must be disclosed.

GEO “maintains” the records sought by HRDC within the meaning of the statute. The Act does not define “maintained,” but courts have determined the term is synonymous with “held” or “retained.” *See, e.g., Adkisson v. Paxton*, 459 S.W.3d 761 (Tex. App.—Austin 2015, no pet.) (“[W]e use the terms ‘collected, assembled, or maintained’ [as used in the TPIA] interchangeably for purposes of this opinion, along with the terms ‘held’ or ‘retained.’”). This comports with the dictionary definition of “to maintain.” *See Maintain*, Black’s Law Dictionary (11th ed. 2019) (“to continue in possession of (property, etc.)”); *8-Plus Props., LLC v. Invesco Commercial Enters., LLC*, No. 01-17-00657-CV, 2019 WL 3819515, at *8 (Tex. App.—Houston [1st Dist.] Aug. 15, 2019, no pet.) (reliance on dictionary definitions is appropriate where a statute uses a word it does not define). The Open Records Division has issued numerous opinions stating that “virtually all the information in a governmental body’s *physical possession* constitutes public information and

¹ GEO’s Brief references OR2019-18285, which decided that GEO was not a “governmental body” under the pre-amendment version of the Act. At least one Texas court held to the contrary as to another private prison contractor, *order attached*, and that question is now being litigated as to GEO in Bexar County District Court. *See Prison Legal News v. Corrections Corporation of America*, No. D-1GN-13-001445 (353rd Dist. Ct., Travis County); *Human Rights Defense Center v. The GEO Group, Inc.*, No. 2018 C1 16343 (255th Dist. Ct., Bexar County). The Bexar County proceeding does not limit the Attorney General’s ability to decide that documents should be produced pursuant to the new Records Request. OR2019-18285 has no bearing on whether GEO is subject to the *present version* of the Act and by its own terms is “limited to the particular information at issue in this request and limited to the facts as presented.” Tex. Att’y Gen. OR2019-18285, at 2.

is subject to the Act.” *See, e.g.*, OR2020-06393. Since GEO has physical possession of the information sought in the Records Request, it “maintains” that information within the meaning of the TPIA. *See* Tex. Gov’t Code § 552.002(a).

GEO maintains the information responsive to the Records Request “in connection with the transaction of official business.” *See id.* The responsive information relates to claims and lawsuits in which GEO paid more than \$1,000. Legal claims and litigation records are squarely within “official business,” which is defined as “any matter over which a governmental body has any authority, administrative duties, or advisory duties.” Tex. Gov’t Code § 552.003(2-a). GEO has authority and administrative duties with respect to claims and lawsuits asserted against it, meaning that the “public information” it “maintains” in connection with those claims and lawsuits is subject to disclosure under the Act.

3. Disclosure Is Consistent with the Purpose of the Act

The Texas Legislature intended the type of information sought in the Records Request to be publicly accessible. The Act states “it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees.” Tex. Gov’t Code § 552.001. Twice, the drafters wrote the Act “shall be liberally construed in favor of granting a request for information.” *Id.*

The recent amendments made clear that private entities like GEO, which operate confinement facilities under contract with the State of Texas, are subject to the Act. *Id.* § 552.003(1)(A)(xii). By including the term “maintained” in the definition of “public information,” the Legislature indicated that records held by a “governmental body” are subject to disclosure, regardless of when they were created, unless an exception applies. *See id.* § 552.002(a). Nowhere does the Act speak of excepting information based upon the date of its creation or when a government entity becomes subject to its provisions.

CONCLUSION

GEO is a “government body” which “maintain[s]” “public information” responsive to the Records Request within the meaning of the TPIA. Tex. Gov’t Code § 552.003(1)(A)(xii); *id.* § 552.002(a). It must make responsive information available to the public generally, and HRDC specifically, for the purposes of inspection and copying, consistent with the plain text of the statute, relevant precedential authorities, and the intent of the Legislature.

Respectfully submitted,

/s/ Thomas S. Leatherbury

EXHIBIT 1

It is therefore ORDERED, ADJUDGED AND DECREED that a writ of mandamus be issued to require CCA to produce the public information requested by PLN. A copy of this Order is to be attached to the writ of mandamus to show the authority of the clerk for such issuance.

The Court further FINDS that PLN prevailed on its action for writ of mandamus and incurred costs of litigation and reasonable attorney fees in the amount of \$ 25,000.

It is therefore ORDERED, ADJUDGED and DECREED that CCA shall pay to PLN \$ 25,000 for costs of court and reasonable attorneys' fees incurred herein.

SIGNED the 15 day of September, 2014.

Misela D. Inan
JUDGE PRESIDING

It is further ordered, adjudged & decreed that CCA shall pay to PLN \$ 5,000 for costs and MWZ reasonable attorneys' fees for appeal ~~therein~~ in the event CCA's appeal is unsuccessful.

I, AMALIA RODRIGUEZ-MENDOZA, District Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office on 09-15-15



AMALIA RODRIGUEZ-MENDOZA

DISTRICT CLERK

By Deputy: Urdia