

THE TEXAS MUNICIPAL LAWYER™

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NEW GUIDELINES REGARDING TIMELINESS OF REQUEST FOR AG OPEN RECORDS DECISIONS

In the case of *City of Dallas v. Greg Abbott*, the Supreme Court of Texas held that the timeliness of a request for an Attorney General (AG) decision is measured from the date a party seeking public information responds to a governmental body's good-faith request for clarification or narrowing of an unclear or overbroad information request.

The case arose when James Hill submitted a Public Information Act request to the City of Dallas for "any and all information pertaining to the City of Dallas Assessment Center Process for uniform positions of the Dallas Fire and Police Departments." The City responded seeking clarification six days later, then Hill responded six days after that with his clarified request.

In preparing to fulfill the clarified request, the City encountered several documents protected from disclosure by the attorney-client privilege. The City then sought an AG decision regarding application of the privilege to the withheld documents. The AG concluded that the City's request was untimely because it was submitted after the 10 business-day deadline for governmental bodies to request

an AG decision following receipt of the original written request. As a result, the attorney-client privileged information the City was trying to withhold was considered public information because there is a public information presumption that applies when a governmental body fails to make a timely AG request.

The City filed suit against the AG seeking a declaratory judgment that the attorney-client privileged



information is protected from public disclosure. Both the trial court and court of appeals ruled in favor of public disclosure. The Supreme Court weighed in on the issue and held that the attorney-client privileged information was timely submitted because Hill's clarification didn't merely toll, but actually restarted the 10 business-day deadline, and that such information was exempted from public disclosure.

INDEPENDENT CONTRACTOR OR EMPLOYEE?

The distinction between who is an independent contractor (IC) and who is an employee depends on more than what the parties call

themselves. Such distinctions are important because proper identification can help municipal employers avoid audits, unnecessary claims and appeals, back taxes, interest, and penalties.

An employee is someone whose work is directed and controlled by an employer responsible for extensive wage reporting and tax responsibility. An IC is self-employed, bears responsibility for his or her own taxes and expenses, and is not subject to an employer's direction and control. While these definitions appear clear enough, there is a fine line separating the two which can often be blurred.

For guidance, both the Texas Workforce Commission (TWC) and IRS have provided tests for determining which category a particular worker falls into. To rectify the two tests, below are considerations for the TWC's test set within the framework of the IRS test.

(Continued on the back)

EDUCATIONAL OPPORTUNITIES

- **May 14:** Alan will be presenting on "Green Development: Landscaping, Conservation of Open Space & New Trends" at TML's seminar, *Planning & Development Regulations: What City Officials Need to Know*, which will be held at the DoubleTree Austin North in Austin, Texas.

(continued from *Independent Contractor or Employee?*)

Financial Control

- An employee is usually paid in regular amounts at stated intervals for their time, *whereas an IC is usually paid by the job.*
- An employee is not expected to invest in the business they work for because the employer takes care of tax matters and expenses, *whereas an IC is investing in their independent business, so they take care of all expenses and taxes.*

Behavioral Control

- An employer is typically very interested in how their employee allocates their time and is in charge of hiring additional help, *whereas the employer should have no interest in how the IC allocates his or her time, or who the IC hires to assist (other than requiring proper licensure).*
- An employee typically works for one employer at a time and may be prohibited from joining a competitor, *whereas an IC often works for more than one client or firm at the same time and is not subject to a non-competition rule.*

Relationship of Worker & Business Entity

- An employee's services are usually merged into the firm's overall operation, *whereas an IC's services are usually separate from the client's business and are not integrated or merged into it.*
- An employee does not advertise their services, *whereas an IC does.*

- An employee carries business cards that reflect the employer's name, *whereas an IC carries business cards that reflect their business's name.*



- An employee is furnished all necessary tools, materials, equipment and training by their employer, *whereas an IC provides all of the tools, training and equipment necessary to complete the job.*
- An employee may quit work at any time without liability on the employee's part, *whereas an IC is legally responsible for job completion and upon quitting, becomes liable for breach of contract.*

While no one factor will determine the worker's classification, and no situation will involve all of the factors above, the important thing to focus on is whether the facts show that the worker in question is an independent business entity in a position to make a profit or loss based upon how they manage their own enterprise. If so, they are most likely an IC, not an employee. Also remember that the more long term, continuous and exclusive the relationship is, the more likely it is to be considered an employee/employer relationship.

If further clarification is required, municipal employers should talk to their city attorney or can re-

quest a ruling on a particular worker's status from the TWC's Tax Department and/or from the IRS by submitting Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, to the IRS.



CLIENT NEWS

Dripping Springs Studio Tour and Hill Country Art Show, May 15:

From 10 a.m. to 6 p.m. there will be artists setup around the Dripping Springs area as well as in a central location (the Hill Country Art Show) which will be located in the first cul-de-sac on the right from the Roger Hanks Parkway. For more information visit <http://www.artistsofdrippingsprings.org/StudioTour.html>.

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