

PRISON LEGAL NEWS

V.

Defendant.

OF TRAVIS COUNTY, TEXAS

353rd JUDICIAL DISTRICT

2. CCA shares a common purpose and objective to that of government;
3. CCA's contracts create an "agency-type" relationship with the government body it serves; and
4. Its function – incarceration – is traditionally performed by governmental bodies.

For each of these independent reasons, CCA is a "governmental body" and therefore obligated to produce records under the PIA.

SUMMARY JUDGMENT STANDARD

Summary judgment "shall be rendered forthwith if... [the evidence presented] show[s] that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." TEX. R. CIV. P. 166a(c). And whether CCA is a "governmental body" under section 552.003 of the PIA is a matter of statutory construction and a question of law. *Texas Ass'n of Appraisal Districts, Inc. v. Hart*, 382 S.W.3d 587, 590 (Tex. App.—Austin 2012, no pet.).

UNDISPUTED FACTS

On March 1, 2013, PLN requested materials, including: settlement agreements; contracts CCA has executed with counties and municipalities; and reports, audits, and investigations by government bodies regarding CCA's services.² CCA does not dispute that the documents requested would generally fall within the categories of "public

² See March 1, 2013 letter from Brian McGivern to Erica Russell requesting public information pursuant to the PIA, attached as **Exhibit A**; see Defendant's Responses to Plaintiff's Interrogatories, Requests for Production and Request for Admission, ¶ 4, attached as **Exhibit B**.

information” under §552.022 of the PIA.³ CCA, however, did not produce any of the requested records because it contends it is not a “governmental body” under Texas Government Code §552.003 and therefore is not subject to the PIA.⁴

CCA further admits that it is a private, for profit, corporation that contracts with the State of Texas (specifically the Texas Department of Criminal Justice (“TDCJ”)) to operate correctional facilities owned by the TDCJ.⁵ Pursuant to these contracts, CCA provides all necessary personnel, equipment, materials, supplies and services and otherwise fully operates state jails.⁶ And that it receives payment from the State of Texas to do so.⁷

ARGUMENT

The PIA requires disclosure of “public information” and defines “public information” as information that is collected, assembled or maintained by or for a “governmental body.” TEX. GOV’T CODE 552.002. The PIA defines a “governmental body” to include “the part, section or portion of a[] ...corporation ... that spends or that is supported in whole or in part by public funds.” TEX. GOV’T CODE § 552.003(1)(A)(xii). Pursuant to this statute and its application by Texas Courts, CCA is a “governmental body” as a matter of law.

The Texas Legislature promulgated the PIA with the express purpose of providing the public “complete information about the affairs of government and the official acts of

³ See **Exhibit B**, ¶ 5.

⁴ See Defendant’s Answer, ¶ 4; **Exhibit B**, ¶¶ 5, 6.

⁵ **Exhibit B**, ¶¶ 1(a), 2.

⁶ **Exhibit B**, ¶ 7(b); Solicitation, Offer And Award, attached as **Exhibit C**, p. 1.

⁷ *Id.*

public officials and employees.” TEX. GOV’T CODE § 552.001(a); *Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 293 (Tex. 2011). At its core, the PIA reflects the public policy that the people of Texas “insist on remaining informed so that they may retain control over the instruments they have created.” TEX. GOV’T CODE § 552.001(a). And the PIA itself directs that it be liberally construed in favor of disclosure of requested information. TEX. GOV’T CODE § 552.001; *Jackson*, 352 S.W.3d at 293.

In construing the PIA, Texas Courts apply the traditional rules of statutory construction including deference to an administrative agency’s construction of the statute if that construction is reasonable. *See Hart*, 382 S.W.3d at 592. With respect to the PIA, courts give even greater deference to the Attorney General’s opinions, even though they are not binding, because the Legislature has directed the Attorney General to determine whether records must be disclosed pursuant to the PIA. *Id.*; *see also Kneeland v. National Collegiate Athletic Ass’n*, 850 F.2d 224, 228 (5th Cir. 1988); TEX. GOV’T CODE §§ 552.008(b-2), 552.306.

In *Kneeland*, the Fifth Circuit first noted that a private entity is not a “governmental body” under the PIA simply because it provides specific good or services under a contract with a governmental body. *Id.*, quoting Tex. Att’y Gen. No. ORD-1 (1973) (explaining that a bank holding funds of a governmental body is not subject to the Act). In an attempt to honor the transparency goals of the PIA while not over-burdening private entities that happen to provide good and services to the government, the Fifth Circuit described what is now known as the *Kneeland* test—three scenarios that the

Attorney General had previously determined met the “governmental body” definition under the PIA:

An entity that receives public funds is treated as a governmental body under the PIA:

1. *unless* the private entity’s relationship with the government imposes a specific and definite obligation to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser;
2. *if* the private entity’s relationship with the government indicates a common purpose or objective or creates an agency-type relationship between the two;⁸ or
3. *if* the private entity’s relationship with the government requires the private entity to provide services traditionally provided by governmental bodies.

Hart, 382 S.W.3d at 593 (emphasis in original), citing *Kneeland*, 850 F.2d at 228; *see also Greater Houston Partnership v. Abbott*, 407 S.W.3d 776, 783 (Tex. App.—Austin 2013, pet. filed). The *Kneeland* test has been later adopted by the Attorney General and the Austin Court of Appeals, and is thus binding on this Court. *See* Tex. Atty’ Gen. No. GA-0666 (adopting the *Kneeland* analysis and framework as its own with the proviso that the first test is primary for determining whether a private entity is a governmental body); *Hart*, 382 S.W.3d at 593-94 (agreeing with the Fifth Circuit’s analysis).

A corporation only needs to satisfy one of the *Kneeland* scenarios to be a “governmental body” under the PIA. CCA satisfies all three.

⁸ As discussed in more detail below, this scenario includes entities that have an agency-type relationship in addition to entities that share a common purpose.

A. CCA receives public funds for the general support of its activities.

CCA is paid public money from the State of Texas to run prisons. Therefore, it *is* a governmental body under the Act *unless* its contractual terms require “a measurable amount of services ... in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser.” *Kneeland*, 850 F.2d at 228. For instance, when the State contracts with a third party to provide office supplies or to clean state offices, those transactions specify a measurable amount of services in exchange for a certain amount of money. CCA’s contract with the State of Texas does not meet this standard for several reasons.

First, in CCA’s contract with the TDCJ, CCA is required to “do all things necessary for, or incidental to, the operation of the [Bartlett] State Jail.”⁹ To accomplish this, the contract requires CCA to provide “Operation and Management Services,”¹⁰ which it defines as:

[F]urnishing by [CCA] of consulting, operation, management, and maintenance services, and all personnel and materials necessary to provide the operation, management, and maintenance of the [the Bartlett State Jail] and for the care, custody, and treatment of Offenders in accordance with the terms of and conditions of this Contract.¹¹

These broad mandates – to do “all things necessary” and to be wholly responsible for physical facilities, guarantee all security, and provide all treatment for the facilities’ inmates – are not measurable or limited in any way.

⁹ See Solicitation, Offer And Award, attached as **Exhibit C**, p. 13

¹⁰ *Id.*, p. 15

¹¹ *Id.*, p. 10

Second, the contract's list of "specific duties and obligations" (which does not purport to be an exhaustive list) identifies several open-ended obligations, including:

- Training for staff that adheres to TDCJ policy, including any training changes made during the term of the contract;¹²
- Guaranteeing "sufficient trained staff to maintain security, control, custody and supervision;"¹³
- Providing "laundry services, maintain necessities, and operate barber shops;"¹⁴ and
- Offering "a full range of academic and vocational programs."¹⁵

Again, none of these obligations define a specific, measurable amount of service. They are general mandates charging CCA with near-complete responsibility over the details of the daily operation of the facility. *See* Tex. Att'y Gen. No. ORD-228 (finding provision in contract to continue "current successful programs and implement such new and innovative programs as will further its corporate objectives" did not impose specific and definite obligation to provide a measurable amount of service).

Third, the contract obligates CCA to perform functions that have no relationship to the amount of money it is paid. Payment is determined exclusively by the number of inmates in the institution,¹⁶ but the contract does not ensure the institution will have any specific number of inmates at any given time,¹⁷ so payment fluctuates. And yet, the contract gives CCA a blanket requirement to maintain the physical facilities and its

¹² *Id.*, p. 16

¹³ *Id.*, p. 17

¹⁴ *Id.*, p. 23

¹⁵ *Id.*, p. 25

¹⁶ **Exhibit C**, p. 13

¹⁷ *Id.*, p. 65

computer system.¹⁸ These contractual obligations to maintain the jail's infrastructure are independent of the number of inmates housed there, and bear no relation to the payments received under the contract.¹⁹ And CCA even *admits* that CCA's "operation of TDCJ owned facilities are not necessarily funded directly by those payments."²⁰ This type of indirect funding is a kin to the kind of "general support" that falls within the definition of a governmental body under the PIA. *See* Tex. Att'y Gen. No. JM-116 (1983) (finding annual payments to an athletic conference that were not tied to any specific measurable service constituted general support under the PIA).

In sum, the provisions of the contract impose obligations on CCA that are not specific, definite, or tied to a measurable amount of service for a certain amount of money. Therefore, CCA is not an arms-length contractor; it is an entity supported by government funds, subject to the requirements of the PIA.

B. CCA shares the common purpose and objective of the government of incarceration creating an agency-type relationship with TDCJ.

Even if an entity provides measurable services for specific amounts of money, it is *still* considered a governmental body for purposes of the PIA if its contract indicates a "common purpose or objective" with a government body, *or* creates an "agency-type" relationship. *See Kneeland*, 850 F.2d at 228; Informal Letter Ruling, Tex. Atty. Gen. Op. OR2005-08717, 2005 WL 2452900 *3 (2005) (concluding a private entity TDCJ hired to

¹⁸ *Id.*, p. 39

¹⁹ Moreover, if the facility suffers sufficient damage to affect its continued operation, CCA could be responsible for rebuilding. If a new law or a court order requires TDCJ to change one of its general policies, CCA must also comply, and if the policy change increases the cost of operating the facility, CCA is responsible for that added cost. The services CCA must provide can significantly increase without any corresponding change in income.

²⁰ **Exhibit B**, ¶ 2.

provide substance abuse treatment was a government body under the PIA because it shared a common purpose with TDCJ).

CCA's contract with the TDCJ does both. First, it has a general requirement for CCA to comply with all TDCJ policies while running the facility.²¹ It goes on to enumerate a long list of specific activities CCA must perform in compliance with TDCJ policy: training, food service, laundry service, telecommunications, libraries, recreation, legal services, visitation, the commissary, maintenance, risk management, treatment programs (including counseling, religion, and rehabilitation), grievance procedures, discipline, mail, community work projects, and use of force.²² CCA must perform each item on the list in accordance with the same policies that apply to every facility TDCJ operates. CCA's assumption of duties that would ordinarily be performed by TDCJ demonstrates an agency-type relationship between the two.

Further, the actions CCA is required to perform under the contract are all in common purpose with TDCJ's statutory mission: "to provide public safety, promote positive change in offender behavior, reintegrate offenders into society, and assist victims of crime." TEX. GOV'T. CODE 493.001; *see* Informal Letter Ruling, Tex. Atty. Gen. Op. OR2005-08717, 2005 WL 2452900 *3 (2005) (noting the parallel between TDCJ's statutory mission and the services provided by the private entity it hired to perform substance abuse treatment).

²¹ **Exhibit C**, p. 15 ("[CCA] shall not deviate from TDCJ Policies and Procedures in the provision of Operation and Management Services without prior written approval of [TDCJ]").

²² *See* **Exhibit C**, pp. 16, 23, 24, 30, 37, 38, 39, 43-46, 49.

Either sharing a common purpose or assuming an agency relationship makes a private entity that receives State funds a governmental body for the purposes of the PIA. *See Kneeland*, 850 F.2d at 228. CCA does both, and is therefore a governmental body.

C. CCA runs prisons – a service traditionally provided by government.

A private entity that receives public funds and whose relationship with the government requires the private entity to provide services traditionally provided by governmental bodies is itself a government body for purposes of the PIA. *See Kneeland*, 850 F.2d at 228 (stating rule); Tex. Atty’ Gen. No. JM-821 (1987) (finding fire protection is a service traditionally provided by governmental bodies; thus volunteer fire department is subject to PIA).

Many courts, in other contexts, have recognized the obvious: “Clearly, confinement of wrongdoers — though sometimes delegated to private entities — is a fundamentally governmental function.” *Rosborough v. Management & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (finding officer employed by private jail could be held liable under the Eighth Amendment); *accord Palm v. Marr*, 174 F.Supp.2d 484, 488 (N.D. Tex. 2001); *Kesler v. King*, 29 F.Supp.2d 356, 371 (S.D. Tex. 1998) (incarcerating prisoners falls within the exclusive responsibility of the state).

In the context of public records, the courts of Tennessee (CCA’s home state) have found CCA to be a governmental body for purposes of that state’s open records law, saying: “With all due respect to CCA, this Court is at a loss as to how operating a state prison could be considered anything less than a governmental function.” *Friedmann v.*

Corrections Corp. of America, 310 SW 3d 366, 375 (Tenn.App.Md. 2009). CCA's relationship with Texas is no different. Incarceration is inherently a power of government. By using public money to perform a public function, CCA is a governmental body for purposes of the PIA.

SUMMARY JUDGMENT EVIDENCE

PLN relies on the pleadings on file and the following summary judgment evidence submitted herewith:

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|------------------|---------------------------------------------------------------------------------------------------------|
| Exhibit A | March 1, 2013 letter from Brian McGivern to Erica Russell |
| Exhibit B | Defendant's Responses to Plaintiff's Interrogatories, Requests for Production and Request for Admission |
| Exhibit C | Solicitation, Offer and Award |

CONCLUSION

CCA is a governmental body for purposes of the PIA. It runs on public funds in a relationship that has no specific payment for a measured service; it has common purpose with TDCJ; it acts as TDCJ's agent; and it performs a government function. For each of these reasons, Plaintiff's motion for summary judgment should be granted, declaring CCA is a governmental body for purposes of the PIA.

WHEREFORE, PREMISES CONSIDERED, Plaintiff Prison Legal News respectfully requests that the Court grant its motion for summary judgment, enter a declaratory judgment that Corrections Corporation of America is a governmental body under the PIA and grant Plaintiff such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this motion was served on the following counsel of record by the methods stated below on the 11th day of February 2014:

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