



STATE OF TENNESSEE
COMPTROLLER OF THE TREASURY
OFFICE OF OPEN RECORDS COUNSEL

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March 9, 2011

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You have requested an opinion from this office that addresses the following issues:

1. Is the Convention Center Authority of the Metropolitan Government of Nashville and Davidson County (hereinafter the "Authority") permitted to disclose the residential street addresses for employees of third-party subcontractors that are contained within certified payroll records?
2. Assuming the third-party subcontractor provides the certified payroll, but excludes or redacts the residential street addresses of its employees and/or other information it is not required to provide, is the Authority obligated to require the subcontractor to otherwise provide residential street addresses or additional information although it is not otherwise legally or contractually obligated to do so?
3. Is the Authority permitted to disclose the social security numbers of the employees of third-party subcontractors? If not, what is the basis for such a denial?

I. Background

A number of public records requests have been made to the Authority for copies of certified payroll records for third-party subcontractors working on the construction of the Music City Center. Pursuant to each request, the requested records have been provided; however, certain personal information, such as residential street addresses and social security numbers have been redacted prior to making the records available to the public. On December 2, 2010 and January 12, 2011, public records requests were made to the Authority by the Plasterers' & Cement Masons' Union (hereinafter "Cement Masons'") for copies of certified payroll records for third-party subcontractors that have been submitted to the Authority for work done on the Music City Center Project. When the Cement Masons' were told that the records would be redacted, this office was contacted. As a result of the communications between this office and the attorney for the Authority, this opinion was requested.

II. Analysis

The Tennessee General Assembly has declared that the Tennessee Public Records Act "shall be broadly construed so as to give the fullest possible public access to public records." Tenn. Code Ann. Section 10-7-505(d). In turn, the courts in Tennessee have held that unless there is an exception for the disclosure of a record, disclosure is required "even in the face of serious contravailing considerations." *Memphis Publishing Company v. City of Memphis*, 871 S.W. 2d 681, 684 (Tenn. 1994). Tenn. Code Ann. Section 10-7-503(a)(1) defines what constitutes a "public record" for purposes of this part of the Tennessee Public Records Act (hereinafter "TPRA") and reads:

As used in this part and title 8, chapter 4, part 6, “public record or records” or “state record or records” means all documents, papers, letters, maps, books, photographs, microfilms, electronic data processing files and output, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any governmental agency.

Tenn. Code Ann. Section 10-7-503(a)(2)(A) goes on to require that all public records, whether maintained by a state, county, or municipal governmental agency, be open for public inspection by a citizen of Tennessee during normal business hours, unless there is a provision within state law that makes the record or a portion thereof confidential.

The Authority is subject to the Tennessee Public Records Act (hereinafter “TPRA”) by virtue of the fact that it was created pursuant to Resolution RS2009-881 passed by the Metropolitan Council of the Metropolitan Government of Nashville and Davidson County and approved by Mayor Dean on August 24, 2009. The Authority identifies itself in its bylaws as a “public nonprofit corporation and a public instrumentality of the Metropolitan government,” and has held its records out as public records in the past. Based upon the fact that the Authority receives the certified payroll records “pursuant to law or ordinance or in connection with the transaction of official business”, the certified payroll records are public records. The analysis must now turn to whether or not there is an exemption for the addresses and the social security numbers of the third-party contractors’ employees that are contained within the certified payroll records. I have been unable to find any state statutory provision that makes either the addresses or the social security numbers contained within the certified payroll records at issue confidential. The only provision that I found that relates to the confidentiality of certified payroll records is specific to contractors who enter into construction contracts with the State of Tennessee. *See* Tenn. Code Ann. Section 12-4-414. Additionally, there is no case law that addresses this issue in Tennessee.

While there is no case law on this issue in Tennessee, a number of other state and federal courts have addressed the public’s ability to access personal information contained within certified payroll records of contractors and subcontractors who are working on public projects. While the opinions on this issue are numerous, the holdings in the cases vary from one jurisdiction to the next. In *Laborers International Union of North America, Local No. 374 v. City of Aberdeen*, the labor union requested the certified payroll records of a contractor who was working on a public project for the City of Aberdeen (hereinafter “City”). *Laborers International Union of North America, Local No. 374 v. City of Aberdeen*, 642 P.2d 418 (Wash. App. March 1982). The City maintained copies of the payroll records pursuant to provision within the construction contract. *Id.* at 420. The payroll records contained employee names, job classifications, hourly wages, hours worked and total pay for the week. *Id.* The City provided copies of the payroll records, but redacted the names of the employees claiming that the “deletion was necessary to prevent an invasion of the employees’ right to privacy.” *Id.* The City relied upon a provision within Washington State law that permits a governmental entity to delete identifying information within public records when deletion is required to prevent an unreasonable invasion of personal privacy. *Id.* at 421. In its analysis, the court wrote that in order for the release of the employees name to be an unreasonable invasion of privacy, the disclosure would have to be (1) highly offensive to a reasonable person, and (2) of no legitimate concern to the public. *Id.* The court ultimately held that the disclosure of the names was not an unreasonable invasion of privacy therefore the deletion of the names was without justification. *Id.* at 421-422.

Likewise, in *Wyoming Department of Transportation v. International Union of Operating Engineers Local Union 800*, the Wyoming Supreme Court held that certified payroll records of private employees working on a federally funded construction project that included the names and addresses of the employees were public records. *Wyoming Department of Transportation v. International Union of Operating Engineers Local Union 800*, 908 P.2d 970, 975 (Wyo. 1995). The International Union of Operating Engineers Local Union 800 (hereinafter the “Union”) requested certified payroll records in order to verify that those private companies contracting with the Wyoming Department of Transportation (hereinafter “WDT”) on construction projects were complying with the prevailing wage rate. *Id.* at 971. The WDT agreed to provide the Union with the payroll records, but only with the names and addresses of the employees redacted. *Id.* at 972. In its analysis, the court examined a number of exemptions that were cited by the WDT as the basis for the redaction, with the final basis for the redaction being the privacy interest of the employees. *Id.* at 974. The court rejected the privacy argument and held that because the Union demonstrated that it had a

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legitimate interest in the names and addresses, “any countervailing interest of the workers in their privacy is outweighed by a public interest.” *Id.* at 974.

The Pennsylvania Supreme Court came to a different conclusion and determined that personal information contained within certified payroll records of a private contractor that were in the possession of a public school district was not information that was accessible to the public through the Pennsylvania Right to Know Act.¹ *Sapp Roofing Company, Inc. v. Sheet Metal Workers’ International Association, Local Union No. 12*, 713 A. 2d 627 (Pa. 1998). In *Sapp*, representatives for the Sheet Metal Workers’ Union (hereinafter “Union”) requested the certified payroll records of a contractor working on a public project that were in the possession of a public school district. *Id.* at 628. The contractor’s certified payroll records contained each employee’s name, address, social security number, job position, rates of pay, and hours worked. *Id.* The Union asserted that it sought access to the records in order to ensure that the contractor was complying with the Prevailing Wage Act. *Id.* The court determined that the records were “public records” but also held that because the definition of “public record” excluded the disclosure of records, “which would operate to the prejudice or impairment of the person’s reputation or personal security,” the names, addresses, social security numbers and phone numbers of the employees were not public information. *Id.* at 630. The court concluded by saying the following:

The disclosure of personal information (names, addresses, social security numbers, and phone numbers) reveals little, if anything, about the government’s (in this case the school district’s) compliance with the Prevailing Wage Act. Indeed, the union here does not explain how the disclosure of this personal information for the purpose of monitoring Prevailing Wage Act compliance overcomes the individual employees’ strong privacy interests. Even if we agree with the union that the public has an interest in enforcing the prevailing wage laws through “monitoring,” the requested information would not enhance enforcement of the Prevailing Wage Act by the government.

Therefore, after balancing this weak public interest in disclosure of the information and the unproven ability of the release of the requested information to assist in the enforcement of the prevailing wage laws against the individual’s right to privacy and personal security, the Court concludes that the personal information is not releasable.

Id.

Likewise, the Louisiana Court of Appeals held that employees of a highway construction contractor had a reasonable expectation of privacy in the personal information contained within their certified payroll records that were submitted to the Louisiana Department of Transportation and Development (DOTD) to ensure compliance with the Davis-Bacon Act. *Angelo Iafrate Construction, L.L.C. v. Department of Transportation and Development*, 879 So. 2d 250, 2003-0892 (La. App. 1 Cir. 5/14/04). In *Iafrate*, a contractor brought suit against the DOTD seeking to enjoin the DOTD from releasing to a local union the names, addresses, and social security numbers of its employees that were contained within the certified payroll records the contractor was required to submit to the DOTD. *Id.* at 253. In its analysis, the court acknowledged that there was no specific exemption related to the requested records within either the state public records act or within any other state statute. *Id.* at 256. With that being the case, the court then turned its attention to whether or not the section in the Louisiana Constitution that prohibits an unreasonable invasion of privacy prohibited the release of the personal information contained within the requested records.² *Id.* at 256.

In support of its assertion that its employees had a reasonable expectation of privacy in their payroll information, *Iafrate* provided the court with multiple excerpts from the employee handbook which stated that information within employee files was confidential and only accessible to certain personnel and certain governmental entities. *Id.* at 259.

¹ The Pennsylvania Right to Know Act is Pennsylvania’s equivalent of the Tennessee Public Records Act.

² The court cites to several cases that were filed against federal governmental entities pursuant to the federal Freedom of Information Act (hereinafter “FOIA”) where certified payroll records of contractors were requested. In those cases which were decided by the Third, Ninth, Tenth, and D.C. Circuit Court of Appeal, the courts found that FOIA Exemption 6 permitted the governmental entities to maintain the personal information within the certified payroll records as confidential because the release of the information would constitute “a clearly unwarranted invasion of personal privacy.” U.S.C.A. Section 552(b)(6).

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The court determined that if it were only the names and addresses of the employees, and the name of the employer that were requested, the employees would not have any constitutional protection; however, given that what was requested was the employees names, addresses, hourly wages, hours worked, deductions and net paycheck amount, the employees did have a reasonable expectation of privacy in the information. *Id.* at 260. After determining that the employees did have a reasonable expectation of privacy in the payroll information, the court stated:

We must proceed to the next step in the analysis and weigh or balance the public records disclosure interest against the privacy interests. In so doing, we keep in mind that DOTD has offered to release all of the certified payroll information with the identifying information removed. This disclosure would enable the recipient, in this case, the union, to determine whether Iafraite is in compliance with the Davis-Bacon Act and whether DOTD is properly monitoring that compliance. Therefore, the issue is whether there is some other public interest in obtaining the names, addresses, and particularized wage information about employees of a private company performing work on public projects, and whether that public interest is sufficiently compelling to override the employees' privacy rights. The purpose of the Act is to keep the public reasonably informed about how public bodies conduct their business and how the affairs of government are handled. The public body involved in this case is DOTD; its business is the building and maintenance of public highways, bridges, and other transportation infrastructures and facilities. The public's interest in DOTD's records is to ensure that those activities are effectively accomplished for the public's convenience and safety at the most reasonable price and in compliance with applicable laws. We fail to discern in this regard any public interest that would be served by the disclosure of the complete certified payroll information concerning the employees of a private contractor working on DOTD projects.

Id. The court concluded by finding that the employees' expectation of privacy in the personal information contained within the certified payroll records outweighed any perceivable public interest that there might be in the disclosure of the payroll information when linked to names and addresses of the employees. *Id.*

Because there are no Tennessee or Sixth Circuit opinions that address the disclosure of personal information contained within certified payroll records of private employers and because the case law in other jurisdictions is so divergent, this office cannot say with certainty that the Authority is permitted to disclose employees' names and addresses contained within the certified payroll records. Although there is no exception for the information within the TPRA and this office has not been able to find an exemption elsewhere within state statute, it appears, based upon the language in some of the cases cited above, that an argument could be made that the Tennessee constitution provides an exemption. It could be argued that the employees of the third-party subcontractors have a reasonable expectation of privacy in their payroll information which is not outweighed by the public interest in the names and the addresses of the employees. However, it appears that argument could be overcome. This office has been unable to find any provision within the constitution of the state of Tennessee that creates a fundamental right to privacy in this particular area. Additionally, in *Doe v. Sundquist*, the court considered whether or not certain statutory provisions relative to the limited disclosure of adoption records violated several constitutional provisions, including the right to non-disclosure of personal information. *Doe v. Sundquist*, 2 S.W. 3d 919 (Tenn. 1999). In response to the plaintiff's contention that the state constitution did contain a right to non-disclosure of personal information, the court said, "We have held, however, that the confidentiality of records is a statutory matter left to the legislature. Absent a fundamental right or other compelling reason, we reject the invitation to extend constitutional protection to the non-disclosure of personal information." *Id.* at 926.

Additionally, the courts in those jurisdictions where disclosure was prohibited first determined that the employees had a reasonable expectation of privacy in the personal information contained within payroll records, and then concluded that the public interest in ensuring that the prevailing wage was being paid did not outweigh the privacy interest of the employees. In this particular situation, it has been explained to this office that the union representatives that are requesting the names and addresses along with the payroll information are doing so to ensure that the prevailing wage is being paid, but also, to ensure that the private companies working on the projects adhere to the conclusions that are contained in a number of the procurement documents for the project which state "80% of labor force to be hired locally," "85% of labor force to be hired locally," and "80%-90% of labor force to be hired locally out of labor halls." (See attached exhibits A, B, and C). The union representatives contend that without the names and addresses of the

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employees contained within the certified payroll records, it is unable to verify that the prevailing wage is being paid and that those working on the project have been hired locally.

Based upon the abovementioned, this office cannot say with certainty that the Authority is permitted to disclose employees' names and addresses contained within the certified payroll records of third-party subcontractors working on the Music City Center. However in response to the next question posed, it is the opinion of this office that if the third-party subcontractors are not otherwise legally or contractually required to provide information such as employees' addresses to the Authority, the Authority is not obligated to require that information be submitted for purposes of responding to public records requests. With regard to social security numbers, it is this office's understanding that social security numbers are not being sought by any of the union representatives at this time. While there is a statute that prohibits state level entities from disclosing social security numbers in the entities' possession except in very limited circumstances, there is not an equivalent provision for local governmental entities. There are federal provisions that prohibit the disclosure of social security numbers, except in limited circumstances, when the social security numbers are obtained or maintained for specific purposes. If the Authority maintains or obtained the social security numbers in the payroll records pursuant to any provision of law enacted on or after October 1, 1990, the social security numbers are confidential pursuant to 42 U.S.C. Section 405(c)(2)(C)(viii).³

Please feel free to call me at (615) 401-7891 if you have any further questions.

Elisha D. Hodge
Open Records Counsel

³ There are a number of cases from other jurisdictions where the social security numbers contained within the payroll records have also been requested and the courts have determined, without mention of the provision in 42 U.S.C. Section 405(c)(2)(C)(viii) and even when there is no statutory exemption, the state and federal constitutions create an exemption based upon a right to privacy in a social security number.

5/14/2010

Music City Center

Procurement Summary

Division 5.a – Structural Steel

Successful Bidder: Lenex Steel Company
Indianapolis, IN

Contract Amount: \$39,503,000

Unsuccessful Bidders: Superior Steel - Knoxville, TN
Lexicon - Blytheville, AK
Structal - Points on Rocks, MD
Owen Steel - Columbia, SC
Zalk Josephs - Stoughton, WI
Schuff Steel - Overland Parks, KS
Cives Steel - Thomasville, GA
Midwest Steel - Detroit, MI
Batker Steel - Lynchburg, VA
Merrill Iron - Schofield, WI
Hirschfield - San Angelo, TX

Summary of Work: Fabricate and install all structural steel including columns, beams, metal deck, joist and trusses.
Provide all hoisting including mobile cranes and lifts.
Provide temporary safety protections including ladders, safety rails, scaffolds and platforms.

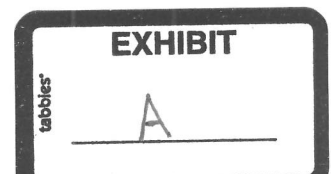
DBE Participation: 30% of contract amount (19% SBE, 3% WBE & 9% MBE)

Proposed DBE Firm(s): Manufacturers Industrial Group
Nashville Fabrication
Evco
Structural Bolt & Manufacturing
TRC International
Hannah Company

Local Participation: Approximately 50% of contract amount

Local Material Breakdown: 30% of contract value will come from local subcontractors and suppliers.

Local Labor Breakdown: 80% - 90% of labor force to be hired locally out of labor halls



6.10.10

Music City Center

Procurement Summary

Division 23.a – Plumbing/Mechanical

Successful Bidder: Nash Inc/ WR Nash (Joint Venture)
Orlando, FL/ Miami, FL

Contract Amount: \$50,158,000

Unsuccessful Bidders: Ivey - Nashville, TN
US Engineering/Nashville Machine (Joint Venture) - Nashville, TN
Foley - Kansas City, Missouri

Summary of Work: Provide and install all plumbing and mechanical systems.
Including equipment, piping, pumps, fixtures, duct, and
necessary hoisting and equipment for a complete package.

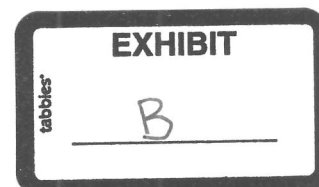
DBE Participation: 30% of contract amount

Proposed DBE Firm(s): Thermal Insulation
3rd Ave Industrial Hardware
A-Action Air, Inc
National Engravers, Inc
Gipson Mechanical
Anderson Backhoe Service

Local Participation: 81% of contract amount

Local Sub/Material Breakdown: 68% of contract value will come from local subcontractors and suppliers.

Local Labor Breakdown: 85% of labor force to be hired locally
*1.5% in Quality Control
*1.2% in Material Handling
*38% in Plumbers/Apprentices
*59% in Pipe Fitters



4/23/2010

Music City Center

Procurement Summary

Division 3.b – Structural Concrete

Successful Bidder: **Ceco Concrete Construction, LLC**
St. Louis, MO

Contract Amount: **\$42,550,000**

Unsuccessful Bidders: **Southern Pan/SRS (Joint Venture) – Atlanta, GA/Nashville, TN**
McHugh – Chicago, IL
Baker/Charter (Joint Venture) – Monroe, OH/Nashville, TN
CCK Service – Orlando, FL
American Pan – Palmetto, GA
Roncelli – Detroit, MI

Summary of Work: **Form and place structural cast-in place concrete including foundations, vertical walls, columns, flat slabs, stairs and ramps.**
Provide, fabricate and erect all precast concrete.
Provide six tower cranes and foundations.
Provide temporary safety protections including ladders, safety rails, scaffolds and platforms.

DBE Participation: **23% of contract amount (Minority Business Enterprise)**

Proposed DBE Firm(s): **Push 4J LLC**
Shrop-Vickers

Local Participation: **84% of contract amount**

Local Material Breakdown: **19% in Rebar Material**
18% in Concrete Material
4% in Cranes
2% in Precast Concrete
1% in small tools, hardware, etc

Local Labor Breakdown: **80% of labor force to be hired locally**

