

Kurt Johnson
15624 Opal Fire Drive
Austin TX 78728
(512) 905-5786
kjohnson999@gmail.com

September 28, 2009

Office of the Attorney General (Via Certified Mail)
Open Records Division
PO Box 12548
Austin TX 78711

RE: Public Information Act request from Kurt Johnson (“Johnson”) to Williamson County (“county”) and subsequent attempts to shield the request from disclosure by county and Waste Management of Texas, Inc. (“WMI”), hence this response to WMI (and county).

Dear Open Records Division:

On August 11, 2009, county received a request from Johnson for “the sequentially-numbered tickets (“tickets”) showing the individual loads of solid-waste disposal events at the Williamson County landfill for the full business day of July 14, 2009.”

On September 1, 2009, county sent a letter to WMI advising WMI of the request, explaining potential consequences, and offering to assist WMI in formulating the response to shield the request from triggering disclosure. County also sent a letter to the Office of the Attorney General (“AG”) “claiming no exceptions to disclosure” for itself and copying the AG regarding its correspondence with WMI. Johnson was copied regarding all these documents.

On September 17, 2009, Johnson received via certified mail a copy of the letter from WMI to the AG (a substantially-redacted version) seeking to shield from disclosure specific (but not all) tickets. Johnson's deadline for timely response (10 business days) is October 1, 2009.

For a better contextual understanding of the reason and nature of this request, it is pointed out that the “tickets” sought by Johnson merely are the standard, written forms filled out for each entity (or public customer) making a deposit of solid-waste at the Williamson County landfill (“landfill”). The landfill operates under an authorizing permit (“permit”)¹ issued by the Texas Commission on Environmental Quality (TCEQ). Williamson County is the permittee, site owner, and site operator for the landfill while WMI is the contractor which operates the landfill for the county under a contract (“the *Agreement*”).² Over the course of the public discussion about the *Agreement* and the processing of MSW Permit No. 1405-B through the TCEQ and the State Office of Administrative Hearings (SOAH), county officials have maintained that county is “in control” of the landfill and its operation.

Johnson avers that there are several reasons consistent with the Texas Government Code, Chapter 552 for Johnson to receive *all* of the requested tickets “showing the individual loads of solid-waste disposal events at the Williamson County landfill for the full business day

1 MSW Permit No. 1405-B.

2 2009 *Williamson County Landfill Operating Agreement*, passed unanimously by the Williamson County Commissioners Court on March 3, 2009. WMI already had signed the *Agreement* on February 27, 2009, and the county approved and signed the agreement on March 3, 2009.

of July 14, 2009, and that withholding or shielding any of the tickets from disclosure to the public or any interested member of the public is not in the public interest and is in violation of performance criteria for disclosure applicable to both county and WMI.

The individual reasons why *all* the tickets should be provided are listed below, and it is pointed out that *any one* of the reasons, on its own, is sufficient to mandate that they be provided to Johnson in response to the request.

THE FIRST reason is that, per the *Agreement*, WMI has waived privilege referable to withholding the tickets, thus it is not only entirely within the county's purview to release them³, the county is obligated to release them, having stated in its September 1, 2009 letter to the AG, that: "The county claims no exceptions to disclosure on its behalf"

THE SECOND reason is that the county, while not limited by any privilege claimed by WMI (and thereby having the ability to respond completely to Johnson's request because of the *Agreement*), nonetheless failed to meet the required deadline for sending an objection to Johnson regarding disclosure.

THE THIRD reason is that, in addition to the mandatory requirement for releasing *all* of the tickets, the public interest is compelling with regard to such release inasmuch as it *appears* that WMI may be utilizing self-dealing within the *Agreement* for its own substantial benefit, and whatever the apparent circumstances or conclusions might be, the public has a right to the facts and circumstances underlying the implementation of the arrangement, especially because the county is the permittee, site owner and site operator of the landfill, which makes the facility a taxpayer asset which should not be subject to abuse, should such abuse be occurring.

Before proceeding to document the above three points, it is important to address one issue raised by WMI in its objection letter to the AG dated September 16, 2009, and received by Johnson on September 17, 2009. On Page 1, under the subhead, *Background Information*," WMI makes this statement in the first paragraph under the subhead:

The requestor in this matter, Mr. Kurt Johnson, is a paid consultant for Texas Disposal Systems, Inc. ("TDS"). See WMI's Exhibit A.⁴ TDS is a direct competitor of Waste Management. Waste Management seeks to preserve the confidential and proprietary nature of its own information and that of its customers from its direct competitors, TDS, and other members of the public.

It is unprecedented that WMI would object to disclosure of public documents by attacking the citizen making the request, using the argument that the citizen should be denied the request because of one of his specific consulting clients. Would WMI take the position that there is no defense for failing to release the documents to the public and only that they should not be released to Johnson because he is a consultant with a specific client? Is Johnson a member of the public, or is he not? Using WMI's tortured logic in targeting Johnson and excepting him from disclosure of the documents, is WMI arguing that release of the documents to the public should be handled in such a way that, though the public might have legal access to them, they somehow should be provided to the public yet somehow should be shielded from Johnson's eyes? No, even WMI is not willing to defy logic with such a leap and includes "members of the public" along with Johnson as those who should not see the tickets. With WMI having made that concession, it is clear that Johnson's status as a requestor with standing

³ As will be documented and addressed later, the county has access to the tickets as per the *Agreement*.

⁴ WMI's *Exhibit A* contains two brief articles, both of which identify Johnson as a TDS consultant.

is *bona fide* and that he has all the rights available to any other member of the public. Hence, with WMI's admission that Johnson is the same as "other members of the public", one wonders why WMI went to the trouble to submit this narrative at all, if not to try to prejudice the AG's eventual ruling on this matter. Johnson objects to this effort on this part of WMI to disparage him inappropriately and unnecessarily, especially in light of WMI's subsequent admission that Johnson is a member of the public with the same rights as other members of the public. WMI should be cautioned by the AG regarding such disparagement and its attempt inject such bias which apparently is intended to influence the AG's ruling inappropriately.

ELABORATING ON THE FIRST REASON: Per the *Agreement*,⁵ WMI has waived privilege referable to withholding the tickets, thus it is not only entirely within the county's purview to release them, the county is obligated to release them, having stated in its September 1, 2009 letter to the AG, that: "The county claims no exceptions to disclosure on its behalf"

The question, then, is whether or not the county owns and can provide the tickets at issue in response to Johnson's request and whether WMI waived privilege regarding their release prior to stating otherwise in its September 16, 2009 letter to the AG. In its September 1, 2009 letter to the AG regarding this matter, county states that "a representative sample of the requested documents⁶ at issue are enclosed for your review." Further, in its September 1, 2009 letter to WMI, county referenced the tickets as "records we received from you or from your company." In addition, the *Agreement* states: "Contractor shall retain all records, data, and/or tickets that represent or document each and every transaction at the Landfill for a period of seven years from the date the transaction occurred. County or its designees shall have unrestricted access to such material"⁷ There's no question about it: county had and has the tickets and claimed no objection to their release, and as of September 1, 2009, WMI had not declared privilege. The county, by law, should have released *all* the tickets to Johnson.

The *Agreement* also states, "Contractor shall keep accurate records of all transactions related to or connected with this Agreement, including, but not limited to, all correspondence and invoices, copies of weigh tickets or receipts issued at the landfill. ... each of the records kept under this section shall remain the exclusive property of the County"⁸

These two ironclad statements in the *Agreement* clearly document the fact that the county owns and controls the tickets. By consenting to the Agreement, WMI waived privilege with the county's approval of the contract on March 3, 2009, (signed by WMI on February 27, 2009) which pre-dates substantially WMI's September 16, 2009 claim that it now somehow has a right to protest the county's release of documents which clearly were and are owned and controlled by the county, and for which WMI had not sought privilege prior to the dateline for county's timely response to Johnson. In addition, in it's September 1 letter to WMI and copied to Johnson, county claimed *no exceptions* to the tickets' release.⁹

5 References to and excerpts from the *Agreement* are made throughout this Response to WMI's objection to release of *all* the tickets. Because of the voluminous nature of the *Agreement*, a hard-copy Exhibit is not provided with this filing; nonetheless, and for purposes of documents associated with this response, the *Agreement* is made available online at <http://www.gismedia.com/agreement> .

6 The tickets.

7 From the *Agreement*, 2.11 (b) (1) found on Page 18.

8 From the *Agreement*, 2.11 (b) (2) (i) found on Page 19.

9 In *Cause No. 07-748-C368, County of Williamson v. WMTX*, in the District Court of Williamson County, 368th Judicial District, WMI (also WMTX) argued that its 2003 landfill contract with the county did not have to be publicly bid because the arrangement did not constitute a *lease* of the landfill property to WMI, thereby documenting the fact that the transactions relating to use of this public facility do convey to WMI any proprietary or exclusive rights for shielding or withholding all

ELABORATING ON THE SECOND REASON: The county, while not limited by any privilege claimed by WMI (and thereby having the ability to respond completely to Johnson's request because of the *Agreement*), nonetheless failed to meet the required deadline for sending an objection to Johnson regarding disclosure. As established by the documentation cited in *The First Reason*, the county owns and controls and tickets and WMI, per the *Agreement* waived privilege regarding the county having such ownership and control when it signed the *Agreement* on March 3, 2009. Thus the county had the ability, responsibility and obligation to provide *all* the tickets subject to the request. Nevertheless, the county admits in its September 1, 2009 letter to the AG that, in addition to claiming “no exceptions to disclosure” relating to *all* the tickets, it also did not respond timely: “The county acknowledges that it failed to seek a ruling within ten business days of its receipt of the request, as required by section 552.301(a) of the Government Code”

In the absence of “claiming an exception” and in its failure “to seek a ruling within ten business days of receipt of the request,” the county is obligated on not *one* but *two* points to produce *all* the tickets for Johnson.

ELABORATING ON THE THIRD REASON: In addition to the mandatory requirement for releasing *all* of the tickets, the public interest is compelling with regard to such release inasmuch as it *appears* that WMI may be utilizing self-dealing within the *Agreement* for its own substantial benefit, and whatever the apparent circumstances or conclusions might be, the public has a right to the facts and circumstances underlying the implementation of the arrangement, especially because the county is the permittee, site owner and site operator of the landfill, which makes the facility a taxpayer asset which should not be subject to abuse, should such abuse be occurring.

There is no question regarding whether WMI waived privilege regarding county's use of the tickets in legally contracting through the *Agreement*. There is no question but that, at the time Johnson filed his public information request, and including and beyond the time that the county, by law, was obligated to respond to Johnson, WMI had *asserted no privilege* regarding the tickets. In addition, it is clear that the intent of the *Agreement* is that of transparency, especially involving landfill records. For example, the *Agreement* specifies that:

*Contractor shall provide County with a monthly report, in a form acceptable to county, showing the tonnage received at the Landfill for disposal, recycling and diversion, the total revenue received by the Contractor from user fees or other revenue sources at the Landfill, the Tip Fee charged to all users of the landfill*¹⁰

An examination of the first four monthly reports¹¹ mandated by the *Agreement* and submitted by WMI to the county reveals that WMI did not include within those monthly reports the “Tip Fee charged to all users of the Landfill” as required. Had WMI not violated this portion of the *Agreement*, it might not have been necessary for Johnson to submit the request for the tickets, which reveal the tip fee (and other) information. Had the county, through members of its commissioners court, the county auditor's office, or its county attorney, seen fit to insure that WMI complies with all aspects of the *Agreement*, such public information requests as this

details of the landfill from the county or the public.

10 From the *Agreement*, 2.11 (a) (1). Emphasis for the last phrase of the paragraph is added.

11 These four monthly reports, for March, April, May and June of 2009, were provided to Johnson by the county through an open records request and may be viewed at: <http://www.gismedia.com/agreement> .

one might not be necessary. The public and the public interest should not be short-changed simply because the county is neither enforcing nor holding WMI accountable for complying with all aspects of the *Agreement*. In addition, by signing the *Agreement* which mandates the “Tip Fee charged to all users of the landfill” in the required monthly reports, WMI has waived privilege in disclosing such information, even though WMI presently may be trying to avoid such disclosure by violating the *Agreement*.

Because the county is the permittee, site owner and site operator of the landfill, it is uncontested that information regarding the landfill's finances and operations should be made available to the public, especially in light of the fact that it is a public, government-owned asset, and particularly in light of the fact that WMI, in signing the *Agreement*, has waived privilege with regard to disclosure of such information.

WMI's central claim that the tickets at issue should not be released is that the tickets “contain information that falls within the exception to disclosure set forth in Texas Gov't Code, Section 552.110 (a) or (b), and Waste Management respectfully asks that this information be protected from disclosure.”¹²

The essential error made by WMI's Ruth Mueller in making this claim is that it is irrelevant. Muelker neither cites, deals with, treats or explains how to get around the fact that WMI already has waived any claim to exceptions to the release of such information through its execution of the *Agreement* which, as previously explained, makes the records “the exclusive property of the county.”¹³ WMI made this concession and waived the privileged right to exception when county approved and signed the *Agreement* on March 3, 2009, prior to which WMI signed the *Agreement* on February 27, 2009. After that point, the waiver to privilege was in place, and WMI had not asserted any privilege prior to county's receipt of Johnson's public information request, received by the county on August 11, 2009, and to which county was obligated to respond no later than August 25, 2009 (ten business days later). And in addition to TGC Section 552.110 (a) and (b) being irrelevant because of WMI's previous waiver of privilege, also irrelevant are WMI's subsequent assertions which attempt to use the *Restatement of Torts* and the six factors cited in the *Restatement*,¹⁴ as will be established in subsequent narrative.

Even though Muelker cites TGC 552.110 (a) and (b), she awkwardly neglects to state the specific language, which reads:

Sec. 552.110. EXCEPTION: TRADE SECRETS; CERTAIN COMMERCIAL OR FINANCIAL INFORMATION. (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of Section 552.021. (b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

It is obvious that the tickets do not meet the criteria cited in “(a)”. The information on the tickets is not and never has been deemed as privileged or confidential “by statute or judicial decision”, or if such is the case, Muelker didn't cite it. And regarding “(b)”, within Muelker's entire letter to the AG there is neither description of nor explanation of how uncited “specific

12 Letter from WMI's Ruth Muelker to AG, dated September 16, 2009, Page 2.

13 From the *Agreement*, 2.11 (b) (2) (i) found on Page 19.

14 Letter from WMI's Ruth Muelker ..., *Op. Cit.*, pp. 2-4.

factual evidence” argues regarding the manner in which such disclosure would inflict “substantial competitive harm” on the world's largest solid-waste disposal company (WMI) which has so much financial clout that it can and does purchase commercials on national network television and serve as a sponsor on the NASCAR racing circuit.¹⁵

WMI's Muelker has redacted so much language from her letter to the AG (as copied to Johnson) that it is difficult to follow the sense of her argument, especially inasmuch as the relevance of the material which she seeks to protect is not disclosed, thus relevance is obscured. Nonetheless, under the subhead, ***Information That Falls Within the Exceptions from Disclosure***, Muelker writes:

*The waste tickets sought by the requestor contain (large block of language blacked out, and footnotes cited within the section are blacked out at the bottom of the page). This information falls within the exception from disclosure authorized pursuant to the Texas Gov't Code Section 552.110 (a) and, or (b) ... the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained.*¹⁶

The very idea that revealing a tipping fee charged to a customer of a landfill owned by a county government (which also holds the permit and functions as site operator) would cause “substantial competitive harm” to the world's largest solid-waste disposal company is ridiculous on its face, especially in light of the fact that WMI already had previously waived the privilege to secret away such information from the same taxpaying public which, in fact, owns the landfill asset through its representative county government. And, throughout her entire argument, Muelker never specifies how such competitive harm could or would occur as a result of the release of landfill gatehouse tickets for only one day of business.

Further, within the exigencies of competitive commerce as generally practiced, the price a service provider charges to a customer for a service is not deemed to be a competitive disadvantage to that provider in the event the provider's competitors are aware of the price the provider charges within such a particular case as this one--wherein a valuable public asset (landfill) is being used to the advantage of the service provider. Muelker has not satisfied the predicate of showing how WMI would be subjected to “substantial competitive harm.” Should any competitor of WMI choose to approach WMI's customers which use the Williamson County landfill for the purpose of proposing to them a better deal than that offered by WMI, they are free to do so, and a negotiation between and among WMI's customers and WMI's competitors could ensue, and such a scenario could occur absent any prior knowledge a WMI competitor might have about the price charged to WMI's customers at the Williamson County landfill. Thus, a competitor of WMI would face the same challenge (free market forces) referable to taking business away from WMI regardless of whether that competitor knew beforehand the price WMI charged to its own customer. It would be the customer who determines which provider offered the best deal, even if the customer alone knew which offers were made by both WMI and WMI's business competitor.¹⁷

15 For example, WMI sponsored Steve Park's Chevrolet (# 35) in the Pepsi Full Fender Frenzy 100 in New Hampshire on July 11, 2009. Reference is at: <http://localracing.nascar.com/race/NCWSE/2009/7>

16 Letter from WMI's Ruth Muelker ..., *Op. Cit.*, p. 2.

17 Even though Johnson is a consultant for Texas Disposal Systems (TDS), this statement regarding competition and “substantial competitive harm” is made by Johnson as a private citizen and not as a consultant for TDS or any other client, person, company corporation, or business entity. The statement is Johnson's opinion alone. This statement by Johnson has not been authorized by any of his clients nor any other person, company, corporation or business entity.

Muelker's "trade secret" and "competitive harm" arguments on behalf of WMI are toothless, not only because privilege previously already was waived by WMI per the *Agreement*, but also because of the reasons cited above. However, it is important to point out that Muelker's arguments actually serve as a smokescreen, a "red herring", meant to divert attention from WMI's apparent, true reason for secreting the tip fee information, which has little or nothing to do with "trade secrets" or "competitive harm", but rather with an entirely different issue which will be treated in this analysis' final section, an issue which involves WMI's apparent *self-dealing*. However, for the moment, in treating WMI's arguments sequentially, we now move to WMI's convoluted analysis involving the *Restatement of Torts*.¹⁸

Regarding the *Torts* issue, Muelker writes: "The first factor in determining whether the information is a trade secret is the extent to which the information is known outside of Waste Management. Waste Management protects the information contained in (large section blacked out) is not readily known outside of Waste Management."¹⁹

WMI's Muelker couldn't be more wrong in making that statement.

Even though WMI was in violation of requirement in the *Agreement* that it must report on a monthly schedule the tipping fees for all landfill customers (by not reporting that specific information), additional information contained in those reports shed light on the subject to the extent that, contrary to Muelker's assertion, such information generally *is known* outside of Waste Management because it can be calculated from other information.

Utilizing WMI's required monthly reports to the county, for the months of March through June, total tonnage reported was 112,666 tons, and revenues for that tonnage from tipping fees was \$2, 502,623. Doing the math, the per-ton tipping fee is \$22.21 per ton. The posted gate rate is \$31.50 per ton, so the explanation for the differential obviously is found in the discounted rates for commercial haulers. It is appropriate to conclude that the discounted rates to commercial haulers averages less than some \$22 per ton, but a more precise number is not available inasmuch as we don't know what proportion of the tonnage is due to discounted haulers as compared to non-discounted haulers. If the proportion of the tonnage due to discounted haulers is substantially higher than the tonnage provided by non-discounted haulers (private citizens), then the tipping fee for discounted haulers would be significantly less than \$22 per ton. The tickets sought by Johnson's request would provide a more specific figure, but in substance, the discount information obviously is known outside of Waste Management.

Additional information consistent with the above conclusion is that for the four-month period, there were collected tipping fees of \$2,502,623, resulting in royalty payments to the county of \$313,055. Inasmuch as the *Agreement* calls for a royalty schedule of 10 percent (for the first year), a royalty total of \$313,055 would reflect tipping fee collections of \$3,130,550. This difference of some \$600,000 for four months (or some \$150,000 per month) is best explained by the fact that discounts to commercial haulers are grossed up for the purpose of royalty payments to the county, but the result is that these haulers receive in the aggregate some \$150,000 per month in discounts (a discount of some 30.5 percent) below the gate rate available to the public (\$31.50 per ton discounted to \$22.21 per ton). It is reasonable to say that the discount provided to commercial haulers actually is much greater than that in light of the fact that the \$22.21 per ton for all waste includes revenues from the general public, which pays the posted gate rate of \$31.50.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, p. 3.

And so, the obvious fact that substantial discounts are made available by WMI to commercial haulers (including its own hauling company, which is the key element in the *self-dealing* component) is already well-known, despite WMI's efforts, as described by Muelker, to secret the information. The secreting away of the information is even more significant in light of the appearance that WMI is doing so (secreting) as part of WMI's possible and apparent abuse of its position in being the contractor for the operation of a publicly-owned asset.

Moving on to the second and third factors of the *Torts* issue, Muelker writes:

The second factor—the extent to which the information is known by employees and others involved in Waste Management's business—can also be met. Within Waste Management, the (The next five lines are blacked out, eliminating the information needed by Johnson to respond to whatever point is made. Nonetheless, the result is that Muelker makes no argument in favor of the second factor which is available for Johnson to critique, thus whatever argument she makes in support of the second factor should not be considered by the AG inasmuch as Johnson cannot respond to it in detail.)²⁰

Muelker continues: *Waste Management takes extensive measures to guard the secrecy of its confidential information, thus meeting the third factor of the trade secrets test. Waste Management restricts access to the electronic databases that house such information and makes it available only to those employees with a need to know the information or a need to have access to the information in order to perform their job functions. In addition, those employees are required to sign a confidentiality agreement wherein the employee acknowledges that Waste Management's* (two lines blacked out). *Waste Management has both terminated and initiated legal action against employees who violate these confidentiality obligations in order to preserve the integrity of the confidential information.*²¹

The mere fact that WMI restricts information's availability to employees doesn't mean that the information is a self-defined “trade secret” or that it would cause “competitive harm” to WMI if released. The acid test depends on the nature of the information itself. WMI might have a policy stating that the price it pays for coffee consumed in the break room is confidential and shouldn't be leaked by employees to outsiders, but the event of an offense wouldn't result in disclosure of a “trade secret” or inflict “substantial harm” on WMI in the competitive marketplace. It is inappropriate for WMI to alone decide what information qualifies for non-disclosure, especially if such information involves tipping fees paid by the public for use of a public, government-owned landfill.

Muelker continues: *The reason Waste Management limits access and protects its customer information is because the information is valuable both to Waste Management and to its competitors—the value of the information being the fourth factor of the trade secret test.* (Ensuing huge section blacked out, including footnotes.)²²

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

Perhaps because of the blacked-out section, but the final result nonetheless, is that Muelker puts forth no argument, citation or information supporting the conclusion that the information is valuable “both to Waste Management and its competitors.” WMI might believe that the information has value to itself, but Johnson already has shown that the value to competitors is very limited at best and generally has no intrinsic value for creating “substantial harm” to WMI’s competitive interests. Johnson admits, however, that the information may have substantial value for the public, which has an interest in curbing abuse of a public asset or stopping *self-dealing* on the part of a county contractor, but none of the “trade secrets” tests cover that specific aspect of the information sought.

Muelker continues: *With regard to the fifth factor of the test—the amount of money or effort spent by Waste Management in developing the information—Waste Management expends significant amounts of time, effort and money* (huge section blacked out—approximately 15 lines).²³

This attempted justification for meeting the “fifth factor” test is ludicrous. Whatever money or effort WMI spends in constructing, sorting and filing the tickets is mandated by the *Agreement*, and WMI would have to bear that expense regardless of whether or not it seeks to protect information from disclosure. Moreover, simply identifying and screening tickets associated with commercial solid-waste haulers who receive discounts on a single business day (July 14) would not involve “significant amounts of time, effort and money” but rather would involve a few minutes of work performed by a clerical employee who does not receive executive pay.

Muelker continues: *Finally, the information that Waste Management seeks to protect cannot be easily duplicated or acquired in any way* (section blacked out) *thus meeting the sixth factor of the trade secret test.* (Section blacked out.) *...unless required by law* (section blacked out) *... restrictions* (section blacked out). *As such it would be difficult to duplicate or properly acquire the* (section blacked out).

The significant redactions make it difficult to follow any logic that would be contained in Muelker’s statement (if, indeed any exists), but one can discern the “easily duplicated or acquired in any way” argument. As has been shown previously on this document’s Page 7, the information has been “easily duplicated in any way”. The tickets WMI wants to secret away would provide a ratification of what already has been duplicated and would particularize the components of what already has been duplicated in addition to comporting with the requirements of a legal and binding contract (*Agreement*), portions of which WMI may have been violating and may presently be violating.

The remaining narrative in Muelker’s letter on Page 4 up to the final paragraph on Page 5 is merely a repackaged statement and repeated argument of the “substantial competitive harm” position and the “considerable amount of money” expenditure position already treated and neutralized in Muelker’s previous presentation of the same subject matter.

Muelker then returns to her attack on the requestor:

It is well documented that TDS—the competitor for whom the requestor consults—has and continues to engage in activities that appear to cause substantial harm to the competitive position of Waste Management, both at the

²³ *Ibid.*, p. 4.

*Williamson County Landfill and elsewhere in Central Texas. The request for information by TDS's consultant appears to be the latest attempt by TDS to try and gain a competitive advantage against Waste Management and other competitors in central (sic) Texas.*²⁴

Muelker's attack on Johnson and TDS which seeks to establish motive on the part of Johnson and TDS is not supported by any facts which she alleges. In the first place, the citations (in footnotes) which Muelker makes in this regard are relative to activities involving TJFA, L.L.P., a totally separate company from TDS, which has every legal right to participate in the various legal venues she has cited. In addition, Johnson says: "Muelker does not have to speculate or guess about my motive, so she doesn't have to try to read my mind or otherwise intuit what that motive might be. The final section of my September 28, 2009 letter (this very letter) to the Texas Attorney General precisely explains the motive in detail and the valid justification for it, and as shall be demonstrated, it has absolutely nothing to do with her allegations pertaining to TJFA, L.L.P., TDS, or any other business entity. The request bears directly on the public interest and a critical public policy issue."

Moreover, Muelker's speculative statements about the motives of Johnson and/or TDS have no relationship to the manner in which TGC Section 552 is to be understood and interpreted, which is the real subject of these communications to the AG in this matter. As a private citizen, Johnson is no less entitled than any other citizen to the requested information no matter what he does for a living, and Muelker has made no arguments nor offered any citations to the contrary. Johnson's request for the tickets is his alone, undertaken on his own initiative as a personal matter to protect the public interest. Johnson, for example, is a published book author and professional writer²⁵ who might well utilize information which he has acquired through public information requests on various subjects. Would Muelker try to argue that Johnson should be deprived of his First Amendment right as an author because he has expertise and knowledge in matters affecting the public interest? Should Johnson be deprived of the products of public information requests because he is a professional author, or, for that matter, because he is a consultant for TDS and has engaged other clients in the past, for example, the Lutheran Seminary Program of the Southwest? Muelker has offered absolutely no arguments or citations which could, would or should preclude Johnson from acquiring the information he seeks as a private citizen, and she has offered no compelling arguments or citations to suggest that Johnson should be treated or considered differently than any other private citizen.

THIS FINAL SECTION reviews the major, legal justifications for releasing *all* the tickets which Johnson has sought in his request, and in addition (as promised) it explains the significance of the tickets' release as pertaining to the public interest in the operation of a major asset owned by a county government in Texas.

Johnson already easily and justifiably has dismissed Muelker's allegations regarding Johnson's motive in making the public information request. Muelker portrays the motive as merely part of a competitive tussle between WMI and WMI's competitors. This superficial issue pales in comparison to what is really at the heart of the matter, namely Johnson's attempt to protect and serve the public interest by revealing to the public for the public's review a key component of the landfill operation, namely the discounted tipping fees made available to commercial solid-waste haulers by WMI outside of the county's control,²⁶ and the manner in

24 *Ibid.*, pp. 5-6.

25 See <http://www.kurtjohnsonbooks.com>.

26 The discounted rates for commercial haulers is outside the county's control, but possession of *all* the tickets is not, inasmuch as the *Agreement* requires that the county to own and control the tickets.

which such discounts are abusive of the public and taxpayer interest referable to the valuable public asset of the landfill. At the heart of that commercial-hauler-discount issue is the fact that WMI self-determines the discounted tipping fee its own hauling company receives in using the landfill, a circumstance which apparently constitutes *self-dealing* involving a valuable public asset, namely, that WMI is able to determine the fee its corporately-related solid-waste hauling company pays for unrestricted use of a valuable asset owned by a county government and by taxpayers.

WMI's Muelker, the office of the Williamson County attorney, or others may argue that the public interest otherwise is protected by county government—namely the members of the commissioners court, the office of the county attorney, and the office of the county auditor—to the extent that such public involvement as illustrated by Johnson's request is unnecessary and unwarranted, and that the county is accountable to its taxpayers and the public through the process of the elections which occur periodically. However, as pertaining to the landfill, county government has shown itself to be a less-than-adequate steward of this public and taxpayer asset, to the extent that the public regrettably must take initiatives such as illustrated by Johnson's request in order to try to protect the public interest—at the very least by causing full transparency regarding the financials, operations and management of the county's landfill.

There is a long history of questions, complications, and problems associated with this landfill, but for purpose of this particular request by Johnson, the issues are targeted specifically at the importance of the county complying fully with the disclosures related to the request. The public is entitled to the information, especially in light of the fact that the county appears to be less than fully competent or fully motivated to protect the public's interest in this matter.

For example, and as already explained, it appears that WMI may be in violation of the contract requirement that WMI must include, in its monthly reports to the county, the charges allocated to all landfill customers. While lawyers may attempt to parse a loophole through some technicality in the requirement, there is no question but that, from a public policy issue, the public has a right to know what landfill customers are paying to use the public, government-owned asset. Yet, in shielding responses to previous public information requests submitted by Johnson regarding the landfill, in publishing audits of the landfill which obscure such granular information as the fee WMI self-charges to its own hauling company²⁷ to dispose of solid-waste at the landfill, and in generally being non-responsive to citizens' inquires²⁸ about the landfill, in failing to insure that WMI meets all the terms and conditions of the *Agreement* (such as the contents of the monthly reports), the county has shown that it is backing away from its responsibility to protect the public interest.

As another example, after the Texas Commission on Environmental Quality (TCEQ) approved the landfill's expansion permit amendment in February of 2009²⁹ citizens became aware of the fact that the county's recycling center was subsumed into the permitted area through the expansion, yet appeared not to be referenced in the permit application documents, thereby becoming a violation of the newly-approved permit amendment to expand the landfill. It also appeared to be a violation of the *Agreement* whereby WMI is responsible for insuring that all permits and licenses related to the landfill's operation and management are in good order.³⁰

27 The passively-worded authorization for such discounts is found in the *Agreement*, Sec. 31(a)(b), pp. 22-23.

28 Through, for example, the Hutto Citizens Group and the Williamson County Public Policy Coalition.

29 TCEQ MSW Permit No. 1405-B.

30 See the *Agreement*, Section 2.7, pp. 14-15.

Citizens contacted Precinct 4 Williamson County Commissioner Ron Morrison about the matter,³¹ but neither Morrison nor any other county official appeared to take any action to address or resolve the issue. Absent any progress, on July 30, 2009, a letter signed by 17 Williamson County citizens was sent to the Region 11 enforcement office of the TCEQ a formal “complaint” about the apparent permit violation.³² TCEQ's subsequent response to the citizens' complaint letter stated that TCEQ MSW Permit 1405-B would be modified by the county to correct problem cited by the citizens' letter.³³ Morrison's only response (non-substantive) via an e-mail was that the recycling center was inside the boundary of the permitted area but not within the landfill's active footprint area. He did not address whether or not the county had an issue with the recycling center appearing to be a violation of the MSW 1405-B permit. Clearly, without the interest and initiative of citizens, the county and WMI would have continued to operate the landfill inappropriately because of an inadequacy in TCEQ MSW Permit No. 1405-B.

Another example of the county's apparently lackadaisical attitude regarding the landfill generally has to do with county's failure to hire an oversight inspector for the landfill, based on the *Agreement*.³⁴ The need for the county to exercise more competent oversight of the landfill was a major issue involving public input as the county negotiated the *Agreement* with WMI, but even though the provision for better oversight was placed in the *Agreement*, the county has failed to act on its implementation and appears to have little or no intention of doing so in the near future. On Thursday, September 10, 2009, Johnson had a brief conversation with Morrison prior to the breakfast meeting of the Hutto Economic Development Corporation, and in response to Johnson's inquiry regarding the status of hiring the oversight inspector, Morrison said he was hopeful that such a hiring could be accomplished by “the first of the year”, but he didn't indicate which year he had in mind. At that point in 2010, the new *Agreement* will have been in full force and effect for almost 10 months without the county having an oversight inspector in place.

These examples make it clear that the county is being less than diligent in its fiduciary responsibility regarding the county-owned landfill, and the public, in the public interest, cannot rely on anything other than full disclosure of the facts, to which the public is entitled, as a means of seeking to protect the public's interest in this public and taxpayer asset.³⁵ And yet, county, despite its non-diligence, repeatedly has tried to thwart disclosure of basic but important details regarding the landfill and its operation, especially as relating to financial details.

Insofar as is known, citizens never have alleged illegal activities pertaining to any of these matters, though questions have been raised about violations involving TCEQ MSW Permit No. 1405-B, enforcement of the *Agreement*, and events over the past several years involving the propriety and openness of the county establishing and maintaining a contract with WMI, including whether or not the 2003 and 2009 landfill contracts should have been publicly bid as a matter of law as opposed to being unilaterally negotiated.³⁶ Nonetheless, these questions and

31 The landfill is wholly contained within Morrison's Precinct 4, and he generally has been the county official responsible for dealing with area residents about landfill issues generally.

32 The complaint letter is viewable at <http://www.gismedia.com/agreement> . Johnson is not a signatory on the letter.

33 The TCEQ response to the citizens' letter is viewable at <http://www.gismedia.com/agreement> .

34 In the *Agreement*, Section 2.11 (c) (4), p. 20.

35 Citizens obviously have the option of bringing a lawsuit to acquire such information, but citizens should not have to incur such expense when, in fact, citizens and the public already are entitled to the information sought through a public information request.

36 Johnson alleges, in this response to the county's refusal to comply with his public information request, that the Texas Public Information Act has been violated.

controversies obviate the need for much greater transparency involving all landfill issues, some of which can be achieved if the county would simply comply with citizens' rights to acquire information which falls under the purview of the Texas Public Information Act and which should be produced without delay.

This ticket issue is the centerpiece of the critical question involving WMI's potential for engaging in self-dealing regarding charges to commercial haulers for using the landfill. WMI has never denied that its own hauling company uses the landfill, and WMI has never denied that its own hauling company, along with other commercial haulers, are charged significant discounts in contrast to the posted gate rate which is charged to the general public. The county's apparent failure³⁷ in its fiduciary responsibility on the several matters previously described more than warrants a complete and valid response to Johnson's request, apparently including the general lack of confidence in the county's ability to oversee the landfill operation and insure that the implementation of the *Agreement* and the status of TCEQ MSW Permit No. 1405-B is handled in good order.

The price WMI charges its own hauling company to utilize the landfill is a specific issue for citizens concern, primarily because (as was established on Page 7) the discount to that hauling company could be significant and, if abusive, affects the value of a public and taxpayer asset. Even if the implementation of a substantial discount is not illegal, it has implications for public policy decisions which are based on such financial information and which are in the public interest as a matter of the importance of the information being made public. The implications include (1) whether the county-owned landfill capacity is being consumed at a below-market cost³⁸ to commercial users (and WMI's hauling company) which inordinately benefits such users, and (2) whether the county, whether wittingly or unwittingly, is a participant in giving these hauling companies extremely high profit margins at the expense of exploiting a publicly-owned, taxpayer asset.

It already has been established in this submission that the public and Johnson have a legal right to the information contained in *all* the tickets pertaining to this request. The request is not burdensome, inasmuch as it only seeks *all* the tickets for a single day (July 14, 2009), with the volume of tickets estimated to number not more than 200. In light of these other factors involving problems pertaining to landfill management, oversight and enforcement, the public interest is *compelling*, in addition to the pure legal right citizens have to see *all* of the tickets for the date indicated for the reasons specified.

In responding to Johnson's original request for the tickets, county sent a partial, untimely response to Johnson in the form of six tickets (which are supposed to be sequentially numbered) with a ticket-number range of 1734908 to 1735065, evidencing that there are at least 157 tickets applicable to July 14, 2009. The response had this cover memo from Connie Watson, the county's public information officer:

Attached are (six) tickets from the landfill from July 14, 2009, that are responsive to your request. Originally, these were inadvertently put in the possible "confidential" group because the rate was not included on the ticket. However, upon closer review, these tickets are for vehicles carrying waste for

37 The county, in this case, being the members of commissioners court, the county attorney, the county auditor, and especially Precinct 4 Commissioner Ron Morrison, in whose precinct the landfill is located, and who has been generally unresponsive to citizens efforts to gain information about various aspects of the landfill and its operations.

38 And,or, even a below-wholesale-market cost.

public entity customers so they are not confidential. The County Attorney's Office asked me to send them to you.

What is interesting about these six tickets³⁹ is that none of them contain the specific charges (dollars) assessed to the entities (cities and school districts) which utilized the services of the landfill, even though the *Agreement* specifically mandates that the tickets should reveal the “charges” assessed to users of the facility. And further, it is obvious that tickets generated by *taxpayer citizens who are members of the public and who ostensibly pay the \$31.50 per ton gate rate tipping fee* also are being withheld in addition to the *tickets containing discounts* generated by the commercial haulers utilizing the landfill, with such commercial haulers including WMI's own hauling company, one of the components regarding the important issue of *self-dealing*.

In addition, Watson, in her e-mail to Johnson, stated that these six tickets were “inadvertently put in the possible “confidential” group because the rate was not included on the ticket.” That particular justification for withholding *any* ticket is not addressed by Muelker in her lengthy and off-point arguments about the basis for withholding the tickets. What does a ticket not showing the rate have to do with withholding it from Johnson as related to any position taken by Muelker or the county? In fact, the significance of tickets not showing rates is two-fold: (1) it shields information from public disclosure which the public has a right to know, and (2) it clearly is a violation of the *Agreement*.

Even if all of these collateral issues involving disputes, controversies and oversight of the Williamson County landfill did not exist, as a matter of law, and as has been shown, Johnson and the public are entitled to prompt receipt of the information sought. It is abundantly clear from the evidence and documentation presented that the county owns, possesses and controls the documents which are sought and has, in fact, not filed an objection in its own behalf regarding their release, that county did not timely file a response to Johnson's request, that WMI has waived any claim of privilege regarding such documents by virtue of its assent to and participation in the *Agreement*, and that WMI has not sufficiently supported claims that the information sought has qualified for exemption under under any theories involving trade secrets, being competitively disadvantaged, or through any similar arguments.

What is at stake in this relatively straightforward public-information-request issue is the ability of citizens to hold their government accountable relative to government entering into arrangements which prospectively abuse a taxpayer asset for the benefit of a private company, and at the very least there is a need for minimal transparency so that the public receives the information to which it is rightfully entitled. In the case of the contents of this *objection* to WMI's effort the secret away all but six of the tickets, it clearly has been shown that WMI has not made its case. The county has not asserted a claim to privilege, and WMI has not demonstrated in the least why the tickets should be secreted away. If the Williamson County landfill were owned by WMI and if WMI were the permittee, site owner and site operator (as contrasted to being merely the “contractor”), then WMI would have a claim to privilege. Unfortunately for WMI, such is not the case, inasmuch as the landfill clearly is a county-owned, taxpayer asset.

Further, Johnson is a citizen who has full entitlement to the applicable information resulting from justified disclosures in response to his legitimate and appropriate public information requests, and any other facts, circumstances or theories, including those put forth by Muelker, involving Johnson's employment, consulting practice, political affiliations, or any

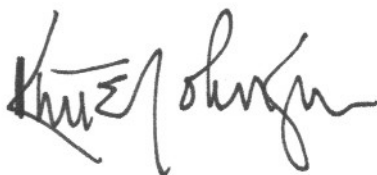
39 These six tickets are viewable at <http://www.gismedia.com/agreement> .

other personal circumstances are moot and irrelevant, notwithstanding Muelker's apparent attempt to bias an AG response to this issue by attacking the motives of Johnson and others in her letter to the AG dated September 16, 2009.

Johnson hereby requests that the AG act promptly to provide the response to Johnson's request, a response to which Johnson was entitled on or before August 25, 2009.

If you have any questions regarding this matter, please do not hesitate to contact me using the contact information found at the top of Page 1 of this letter.

Sincerely,



Kurt Johnson

Attachments:⁴⁰

Assistant (Williamson) County Attorney's letter dated September 1, 2009 to the AG⁴¹
Assistant (Williamson) County Attorney's letter dated September 1, 2009 to WMI's Muelker⁴²
Ruth Muelker's (WMI) letter dated September 16, 2009 letter to the AG⁴³
The 2009 landfill *Agreement*
WMI's 2009 monthly reports to the county for March, April, May and June
Complaint letter regarding the MSW 1405-B permit violation to TCEQ dated July 31, 2009
TCEQ's *Response* to the citizens' complaint letter
Six out of at least 157 tickets sought by Johnson in the Public Information Request

cc:

VIA CERTIFIED MAIL

Ruth Muelker (WMI)

VIA E-MAIL

Dan Gattis, Sr., Lisa Birkman, Cynthia Long, Valerie Covey, Ron Morrison,
Caroline Cho, Jana Duty, David Flores, Connie Watson

40 For the purpose of limiting volume, recipients of this communication who do not receive accompanying hard-copy or e-mail attachments in this mailing will find them as posted by Johnson on the Internet at: <http://www.gismedia.com/agreement> .

41 With copy sent to Johnson

42 With copy sent to Johnson

43 With significantly redacted copy sent to Johnson