



Office of the Attorney General
State of Texas

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November 23, 1993

Mr. Jerry R. Hoodenpyle
Rohne Hoodenpyle Lobert Myers &
Scott, P.C.
P.O. Box 13010
Arlington, Texas 76094-0010

Open Records Decision No. 621

Re: Whether the Arlington Chamber of
Commerce and the Arlington Economic
Development Foundation are subject to the
Texas Open Records Act, Government Code
chapter 552 (RQ-542)

Ms. Jennifer Riggs
Attorney at Law
301 Congress Avenue, Suite 1400
Austin, Texas 78701

Dear Mr. Hoodenpyle and Ms. Riggs:

The Arlington Chamber of Commerce (the "chamber") and the Arlington Economic Development Foundation (the "foundation"), both of which you represent, have received a request for information relating to their activities in the area of economic development. We address here your contention that the foundation and chamber do not constitute "governmental bodies" within the meaning of section 552.003 of the Texas Open Records Act (the "act"), Government Code chapter 552,¹ and are therefore not subject to the act.²

You advise us that the chamber created the foundation as a nonprofit eleemosynary corporation in 1987 under title 26, section 501(c)(3) of the United States Code.³ In 1987 the voters adopted article III, section 52-a of the Texas Constitution,

¹We note that the Seventy-Third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46, at 988. The Open Records Act now is codified in the Government Code at chapter 552. *Id.* § 1, at 599. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47, at 988.

²We address the applicability of exceptions asserted under subchapter C of the act in an informal letter ruling, Open Records Letter OR93-685 (1993).

³Title 26, section 501(a), (c)(3) of the United States Code exempts from taxation under subtitle A of title 26

[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, . . . no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . , and which does not participate in, or intervene in . . . any political campaign.

authorizing the legislature to "provide for the creation of programs and the making of loans and grants of public money . . . for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state . . . or the development or expansion of transportation or commerce in the state." Pursuant to this constitutional authority, the legislature adopted in 1989 section 380.001 of the Local Government Code, which authorizes the governing body of a municipality to establish programs to promote state and local economic development and to stimulate business and commercial activity in a municipality. The city may establish programs for making loans and grants of public money and may contract with a nonprofit organization to administer a program.⁴ Subsequently, on October 3, 1989, the chamber and the City of Arlington (the "city") entered into an "Economic Development Partnership Agreement" (the "agreement") "as a means of controlling Arlington's economic destiny" and realizing its "full economic potential." ECONOMIC DEVELOPMENT PARTNERSHIP AGREEMENT (1989) at 1.

The five-year agreement between the city and the chamber includes provisions affecting both the chamber and the foundation.⁵ The agreement provides that the city will "authorize an amount not to exceed [\$445,000.00 annually] to be paid to the Arlington Economic Development Foundation." *Id.* at 2. The primary duty of the chamber under this agreement is to "conduct solicitation efforts to supplement and/or reduce the monies provided by City." *Id.* In addition, the chamber president is to serve as director of the foundation "and will spend approximately seventy-five percent (75%) of his time on economic development activities." *Id.* The chamber receives no funds under this agreement.⁶ The agreement charges both the chamber and the foundation with the responsibility "of providing policy direction and developing an effective, long-range fund solicitation effort." *Id.* The agreement also provides that "[a]s soon as reasonably possible, the following will be submitted for acceptance by City, the Chamber Board and the [foundation]: . . . A Strategic Plan for Economic Development for 1989 - 1990. . . . [and

⁴In 1989 the legislature also enacted the predecessor to section 380.002 of the Local Government Code. See Acts 1989, 71st Leg., ch. 215, at 972. As originally enacted, the predecessor authorized a home-rule municipality with a population larger than 780,000 to create programs for the grant of public money to a tax-exempt organization for the purposes of developing and diversifying the state economy, eliminating unemployment in the state, and developing commerce in the state. See *id.* The legislature codified the predecessor as section 380.002 of the Local Government Code in 1991, see Acts 1991, 72d Leg., ch. 16, § 13.06(a), at 364, and amended the provision to apply to home-rule municipalities with a population of more than 100,000, see Acts 1991, 72d Leg., 1st C.S., ch. 4, § 25.02, at 130.

⁵The "Economic Partnership Agreement" (the "agreement") between the city and chamber provides that the foundation "will function as the Economic Development Organization for Chamber and City." You advise us that the foundation is not a subdivision of the chamber, but rather a distinct and separate entity. This office may not construe contracts. See, e.g., Attorney General Opinions DM-192 (1992) at 10; JM-697 (1987) at 6. Accordingly, this office cannot determine whether the agreement makes the foundation a part of the chamber and will rely on your averment that it does not.

⁶The agreement provides that "[a]ll authorized funds to [the foundation] by City will be used for [foundation] approved economic development activities and not Chamber activities." *Id.*

a) detailed budget to support implementation of the Strategic Plan." *Id.* at 3. In three years under the agreement, the foundation has received \$1,112,715.00 from the city to supplement the \$56,185.51 it has received in private contributions during the same period. We understand that the public and private monies are commingled and that the foundation makes expenditures drawing from a common operating fund.

The act's definition of "governmental body," found in section 552.003 of the Government Code, includes the following:

the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds. [Emphasis added.]

Courts, as well as this office, previously have considered the scope of the act's definition of "governmental body." In *Kneeland v. National Collegiate Athletic Association*, 850 F.2d 224 (5th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989), the United States Court of Appeals for the Fifth Circuit recognized that opinions of the Texas Attorney General do not declare private persons or businesses "governmental bodies" subject to the act "simply because [the persons or businesses] provide specific goods or services under a contract with a government body." *Kneeland*, 850 F.2d at 228. Rather, when interpreting the predecessor to section 552.003 of the Government Code, the *Kneeland* court noted that the attorney general's opinions generally examine the facts of the relationship between the private entity and the governmental body and apply three distinct patterns of analysis:

The opinions advise that an entity receiving public funds becomes a governmental body under the Act, unless its 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." Tex. Att'y Gen. No. JM-821 (1987), *quoting* ORD-228 (1979). That same opinion informs that "a contract or relationship that involves public funds and that indicates a common purpose or objective or that creates an agency-type relationship between a private entity and a public entity will bring the private entity within the . . . definition of a 'governmental body.'" Finally, that opinion, citing others, advises that some entities, such as volunteer fire departments, will be considered governmental bodies if they provide "services traditionally provided by governmental bodies."

Id. In *Kneeland* the court found that although the National Collegiate Athletic Association ("NCAA") and the Southwest Athletic Conference ("SWC") receive public funds, the two organizations do not qualify as governmental bodies under section 552.003 of the act because the funds the NCAA and the SWC received were not for their general

support, but rather were received in exchange for known, specific, and measurable services. *Id.* at 225-31.

As the *Kneeland* court noted, when considering the breadth of the act's definition of "governmental body," this office has distinguished between private entities receiving public funds in return for specific, measurable services and entities receiving public funds as general support. For example, in Open Records Decision No. 228 (1979), we considered whether the North Texas Commission (the "commission"), a private, nonprofit corporation chartered for the purpose of promoting the interests of the Dallas-Fort Worth metropolitan area, constituted a "governmental body" under the act. Open Records Decision No. 228 at 1. The contract existing between the commission and the City of Fort Worth obligated Fort Worth to pay the commission \$80,000 per year for three years. *Id.* The contract obligated the commission to, among other things, "continue its current successful programs and implement such new and innovative programs as will further its corporate objectives and common city's interests and activities." *Id.* at 2. We found that this broad provision failed to impose on the commission a specific and definite obligation to provide a measurable amount of service in exchange for a certain amount of money, as one would expect to find in a typical arms-length contract for services between a vendor and a purchaser, and thus failed to provide adequate consideration flowing to the cities supporting the commission. *Id.* The contract therefore placed Fort Worth, and other cities engaged in identical contracts with the commission, in the position of providing general support for the operation of the commission. *Id.* Accordingly, we found the commission to be a governmental body for purposes of the act. *Id.*⁷

The foundation admits, for purposes of the definition of "governmental body" in section 552.003, that it receives "public funds" from the city. The foundation argues, however, that the public funds it receives do not constitute *general* support of the organization, thereby excluding it from "governmental body" status. Instead, the foundation contends that it provides "a measurable amount of service in exchange for a certain amount of money," *Kneeland*, 850 F.2d at 228, because it provides measurable services to the city in the form of highly specialized public relations services. However, with respect to the foundation, we note that the general provisions the agreement sets forth are similar to those at issue in Open Records Decision No. 228. While the city may

⁷See also Attorney General Opinions JM-821 (1987) (volunteer fire department received general support from rural fire prevention district because department received public funds from district to provide all of district's needed services, as well as other close ties); JM-116 (1983) (Gulf Star Conference, intercollegiate athletic conference, was governmental body subject to act because funds member colleges pay to Conference used for general support); MW-373 (1981) (University of Texas Law School Foundation, nonprofit corporation that solicits donations and expends funds to benefit University of Texas Law School, was governmental body because university provided foundation with office space, utilities and telephone, and reasonable use of university's equipment and personnel); Open Records Decision No. 302 (1982) (Brazos County Industrial Foundation, nonprofit corporation, was governmental body subject to act because it received unrestricted grant from City of Bryan); *cf.* Open Records Decision No. 602 (1992) (Dallas Museum of Art was governmental body only to extent that it received support from City of Dallas and State of Texas).

be receiving valuable services in exchange for the public funds it provides the foundation, we find that the general provisions of the agreement fail to impose on the foundation a specific and definite obligation to provide a measurable amount of service in exchange for a certain amount of money, as one would expect to find in a typical arms-length contract. The agreement thus puts the city in the position of providing general support for the operation of the foundation. We conclude, therefore, that the entire foundation constitutes a "governmental body" within the meaning of section 552.003 and that the foundation must release all of the requested information in its possession unless the information falls within one of the exceptions enumerated under the act.

The chamber also contends that it provides "a measurable amount of service in exchange for a certain amount of money." We note that while the agreement requires the chamber to provide certain services to the city, it does not on its face indicate that the chamber receives any public funds from the city. Indeed, you advise us that the chamber does not receive *any* public funds directly from the city, whether under the agreement or by other means. Without evidence demonstrating that the chamber receives or expends public funds, we ordinarily could not conclude that it is a governmental body within the meaning of section 552.003 of the act.⁸ For the following reasons, however, we find that the chamber is a governmental body for purposes of the act to the extent that it receives public funds from the foundation to perform economic development activities on behalf of the foundation.

We find support for our conclusion that the chamber is a governmental body in the agreement between the city and the chamber.⁹ The chamber's obligations under the

⁸Prior decisions of this office have recognized that a governmental body may contract with a consultant or independent contractor to prepare information for its use in the conduct of official business. *See, e.g.*, Open Records Decision Nos. 499 (1988) at 5 (holding that records held by private attorney that are related to legal services attorney performed at request of a municipality are subject to act); 485 (1987) at 6-7 (holding that certain investigative materials that private detective prepared for junior college district were subject to act); 437 (1986) at 2-3 (holding that records prepared by bond underwriters and attorneys of utility district and by outside operator of another district contained "public information" within section 552.021, because in preparing records bond underwriters and attorneys "were in effect carrying out a task which otherwise would have been left to the governmental body itself to carry out and which was delegated to them"). Generally, the act applies to information collected or maintained by outside parties if: (1) the information relates to the governmental body's official duties or business; (2) the consultant acts as agent of the governmental body in collecting the information; and (3) the governmental body has or is entitled to access to the information. Open Records Decision No. 462 (1987) at 4. You advise us that most of the public funds with which the city endows the foundation are used to reimburse the chamber for services rendered in performance of the foundation's obligations under the agreement, but that no contractual relationship exists between the chamber and foundation regarding the foundation's use of chamber services. Because no contract governs the foundation's use of chamber services, this office has no basis on which to conclude that the act obligates the foundation to obtain information in the chamber's possession.

⁹As we have stated previously, *see supra* note 4, this office may not construe contracts. Attorney General Opinions JM-697 (1987) at 6; DM-192 (1992) at 10. To "construe" is "[t]o ascertain the meaning of language by a process of arrangement and influence." BLACK'S LAW DICTIONARY 285 (5th ed. 1979); *see also* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 282 (1990). We do not, in this opinion,

agreement overlap with those of the foundation. Article III of the agreement, titled "Strategic Plan," charges the city, chamber board, and foundation with the duty to develop a strategic plan "with emphasis on the three following areas":

1. Business retention and expansion.
2. Business prospecting and recruitment.
3. Data base development and marketing.

ECONOMIC DEVELOPMENT PARTNERSHIP AGREEMENT at 3. Articles IV, V, and VI, titled "Local Businesses," "Attracting New Businesses," and "Data Generation," respectively, *id.* at 3-5, detail the three strategy areas set forth in article III. These provisions of the agreement, however, charge only the chamber with the duty to oversee the three strategy areas and to implement "the techniques and initiatives to accomplish" the three strategy areas. *Id.* In addition, the agreement requires the chamber to fill the positions of Vice President of Business Development, Vice President of Business Services, Development Specialist, Data Specialist, and Executive Secretary. The agreement stipulates as well that the chamber president serve as foundation director and will "spend approximately seventy-five percent (75%) of his time on economic development activities." *Id.* at 2.

You advise us that most or all of the employees of the foundation are also employees of the chamber and that their salaries are drawn from both chamber and foundation funds. The documents submitted to us for review indicate that the chamber continues to fill the positions mandated under the agreement and that these positions are both chamber and foundation positions. Although the agreement provides that the "[foundation] policy and by-laws will be amended to accommodate the appointment of the Mayor and one other City representative to its Board of Directors," *id.*, chamber members who are in a position to control the foundation dominate the board. Thus, while the agreement makes the foundation the economic development organization for the city, it obligates the chamber to perform this function at least as much as the foundation, as though the foundation and chamber are interchangeable entities. The agreement appears to mirror contractually what the facts bear out practically, namely, that the chamber and foundation perform essentially the same economic development functions and in the economic development context are entities virtually indistinguishable from one another.

The agreement's apparent failure to provide any consideration to the chamber in exchange for the chamber's promise to perform the aforementioned functions lends further support to our assertion that the chamber and foundation are virtually indistinguishable from one another. Indeed, the foundation, which is not a party to the agreement, may receive nearly half a million dollars annually from the city, while the chamber receives nothing in return for its numerous promises. While this office is without authority to

(footnote continued)

attempt to construe the agreement between the city and the chamber. We cannot, however, analyze the chamber's status as a governmental body without referring to the terms of the agreement.

declare the agreement void for lack of consideration, we nonetheless believe that the agreement demonstrates on its face the virtual inseparability of the chamber and foundation for purposes of economic development activities.¹⁰

In concluding that the chamber is at least partly a governmental body, we note that since the agreement took effect in 1989, the chamber has received, through the foundation, a large portion of the funds the city provided the foundation pursuant to the agreement. For example, the chamber received from the foundation the amount of \$157,542 in 1991 and \$171,213 in 1992. You advise us that the chamber and foundation have refrained from entering into a formal contractual relationship governing the foundation's use of chamber services, but have instead opted to confine their dealings to informal oral agreements. While we are unable to comment on the substance and scope of these oral agreements, no one contends that the funds the foundation disperses to the chamber are reimbursement for specific chamber expenses incurred in implementing the foundation's economic development activities as mandated by the agreement. See Open Records Decision No. 602 (1992) at 5. Moreover, because the foundation and chamber have confined their relationship to oral agreements, we are unable to determine whether the chamber has entered "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." Attorney General Opinion JM-821 at 3, quoting Open Records Decision No. 228 (1979). We can only conclude that the foundation is in the position of providing general support for the economic development functions the chamber performs for the foundation.

Furthermore, article III, section 52-a of the constitution expressly refers to the grant of public funds to be used for the public purposes set out therein. Section 380.001 of the Local Government Code authorizes the city to establish a program for making grants of public money for the constitutional purposes and to contract with a nonprofit entity to administer the program. The relationship between city and nonprofit corporation

¹⁰The virtual inseparability of the chamber and foundation speaks to the last two factors alluded to by the *Kneeland* court as indicia of whether an entity constitutes a governmental body under the act. As noted above, the court stated:

[Attorney General Opinion JM-821 (1987)] informs that "a contract or relationship that involves public funds and that indicates a common purpose or objective or that creates an agency-type relationship between a private entity and a public entity will bring the private entity within the . . . definition of a 'governmental body.'" Finally, that opinion, citing others, advises that some entities, such as volunteer fire departments, will be considered governmental bodies if they provide "services traditionally provided by governmental bodies."

Kneeland, 850 F.2d at 228. Although no contract exists that creates an agency-type relationship between the chamber and foundation, their virtual inseparability clearly "indicates a common purpose or objective that creates an agency-type relationship." *Id.* Moreover, the purpose common to both the chamber and foundation, namely, the broadening of the city's tax base, is a service "traditionally provided by governmental bodies." *Id.*

under section 380.001 resembles the relationship between a local governmental body and nonprofit corporation created to carry out the terms of a federal grant program.

In Open Records Decision No. 195 (1978) this office concluded that Hidalgo County Jobs for Progress, Inc., was a governmental body subject to the act. The Hidalgo County Jobs for Progress, Inc., whose purpose was to assist low-income persons with education, job training, and job placement, was an officially designated community action agency under the federal Economic Opportunity Act of 1964, 42 U.S.C. § 2781 *et seq.*, and it received public funding from Hidalgo County as well as federal funding and funding from other local sources. Similarly, in Open Records Decision No. 509 (1988), this office concluded that the Austin-Travis County Private Industry Council, Inc., established to administer federal funds granted to the state under the federal Job Training Act, was a governmental body because of its support by public funds. Open Records Decision No. 509 indicated that the private industry council received and expended state funds. Open Records Decision No. 509 at 3. Thus, the private industry council was an instrument for implementing a federal program through its receipt and expenditure of public funds for the purposes of the program.

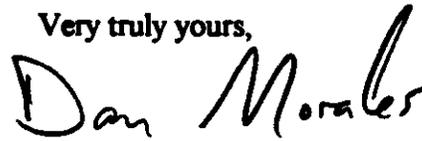
The chamber, acting through the foundation, is an instrument of the city for carrying out the public purposes authorized by the constitutional provision and by section 380.001 of the Local Government Code. The city might have administered the grant of public funds through its own employees, *see* Local Government Code § 380.001(b)(1), but it chose to have a nonprofit organization operate the program for it and transferred public funds to that entity to spend in accordance with the public purposes underlying the program. Accordingly, we conclude that the chamber is a governmental body to the extent that it receives public funds from the foundation to perform economic development activities on behalf of the foundation.¹¹ Information relating to the economic development activities the chamber performs on behalf of the foundation is, therefore, subject to the act.

¹¹In response to a suggestion that the issues here presented "would differ if the city passed a resolution instructing the city manager to request the documents," you contend that the chamber and the foundation are not subject to the act through the city "because the Chamber has a contract with the city." Because we determine that the requested information is at least partly subject to the act, we need not address whether a city resolution instructing the city manager to request the information would change the result of this opinion.

S U M M A R Y

The Arlington Economic Development Foundation is a "governmental body" within the meaning of the Texas Open Records Act; all information that it collects, assembles, or maintains is subject to the act. The Arlington Chamber of Commerce is a governmental body to the extent that it receives support from the Arlington Economic Development Foundation; information relating to the economic development activities the chamber performs on behalf of the foundation is subject to the Open Records Act.

Very truly yours,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly slanted style.

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