Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 14, 1997

Mr. Ray Farabee
Vice Chancellor and General Counsel
The University of Texas System
210 West Seventh Street
Austin, Texas 78701-2981

OR97-1595

Dear Mr. Farabee:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 106363.

The University of Texas System (the "university") received a request for two categories of information relating to the University of Texas Foundation, Inc. (the "foundation"). The first category relates to records of all payments made by the foundation to the university from January 1992 to the present, including documentation as to how this money was spent by the university. Your office states that the university is providing these records to the requestor. The second category of information requested consists of

> [a]ll financial records, books, independent audits, annual reports and related documents pertaining to the income and expenditures of the University of Texas Foundation, Inc. for the last three fiscal years. . . . In addition, the form 990's provided to the Internal Revenue Service for the last five years.

You assert that the foundation has refused to authorize release of these records for review by this office. You state that it is the position of the university that the documents responsive to the second category of information requested are the records of the foundation, a separate legal entity that is not a governmental body within the meaning of section 552.003 of the Government Code, and that the records at issue are not public records within the meaning of section 552.002 of the Government Code. You therefore request our opinion as to 1) whether the foundation is a public body, and 2) whether the documents at issue are public information within the meaning of the Open Records Act. We have considered your arguments and have reviewed the information submitted.

We first address whether the requested information is "public information" pursuant to section 552.002. This section provides that

> "public information" means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
>
> (1) by a governmental body; or
>
> (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov. Code §552.002(a).

You have informed this office that the requested information is currently housed in a building owned by the university pursuant to a lease agreement between the foundation and the university. We note, however, that the physical location of information is not necessarily dispositive of whether the information is covered by the Open Records Act. *See* Open Records Decision Nos. 492, (1988), 462 (1987), 445 (1986), 437 (1986), 332 (1982). As it is our understanding that the requested information is not maintained under a law or ordinance or in connection with the transaction of official business by or for the university, but is merely stored in a university facility under terms of a lease, we conclude it is not public information pursuant to section 552.002.[1] *Cf.* Open Records Decision No. 617 (1993) (Records Management Division of State Library is not "custodian" of records which it stores for another agency; request for records temporarily stored at Records Management Division should be made to agency that generated records). *See also* Open Records Decision No. 635 (1995) at 6 (regarding factors considered by this office in determining whether records are subject to provisions of chapter 552).

We next address whether the foundation is a governmental body. Section 552.003 of the Government Code defines "governmental body," in part, as follows:

> 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.

Gov't Code § 552.003(a)(10).

Courts, as well as this office, previously have considered the scope of the Open Records Act's definition of "governmental body." In *Kneeland v. National Collegiate Athletic Ass'n*, 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

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[1]We note that when records clearly relate to official business, those records are generally subject to the provisions of chapter 552, regardless of where they are maintained. Open Records Decision No. 425 (1985) at 2 (overruled on other grounds by Open Records Decision No. 439 (1986)). We emphasize that this ruling is based in part on your assertion that the records are not related to the university's offical business.

private persons or businesses "governmental bodies" subject to the Open Records 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 (quoting Open Records Decision No. 1 (1973)). 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.

As the *Kneeland* court noted, when considering the breadth of the Open Records 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.

The Memorandum of Understanding between the university and the foundation provides that "funds raised by the development activities of the Foundations may be subject to a reasonable management or operations charge or fee by the Foundations, or its agents, but all such charges or fees with regard to endowed funds shall come from income, not from the corpus." Thus, the foundation does not appear to receive direct payment of public funds for its services. However, in Attorney General Opinion MW-373 (1981), this office found that the University of Texas Law School Foundation (the "Law School Foundation") was a governmental body subject to the Open Records Act. Pursuant to a Memorandum of Understanding, the university provided the Law School Foundation space in the law school building to carry out its obligations, utilities and telephone services, and reasonable use of university equipment and personnel as needed to coordinate the activities of the Law School Foundation with the educational operations of the Law School. The attorney general found such services amounted to support for purposes of the Open Records Act and concluded "[s]ince the foundation receives support from the university that is financed by public funds, its records relating to the activities supported by public funds will be subject to public scrutiny. *See* Open Records Decision No. 228 (1979)."

Counsel for the foundation, in a brief submitted to this office, notes that the Memorandum of Understanding between the foundation and the university has all the provisions that were present in the 1981 Memorandum analyzed by General White, but adds a clause missing from the one considered in Opinion MW-373. This clause provides that

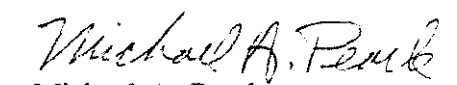
> 4. The University agrees that, during the term of this Memorandum of Understanding, the University will. . . (4) in conjunction with the Foundation, execute annual written agreements specifying the use of University personnel to directly assist in the operation of the Foundations, setting forth a reasonable sum to be paid by the Foundations to the University for the assistance rendered by such personnel.

Counsel for the foundation asserts that, "[r]elying on the teaching of MW-373 and Open Records Decision No. 228 (1979), the drafters of the new Memorandum of Understanding took care to be sure that the University was reimbursed for any support it provided to the Foundation." According to counsel, the amount of reimbursement has varied from year to year and is designed to cover the percentage of staff salary that is equivalent to the percentage of time spent on foundation services, and that an additional amount is provided to cover the cost of utilities and similar costs. He also states that while in the past, some foundation activities have occurred in university facilities, the foundation is currently located in leased space that is not owned by or otherwise connected to the university.

Based upon the information that has been provided this office, it appears that the Memorandum of Understanding between the university and the foundation establishes a *quid pro quo* relationship. We therefore find that the foundation is not supported in whole or in part by public funds, and conclude that the foundation is not a governmental body for purposes of the Open Records Act. Further, as we find that the information is not public information under the Open Records Act, the university is not required to provide the records at issue to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 106363

Enclosures: Submitted documents

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