

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 29, 2004

Ms. Jennifer S. Riggs
Riggs & Aleshire
700 Lavaca, Suite 920
Austin, Texas 78701

OR2004-5295

Dear Ms. Riggs:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 203922.

The Arlington Chamber of Commerce (the "chamber"), which you represent, received a request for the following information:

- *1. TOTAL Number of employees.
2. Break down of the above - *1. (a) by employee rank, rating, classification and job description.
3. Break down of the above - *1. (a) by disability, ethnicity, race, gender and religion.

You first contend that the chamber is not a governmental body subject to the Act. In the alternative, you state that the chamber holds some information that is responsive to items 1 and 2 of the request, and inform us that "the [c]hamber stipulates that such information would be public information if the [c]hamber were a governmental body" subject to the Act. You further state that the chamber has no information that is responsive to item 3 of the request. We note that you have not submitted any of the responsive information to this office for review.

We first address the threshold issue of whether the chamber is subject to the Act. The Act requires a governmental body to make information that is within its possession or control available to the public, with certain statutory exceptions. *See* Gov't Code §§ 552.002(a), .006, .021. Under the Act, the term "governmental body" includes several enumerated kinds of entities and "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[.]" *Id.* § 552.003(1)(A)(xii). The phrase "public funds" means funds of the state or of a governmental subdivision of the state. *Id.* § 552.003(5).

Both the courts and this office previously have considered the scope of the definition of "governmental body" under the Act and its statutory predecessor. In *Kneeland v. National Collegiate Athletic Association*, 850 F.2d 224 (5th Cir. 1988), the United States Court of Appeals for the Fifth Circuit recognized that opinions of this office do not declare private persons or businesses to be "governmental bodies" that are 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 (quoting Open Records Decision No. 1 (1973)). Rather, the *Kneeland* court noted that in interpreting the predecessor to section 552.003 of the Government Code, this office'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. The *Kneeland* court ultimately concluded that the National Collegiate Athletic Association (the "NCAA") and the Southwest Conference (the "SWC"), both of which received public funds, were not "governmental bodies" for purposes of the Act, because both provided specific, measurable services in return for those funds. *See Kneeland*, 850 F.2d at 230-31. Both the NCAA and the SWC were associations made up of both private and public universities. Both the NCAA and the SWC received dues and other revenues from their member institutions. *Id.* at 226-28. In return for those funds, the NCAA and the SWC provided specific services to their members, such as supporting various NCAA and SWC

committees; producing publications, television messages, and statistics; and investigating complaints of violations of NCAA and SWC rules and regulations. *Id.* at 229-31. The *Kneeland* court concluded that although the NCAA and the SWC received public funds from some of their members, neither entity was a “governmental body” for purposes of the Act, because the NCAA and SWC did not receive the funds for their general support. Rather, the NCAA and the SWC provided “specific and gaugeable services” in return for the funds that they received from their member public institutions. *See id.* at 231; *see also A.H. Belo Corp. v. S. Methodist Univ.*, 734 S.W.2d 720 (Tex. App.—Dallas 1987, writ denied) (athletic departments of private-school members of Southwest Conference did not receive or spend public funds and thus were not governmental bodies for purposes of Act).

In exploring the scope of the definition of “governmental body” under the Act, this office has distinguished between private entities that receive public funds in return for specific, measurable services and those entities that receive public funds as general support. 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, was a governmental body. *See* Open Records Decision No. 288 at 1. The commission’s contract with the City of Fort Worth obligated the city to pay the commission \$80,000 per year for three years. *Id.* The contract obligated the commission, among other things, to “[c]ontinue 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. Noting this provision, this office stated that “[e]ven if all other parts of the contract were found to represent a strictly arms-length transaction, we believe that this provision places the various governmental bodies which have entered into the contract in the position of ‘supporting’ the operation of the Commission with public funds within the meaning of section 2(1)(F).” *Id.* Accordingly, the commission was determined to be a governmental body for purposes of the Act. *Id.*

In Open Records Decision No. 602 (1992), we addressed the status of the Dallas Museum of Art (the “DMA”) under the Act. The DMA was a private, nonprofit corporation that had contracted with the City of Dallas to care for and preserve an art collection owned by the city and to maintain, operate, and manage an art museum. *See* Open Records Decision No. 602 at 1-2. The contract required the city to support the DMA by maintaining the museum building, paying for utility service, and providing funds for other costs of operating the museum. *Id.* at 2. We noted that an entity that receives public funds is a governmental body under the Act, unless the entity’s relationship with the governmental body from which it receives funds 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.” *Id.* at 4. We found that “the [City of Dallas] is receiving valuable services in exchange for its obligations, but, in our opinion, the very nature of the services the DMA provides to the [City of Dallas] cannot be known, specific, or measurable.” *Id.* at 5. Thus, we concluded that the City of Dallas provided general support to the DMA facilities and operation, making the DMA a

governmental body to the extent that it received the city's financial support. *Id.* Therefore, the DMA's records that related to programs supported by public funds were subject to the Act. *Id.*

This office has previously addressed the issue of whether the chamber is a governmental body subject to the Act. In Open Records Decision No. 621 (1993), this office ruled that the chamber was a governmental body to the extent that it received support from another governmental body, and that information relating to the economic development activities that the chamber performed on behalf of Arlington Economic Development Foundation were subject to the Act. *See* Open Records Decision No. 621 (1993). That decision was based in part on a finding that the contract between the chamber and the City of Arlington (the "city") did not impose "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." *Id.* at 8 (citing Attorney General Opinion JM-821 at 3, quoting ORD No. 228 (1979)). That ruling also found that the chamber, acting through the foundation, was an instrument of the city for carrying out the public purposes authorized by the constitution and by section 380.001 of the Local Government Code. *See* ORD 621 at 9.

You inform us that the contract that was the subject of the ruling in Open Records Decision No. 621 has been renegotiated and amended. You have provided this office with a copy of the amended contract that was in effect on the date that the chamber received the instant request for information. You state that the contract establishes a fixed amount of money to be paid by the city to the chamber for specific services that are described in the contract. You also state that the contract identifies the chamber as an independent contractor, with "sole responsibility for providing the services [and that] the [c]ity is limited to evaluating the results obtained."

After reviewing the submitted contract, we note, although the contract imposes an obligation on the chamber to provide certain specific services in exchange for a certain amount of money, the contract also contains a provision that obligates the chamber to

[h]eighten the national image and identity of Arlington among site selectors and corporate real estate professionals while continuing to develop a positive local business environment

As in Open Records Decision No. 228 where we construed a similar contractual provision, we believe this quoted provision places the city in the position of "supporting" the operation of the chamber with public funds within the meaning of section 552.003 of the Government Code. *See* Open Records Decision No. 228 (1979).

We additionally note that the precise manner of public funding is not the sole dispositive issue in determining whether a particular entity is subject to the Act. *See* Attorney General Opinion JM-821 at 3 (1987). Other aspects of a contract or relationship that involves the transfer of public funds between a private and a public entity must be considered in determining whether the private entity is a “governmental body” under the Act. *Id.* at 4. For example, 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” under section 552.003(1)(A)(xii) of the Government Code. The overall nature of the relationship created by the contract is relevant in determining whether the private entity is so closely associated with the governmental body that the private entity falls within the Act. *Id.*

In this case, the city and the chamber have entered into an “Economic Development Services Contract.” Based upon our review of the submitted contract, we conclude that the city and the chamber share a common purpose and objective such that an agency-type relationship is created. *See* ORD 621 at 9; *see also* Loc. Gov’t Code § 380.001(a), (b) (providing that governing body of municipality may establish and provide for administration of one or more programs, including programs for making loans and grants of public money and providing personnel and services of the municipality, to promote state or local economic development and to stimulate business and commercial activity in the municipality). Further, we find that many of the specific services that the chamber provides pursuant to the contract comprise traditional governmental functions. *See* ORD 621 at 8 n.10. Accordingly, we conclude that the chamber falls within the definition of a “governmental body” under section 552.003(1)(A)(xii) of the Government Code with respect to the services it performs under the contract at issue. Consequently, the information at issue is subject to the Act as public information. *See* ORD 602 at 5; *see also* Gov’t Code §§ 552.002(a), .006, .021.

We turn now to your representations regarding the requested information. You state that the chamber has no information that is responsive to item 3 of the request. The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ *dism’d*); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

You raise no exceptions to disclosure of the information that is responsive to items 1 and 2 of the request, nor have you submitted the information at issue to this office for review. Accordingly, we conclude that the chamber must release the responsive information. *See* Gov’t Code §§ 552.301, .302.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles". The signature is fluid and cursive, with the first name "Cindy" written in a larger, more prominent script than the last name "Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 203922

c: Mr. Lico Reyes
LULAC
Box 150001
Arlington, Texas 76015

CAUSE NO. GN-402163

ARLINGTON CHAMBER OF COMMERCE
Plaintiff,

V.

GREG ABBOTT,
TEXAS ATTORNEY GENERAL
Defendant

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IN THE 200th JUDICIAL
DISTRICT COURT
TRAVIS COUNTY, TEXAS

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FINAL JUDGMENT

On October 27, 2005 the above styled case was called for trial. Plaintiff, Arlington Chamber of Commerce, appeared through its attorneys of record. Defendant, Greg Abbott, Texas Attorney General, appeared through his attorney of record. The parties announced that they were ready to proceed to trial.

Having heard the testimony at trial and having considered the arguments and briefs of counsel, the Court ORDERS, ADJUDGES and DECREES as follows:

The Arlington Chamber of Commerce is not a "governmental body" as that term is defined in the Texas Public Information Act.

Tex. Att'y Gen. OR2004-5295 is incorrect.

The Arlington Chamber of Commerce is not required by the Texas Public Information Act to provide the information requested in the open records request of Mr. Lico Reyes dated October 2, 2003.

Costs of court are taxed against the Defendant.

~~Pursuant to section 552.323 of the Texas Public Information Act, the Court awards to Plaintiff, Arlington Chamber of Commerce, \$ _____ as reasonable and necessary Attorneys' fees.~~ 5.7.

All relief not expressly granted herein is hereby denied.

SIGNED this 7th day of November, 2005.

Sybil L. L.
JUDGE PRESIDING