



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 16, 2004

Mr. Frank M. Reilly
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Austin, Texas 78701-1665

OR2004-5911

Dear Mr. Reilly:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204621.

The OneStar Foundation Inc. (the "foundation"), which you represent, received a request for 1) information relating to private donations the foundation has received since its inception; 2) the names of employees, directors, and other individuals associated with the foundation; 3) an itemized budget; and 4) state contributions and appropriations the foundation has received. The foundation has referred the requestor to its website in response to the request for the names of its staff and directors. The foundation contends it is not a governmental body subject to the Public Information Act (the "act"). Alternatively, the foundation claims the submitted information relating to its private donors is excepted from public disclosure under sections 552.101, 552.102, 552.110, 552.117, and 552.137 of the Government Code. We have considered the foundation's arguments and reviewed the submitted information.

We find the foundation is a governmental body subject to the act to the extent it receives public funds for general support, and therefore, any information relating to activities for which the foundation receives public funds is public information subject to the act. To the extent the submitted information is public information because it relates to such activities, the foundation must withhold the access device numbers under section 552.136 and the e-mail addresses under section 552.137. The foundation must release the remaining information in Exhibit E.

First, the foundation contends it is not a governmental body. The foundation was incorporated on May 6, 2003, as a non-profit corporation operating as a public charity under section 501(c)(3) of the Internal Revenue Code. The act applies to “governmental bodies” as that term is defined in section 552.003(1)(A) of the Government Code. That section contains the following description of an entity as within the meaning of a “governmental body”:

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(1)(A)(xii). “Public funds” means funds of the state or of a governmental subdivision of the state. *Id.* § 552.003(5).

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 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 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 (quoting Open Records Decision No. 1 (1973)). Rather, 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:

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.’”

Id. 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, Open Records Decision No. 228 (1979) 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 (1979). 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, “[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, Open Records Decision No. 228 stated, “[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.” *Id.* Accordingly, the decision found the commission to be a governmental body for purposes of the act. *Id.*

Similarly, in Open Records Decision No. 602 (1992), this office examined the Dallas Museum of Art (“DMA”), which received partial funding from the City of Dallas (“Dallas”) in exchange for the DMA’s obligation to care for and preserve Dallas’ art collection and to maintain, operate, and manage the art museum. The decision determined that the nature of the services the DMA provided Dallas could not be known, specific, or measurable. Thus, to the extent the DMA received Dallas’ support, the DMA was a governmental body subject to the act. *See* Open Records Decision No. 602 at 5 (1992). Accordingly, only documents relating to those sections of the DMA that are supported by public funds were found to be public documents subject to the act. *Id.* Documents related to areas of the DMA that are not supported with public funds are not subject to the act. *Id.*

We now consider the structure and funding of the foundation. Congress enacted the National and Community Service Act of 1990, 42 U.S.C. § 12501, which created the AmeriCorps program to provide grants to states to conduct national service programs. The governor designated the OneStar National Service Commission, Inc. (the “commission”) as the Texas entity to receive federal funds from the AmeriCorps program, oversee the state’s participation in the program, and fulfill the duties prescribed by the federal act. Executive Order RP 30; *see* 42 U.S.C. § 12638. As the state’s liaison for AmeriCorps, the commission receives several federal grants, one of which is an administrative grant. The foundation explains the administrative grant provides for “specific services required by the federal grant.” Furthermore, “[t]his federal administrative grant is matched with a \$641,094 grant from the State of Texas with the remainder of \$12,916 from private and in-kind contributions.” *See* General Appropriations Act, 77th Leg., R.S., ch. 1515, art. VII-44, 2001 Tex. Gen. Laws 5411, 6130 (“the Texas Workforce Commission shall allocate \$700,000 in each year of the biennium for the purpose of meeting state matching requirements of federal dollars for National Community Service Act programs”); General Appropriations Act, 78th Leg., R.S., ch. 1330, art. VII-41, 2003 Tex. Gen. Laws 5023, 5761 (“All funds received by the Texas Workforce Commission from . . . federal agencies, . . . during the 2004-05 biennium, and all balances from such sources as of August 31, 2003, are hereby appropriated for the biennium ending August 31, 2005, for the purpose of carrying out the provisions of this Act.”).

The commission then contracted with the foundation to perform the commission's administrative functions and administer the AmeriCorps program grants. The commission uses the federal and state administrative grants to pay for the foundation's administrative services. Although you state the foundation issues invoices to the commission for specific and measurable services, you also explain that the commission pays the foundation for its personnel expenses, employee benefits, supplies, occupancy expenses (rent and utilities), and office equipment leases. The payment of such expenses constitutes general support of the foundation. *See* Attorney General Opinion MW-373 (1981) (University of Texas Law School Foundation was a governmental body because it received the following general support from the university that is financed by public funds: 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 with the educational operations of the law school). Because the foundation receives public funds for its general support, we conclude the foundation is a governmental body for purposes of the act only to the extent that it receives public funds in this manner. Accordingly, only information relating to the foundation's administration of the AmeriCorps program grants that are supported by public funds is public information subject to the act. However, we note that the foundation has other contracts to administer several grants under different federal programs. For example, the foundation has a contract with the Texas Workforce Commission to administer a criminal justice fund grant. The above analysis and conclusion apply to information pertaining to the foundation's administration of all grants with similar contractual terms and funding. Thus, we will address the foundation's obligations under the act and its asserted exceptions to the extent the submitted information relates to the foundation's activities that are supported by public funds and therefore is public information subject to the act.

The foundation has sought clarification of the request for the names of individuals associated with the foundation. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request). Until the foundation receives the requestor's clarification, it need not respond to this item of the request for information.

In response to the request for "documents detailing the names of employees," the foundation states it has no employees. The foundation contracted with a staff leasing company, SOI-28 of Tx, Inc. ("SOI"), whereby the foundation leases its personnel from SOI. Staff leasing services are governed by chapter 91 of the Labor Code. The foundation explains that because SOI's employees are assigned to do work for the foundation, the foundation's staff are SOI's employees and not the foundation's. This office does not have jurisdiction to determine whether the assigned employees are considered the foundation's employees. Accordingly, this office does not make a determination as to this question, and we will base our decision on the foundation's representation that the foundation has no employees. Because it has no employees, the foundation states it has no documents responsive to the request. The act does not require a governmental body to disclose information that did not

exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Therefore, we need not address the foundation's arguments under sections 552.102 and 552.117.

We now address whether the foundation may withhold the donors' names. For those donors whose contributions relate to the foundation's activities that are not supported by public funds, their names are not public information, and the foundation may withhold them. For those whose contributions relate to the foundation's activities and administration of grants that are supported by public funds, their names are public information subject to the act. The foundation contends that revealing the donors' names would violate their First Amendment rights to freedom of association, and that the names are therefore excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The First Amendment guarantees the freedom of association for the purpose of advancing ideas and airing grievances. U.S. Const. amend. I; *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The party asserting the right of association bears the initial burden of making a prima facie showing of harm to its First Amendment right. *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 376 (Tex. 1998). Such a burden is a light one. *Id.* The party "need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley v. Valeo*, 424 U.S. 1, 74 (1976). Such proof includes "specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself." *Id.*

Here, the foundation's argument is that "revealing its donor lists will hinder future contributions, subject its contributors to harassment, and hinder its contributors' ability to pursue collective advocacy of their beliefs." The foundation's argument is similar to that of the *Buckley* appellants, whose demonstration of harm consisted of the "clearly articulated fears of individuals, well experienced in the political process" and testimonial evidence that "one or two persons refused to make contributions because of the possibility of disclosure." *Id.* at 71-72. The Supreme Court concluded the appellants failed to demonstrate harm to their First Amendment right because their evidence of retaliation was highly speculative. *Id.* at 69-73. Likewise, the foundation has not offered any specific evidence of past or present harassment of its donors due to their associational ties or of harassment against the foundation itself. Rather, the foundation's assertions are conclusory, subjective, and speculative. Accordingly, we conclude the foundation may not withhold the donors's names under the right of association.

In addition, the foundation contends release of the donors' names and contribution amounts would infringe upon their First Amendment rights to freedom of speech and the free exercise of religion. In support of its assertion, the foundation cites only to *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002). In this case, the

petitioners challenged the constitutionality of a municipal ordinance that requires canvassers and others to register and obtain a permit before engaging in door-to-door advocacy. The court reviewed other cases with similar laws requiring a permit as a prior condition to the exercise of the right of free speech. The court held such an ordinance violates the First Amendment due to the breadth of speech covered by the ordinance, and because it is not tailored to the stated governmental interests. *Watchtower Bible*, 536 U.S. at 168. In this instance, there is no comparable law or permit requirement at issue. Thus, *Watchtower Bible* is not applicable. The foundation has not demonstrated how release of the donors' names and contribution amounts would infringe upon their First Amendment rights.

Next, we consider the foundation's constitutional privacy assertion. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After reviewing the information, we conclude the information does not concern the most intimate aspects of human affairs. See Open Records Decision No. 590 (1991) (concluding financial dealings between individual and public body cannot be considered intimate aspect of life under constitutional privacy and requiring release of information identifying donors and donation amounts to public university). Thus, the foundation may not withhold the donors' names under constitutional privacy.

The foundation also argues the donors have an expectation of privacy because "it is a common policy for non-profit organizations to keep the names of their donors confidential." Information is not confidential under the act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.").

The foundation also contends the donors' names are confidential under section 6103(a) of title 26 of the United States Code. Federal tax return information is confidential under federal law. 26 U.S.C. § 6103(a); see Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). In addition, the names and addresses of contributors to a non-profit organization found in information

returns are not available for public inspection. 26 C.F.R. § 301.6104(b)(1); *see id.* § 301.6104(d)-1(b)(4) (definition of annual information return does not include name and address of any contributor to section 501(c) organization). The information at issue is not tax return information made confidential by section 6103(a) or annual information return under the federal regulation. Therefore, the foundation may not withhold the donors' names under section 6103(a).

Finally, the foundation argues its donors' names are excepted from disclosure under section 552.110. Section 552.110 protects the proprietary interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) 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. Gov't Code § 552.110. By its terms, section 552.110 only protects the interests of the person from whom the information was obtained. This provision does not protect the interests of the governmental body that receives proprietary information nor does it allow a governmental body to assert section 552.110 for information it creates. Accordingly, we find that the foundation has failed to establish the applicability of section 552.110. Thus, the foundation may not withhold Exhibit E under section 552.110.

However, Exhibit E contains access device numbers and personal e-mail addresses excepted from disclosure under sections 552.136 and 552.137 of the Government Code, respectively. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. The department must, therefore, withhold the marked bank account numbers under section 552.136.

Section 552.137 of the Government Code provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 does not apply to a government employee's work e-mail address. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The foundation must, therefore, withhold the marked e-mail addresses of members of the public under section 552.137.

Lastly, we note that as a section 501(c) corporation, the foundation is required by federal regulations to release certain information. If the Internal Revenue Service (the "IRS") determines that the foundation is exempt from taxation for any taxable year, then the foundation's application for tax exemption, together with any supporting documents, must be disclosed. 26 C.F.R. §§ 301.6104(a)-1(a), .6104(d)-1(a). In addition, "any letter or document issued . . . by the [IRS] which relates to the application is also open to public inspection." *Id.* § 301.6104(a)-1(b). Moreover, the foundation must also disclose its annual information returns. *Id.* §§ 301.6104(b)-1(a), .6104(d)-1. The foundation has released responsive information to the requestor pursuant to these federal regulations governing non-profit organizations. Specifically, the foundation has released the names of its directors and its current and three-year projected budgets that are contained in its application for tax exemption.

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).

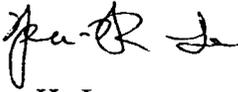
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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); *Tex. 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 of 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 204621

Enc: Marked documents

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