



ATTORNEY GENERAL OF TEXAS  
G R E G A B B O T T

September 26, 2005

Mr. Gary S. Salit  
The Gateway Foundation  
55 East Jackson Boulevard, Suite 1500  
Chicago, Illinois 60604

OR2005-08717

Dear Mr. Salit:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 233935.

Gateway Foundation, Inc. ("Gateway") received a request for ten items of information concerning the "Ellen Halbert SAFPF Program," which we understand to be the Substance Abuse Felony Punishment Facility Program at the Burnet Unit, a Texas Department of Criminal Justice correction facility in Burnet, Texas. You claim that Gateway is not a governmental body under the Texas Public Information Act (the "Act"), chapter 552 of the Government Code. We have considered your arguments and those of the requestor. *See* Gov't Code §§ 552.301, .304.

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 id.* §§ 552.001(a), .006, .021. Under the Act, the term "governmental body" includes several enumerated kinds of entities and also includes "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).

Courts, as well as this office, have considered the scope of the Act's definition of "governmental body." In *Kneeland v. National Collegiate Athletic Ass'n*, 850 F.2d 224 (5<sup>th</sup> 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, 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 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 within the meaning of section 2(1)(F).” *Id.* Accordingly, the decision found the commission to be a governmental body for purposes of the Act. *Id.*

However, the precise manner of funding is not the sole dispositive issue in determining whether an entity falls under the Act. Attorney General Opinion JM-821 at 3 (1987). Other aspects of a contract or relationship involving the transfer of public funds between a private

and public entity must be considered in determining whether a 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 section 552.003(1)(A)(x) definition of a “governmental body.” Structuring a contract that involves public funds to provide a formula to compute a fixed amount of money for a fixed period of time will not automatically prevent a private entity from constituting a “governmental body” under section 552.003(1)(A)(x) of the Act. 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.*

You indicate that Gateway is under contract with the Texas Department of Criminal Justice (the “department”) “with respect to the . . . SAFFP at Burnet, Texas [to perform] substantial performance of services by Gateway and for the consideration to be paid by [the department].” You also state that “[t]here are no funds under the [c]ontract . . . for the general support of Gateway or any of its affiliates.” You submitted to this office portions of a contract you say is Contract No. 696-PS-5-7-C0203 Ellen Halbert, which we have reviewed. Although we asked you to do so, you failed to submit the entire contract. *See* Gov’t Code § 552.303. We understand Gateway is receiving public funds under its contract with the department.

The department’s mission is to provide public safety, promote positive change in offender behavior, reintegrate offenders into society, and assist victims of crime. *See* Gov’t Code § 493.001. The department is responsible for providing substance abuse felony punishment facilities for certain defendants and that responsibility is governed in part by section 493.009 of the Government Code. *See id.* §§ 493.009, 507.006(c). Section 493.009(a) of the Government Code states that the “department shall establish a program to confine and treat defendants required to participate in the [substance abuse treatment facility] program under section 14, article 42.12, Code of Criminal Procedure and individuals referred for treatment as part of a drug court program established under Chapter 469, Health and Safety Code, or a similar program created under other law.” *Id.* § 493.009(a). The department and the Texas Commission on Alcohol and Drug Abuse jointly develop methods of screening and assessing defendants required to participate in the program under section 14 of article 42.12 of the Code of Criminal Procedure to determine their need for specific types of treatment for alcohol or drug abuse problems. *See id.* § 493.009(b). The program must contain “highly structured work, education, and treatment schedules, a clearly delineated authority structure, and well-defined goals and guidelines.” *See id.* § 493.009(e).

Section 493.009(e) requires the department to employ or contract with qualified professionals to implement the program. *See id.* If the qualified professional treating a defendant and the individual in charge of security in the facility in which the defendant is housed jointly determine that the defendant is not complying with the rules or is medically

or psychologically unsuitable for the program, they must notify the department of that fact and the department shall request that either the sentencing court, the pardons and paroles division, or the county jail reassume custody of the defendant.<sup>1</sup> *See id.* § 493.009(f)(2)-(5).

The contract between Gateway and the department requires Gateway to provide substance abuse treatment program to offenders referred by the department. The contract requires Gateway to comply with department policies and to establish procedures under which the services provided attain the goals established by the department's policies, provided that any deviation from department policies are approved in writing by the department prior to their implementation. The contract states that offender records are the department's property and requires Gateway to utilize compatible equipment to connect to the department's computer mainframe. The contract requires Gateway to establish written procedures for monitoring offenders' progress in offender rehabilitation treatment and for reporting to department staff progress in offender rehabilitation treatment. Under the contract, Gateway must submit to the department various reports including a weekly referral form, a monthly operational report, a monthly statistical report, a monthly HUB subcontracting report, a monthly report of original invoices, a quarterly performance measure report, an annual updated staffing plan, and an annual financial disclosure report. The contract states that the department develops the minimum performance measures and that the department must approve upper level management personnel for administration of the facility.

We believe that the submitted portions of the contract establish a common purpose and objective and "create an agency-type relationship" between Gateway and the department by requiring Gateway to perform a service that would otherwise be provided by the department, a governmental body. We therefore conclude that Gateway is a governmental body subject to the Act to the extent Gateway is implementing and managing the Burnet Unit substance abuse felony punishment facility program.

Turning to the question of the required disclosure of the requested information, we note that you did not comply with several procedural requirements in the Act. You did not seek a ruling from this office within the ten business day time period as required by subsections 552.301(a) and (b). In addition, you did not comply with the procedures set out in section 552.301(e). Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit to this office within fifteen business days a copy

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<sup>1</sup>The appropriate entity to be notified depends on the circumstances of the defendant's participation in the program. *See id.* § 493.009(f)(2)-(5).

of the written request for information, a signed statement or sufficient evidence showing the date Gateway received the written request, or a copy of the specific information requested or representative samples. Furthermore, you did not submit the additional information we requested pursuant to section 552.303(c) in our September 2, 2005, facsimile to you.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to timely seek an open records ruling in accordance with section 552.301(a) or to timely submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Pursuant to section 552.303(e), a governmental body's failure to submit the additional information this office requests also results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code § 552.302, 303(e); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You do not argue that the information is excepted from disclosure. You have not shown a compelling interest to overcome the presumption that the information at issue is public. Because you have not submitted the information, we have no basis for finding it confidential. Thus, we have no choice but to order the information released per sections 552.302 and 552.303(e). If you believe the information is confidential and may not lawfully be released, you must challenge this ruling in court as outlined below. Accordingly, you must release the requested information. We caution that the distribution of confidential information constitutes a criminal offense. *See* Gov't Code § 552.352.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/seg

Ref: ID# 233935

c: Mr. Lee Horowitz  
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