ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2007

Ms. Claudia Morgan
Legal Counsel
Southwest Key Programs, Inc.
3000 South IH-35, Suite 410
Austin, Texas 78704-6536

OR2007-15137

Dear Ms. Morgan:

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# 294986.

Southwest Key Programs, Inc. ("Southwest Key") received a request for thirty items of information related to funding, operations, services provided, and finances. You inform us that Southwest Key sought and received a clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). You first contend that Southwest Key is not a governmental body, and therefore Southwest Key is not subject to the requirements of the Act. You further claim that if Southwest Key is determined to be subject to the Act, the requested information is excepted from disclosure under sections 552.105, 552.107, 552.110, and 552.111 of the Government Code. You also believe that the submitted information implicates the proprietary interests of interested third parties, and you have notified the third parties of the request for information and of each party's opportunity to submit comments to this office.[1] *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining

[1]The third parties notified pursuant to section 552.305 are the following: the Honorable Lloyd Doggett; the U.S. Department of Commerce, Economic Development Administration; the Office of Refugee Resettlement; the Texas Education Agency; and the City of Austin.

that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

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 id.*, 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 SWC 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. 228 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.*

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 involve 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.*

You state that the bulk of funding received by Southwest Key is federal funding, which is not considered "public funds" as defined by section 552.003(5) of the Government Code. We agree that those portions of Southwest Key that are supported solely by direct federal funding are not subject to the Act. *See* Gov't Code § 552.003(5). However, you also inform this office that Southwest Key receives funds from the Texas Health and Human Services Commission ("HHSC"), an agency of the State of Texas.

We understand that HHSC administers the National School Lunch Program (the "NSLP") in Texas. You explain that the "NSLP is a federally assisted meal program [that] provides nutritionally balanced, low-cost or free lunches to children each school day." You state that HHSC paid funds to Southwest Key to provide meals to children in the Unaccompanied Minors Programs ("UMP") pursuant to the NSLP. You inform us that "Southwest Key is reimbursed by HHSC for the number of meals served to eligible children by Southwest Key, to the extent the federal government has appropriated sufficient funds to HHSC." Accordingly, we examine the specific nature of the funding received from HHSC.

We note that in Open Records Decision No. 509 (1988), this office concluded that a private nonprofit corporation established under the Job Training Partnership Act and supported by federal funds appropriated by the state was a governmental body for the purposes of the Act. In that case, we analyzed the state's role under the federal statute and concluded the state acted as more than a simple conduit for federal funds, in part because of the layers of decision-making and oversight provided by the state in administering the programs. *Id.* at 2. The decision noted that federal funds were initially distributed to the state and then allocated among the programs at issue. Citing Attorney General Opinions JM-716 (1987) and H-777 (1976), the decision observed that federal funds granted to a state are often treated as the

public funds of the state. Furthermore, in Open Records Decision No. 563 (1990), this office held that "[f]ederal funds deposited in the state treasury become state funds." *Id.* at 5 (citing Attorney General Opinions JM-118 (1983); C-530 (1965)).

In this case, Southwest Key receives federal funding through HHSC. In section I.A of the submitted agreement between Southwest Key and HHSC, HHSC retains the right to terminate the contract if Southwest Key fails to provide services in accordance with the provisions noted therein. Section IV.C of the same agreement requires Southwest Key to "compile data, maintain records, and submit reports as required . . . and permit authorized HHSC [and the United States Department of Agriculture] personnel during normal working hours to review such records, books, and accounts as needed to ascertain compliance with [specified laws]." Finally, the same agreement gives HHSC and other entities the right to seek judicial enforcement of Southwest Key's obligations pursuant to the agreement. We find that provisions such as these demonstrate that HHSC has oversight over the distribution of the funds. Accordingly, Southwest Key receives public funds in connection with the school meal program.

As previously noted, however, the Act does not apply to private persons or businesses simply because they receive public funds from a governmental body. *See* Attorney General Opinion JM-821 (1987); Open Records Decision Nos. 1 (1973), 228 at 2 (1979). On the other hand, where a governmental body makes an unrestricted grant of funds to a private entity to use for its general support, the private entity is a governmental body subject to the Act. *See* Attorney General Opinion JM-821 (1987); ORD 228 at 2. However, if only a distinct part of an entity is supported by public funds within section 552.003(1)(A)(xii) of the Government Code, only the records relating to that part supported by public funds are subject to the Act, and records relating to parts of the entity not supported by public funds are not subject to the Act. ORD 602.

You inform us that NSLP funds obtained from HHSC are "specifically used only to pay for a portion of the food prepared to feed Southwest Key's UMP clients." Based upon your representations and our review of the submitted materials, we find that Southwest Key did not receive public funds from HHSC for Southwest Key's general support. Rather, Southwest Key provided "specific and gaugeable services" in return for the funds that it received from HHSC. *See Kneeland*, 850 F.2d at 231. We conclude, therefore, that Southwest Key is not a governmental body subject to the Act, and it need not comply with its disclosure provisions with regard to the instant request. As our ruling is dispositive, we do not address the claimed exceptions.

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).

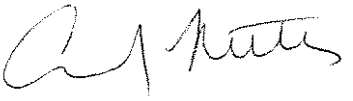
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 294986

Enc. Submitted documents

c: Ms. Rita D. Gonzales-Garza
LULAC Division VII
P.O. Box 13505
Austin, Texas 78711
(w/o enclosures)

Mr. Pedro Garza
Austin Regional Office
U.S. Department of Commerce,
Economic Development
Administration
504 Lavaca Street, Suite 1100
Austin, Texas 78701
(w/o enclosures)

Ms. Edith Merla
City of Austin
P.O. Box 1088
Austin, Texas 78767
(w/o enclosures)

Texas Education Agency
PIR Adminstration Office
5th Floor, Room 128 A-D
1701 North Congress Avenue
Austin, Texas 78701
(w/o enclosures)

The Honorable Lloyd Doggett
300 East 8th Street #763
Austin, Texas 78701
(w/o enclosures)

Ms. Maureen Dunn
Director, Division of
Unaccompanied Children's
Services
Office of Refugee Resettlement
370 L'Enfant Promenade, S.W.
Washington, D.C. 20447
(w/o enclosures)