



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 18, 2008

Ms. Joyce B. McLaughlin
Davis & Wilkerson, P.C.
P.O. Box 2283
Austin, Texas 78768-2283

OR2008-12898

Dear Ms. McLaughlin:

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# 320734.

Preferred Hospital Leasing Hemphill ("Preferred"), which you represent, received four requests for 1) all financial reports, balance sheets, and income statements relating to the operation of the Sabine County Hospital (the "hospital"), 2) all agreements entered into by Preferred or the hospital during a specified time period, and 3) all itemized bank statements for Preferred or the hospital for a specified time period. You claim Preferred is not a "governmental body," and as such is not subject to the Act. In the alternative, you contend only the information pertaining to indigent care and ambulance services are subject to the Act. We have considered your arguments. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

The Act applies to "governmental bodies" as that term is defined in section 552.003(1)(A) of the Government Code. A "governmental body" is defined, among other things, as:

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). "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, have previously considered the scope of the Act's definition of "governmental body." For example, in *Kneeland v. National Collegiate Athletic Association*, 850 F.2d 224 (5th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989), the United States Court of Appeals for the Fifth Circuit examined the financial relationship between Texas public universities and the National Collegiate Athletic Association ("NCAA") and the Southwest Conference (the "SWC") to determine whether the NCAA and the SWC were governmental bodies within the statutory

predecessor to section 552.003(1)(A)(xii). The *Kneeland* court's first line of inquiry was whether the funds received by the NCAA constituted public funds. *Id.* at 226.

You inform us Preferred has entered into a Lease and Operating Agreement, an Indigent Care Agreement, and an Ambulance Service Agreement (the "agreements") with the Sabine County Hospital District (the "district"), a hospital district created pursuant to Article IX, section 9 of the Texas Constitution. Under the agreements, Preferred leases the hospital facility and has taken over the hospital's operations and management providing substantially the same level of services as provided by the district prior to the lease. In return for Preferred providing health care services to residents of the district under the agreements, the district provides payment to Preferred under a payment schedule, attached to the agreements as Exhibit C. Exhibit C provides for a payment totaling \$950,000 for 2008 and payments in subsequent years amounting to 97% of the collected district property taxes, less the greater of 7% of collected district property taxes or \$50,000. In addition, the agreements provide for other payments by the district to Preferred. Thus, Preferred is receiving public funds under its agreements with the district.

Next, the court in *Kneeland* resolved the question of whether the public funds constitute "support" under the Act. *Id.* at 228. The 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. *Id.* 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 at 2 (1987) (quoting Open Records Decision No. 228 (1979)).

In the present case, you contend Preferred is not a governmental body because you claim that the services performed under the agreements with the district are arms-length transactions where Preferred provides a measurable amount of service in exchange for a certain amount of money. However, Exhibit C of the agreements, by its express terms, provides that the payments of public funds from the district to Preferred are for the "operation of the hospital, the indigent care program, and ambulance services." Thus, although Preferred is obligated under the agreement to provide valuable services to the district in exchange for public funds, we find those services are not known, specific, or measurable. We therefore conclude the district is providing support to Preferred and the relationship between the district and Preferred is not a typical arms-length transaction.

Next, you alternatively argue Preferred should only be required to provide information under the Act related to the indigent care and ambulance services provided by Preferred to the district. You contend only the indigent care and ambulance services are supported by public funds. In certain instances, based on our examination of the specifics of the relationship between the parties, this office will find that only records related to those parts of the operation directly supported by the public funds are subject to the Act and that those areas

for which the public funds has not provided direct support are not subject to the Act. In Open Records Decision No. 602 (1992), the Dallas Museum of Art (the "DMA") 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 id.* At 1-2. However, the DMA also owned a private collection. 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 concluded the DMA was subject to the Act only to the extent it receives support from public funds. Thus, the DMA's records that relate to programs supported by public funds were subject to the Act but the records related to the private collection were not subject to the Act. *Id.* In this case, you argue that like our ruling in Open Records Decision No. 602, we should find that Preferred is only a governmental body with regard to the indigent care and ambulance services provided by Preferred because only those services are supported by public funds. We disagree. Exhibit C expressly provides that the payments from the district are also for "the operation of the hospital." In addition, section 20.1 of the lease agreement provides as follows:

[Preferred] shall continue to make available to the residents of the [d]istrict healthcare services encompassing substantially the same level of services as provided by the [d]istrict in its hospital operations immediately prior to the commencement date of this agreement, including the uninterrupted operation of ambulance services at the same level provided by [d]istrict It is recognized that new treatment and diagnostic modalities will become available over the term of this Agreement, and these new services will be made available to residents of the [d]istrict to the extent reasonable and customary in general hospitals serving communities of like nature to that served by the [d]istrict.

Preferred, in essence, is obligated under the agreement to provide whatever services are needed and to provide services in the future as they become reasonably available.

In Open Records Decision No. 228, we considered whether the North Texas Commission (the "commission"), an entity chartered for the purpose of promoting the interests of the Dallas-Fort Worth metropolitan area, was a governmental body. *See* ORD 288 at 1. The commission's contract with the City of Fort Worth 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. This office found the commission is a governmental body because that contractual provision placed "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 [the predecessor to section 552.003]." *Id.* We find the instant case to be analogous to our ruling in Open Records Decision No. 228. From our review of the agreements between Preferred and the district, it is clear that the public funds are not earmarked specifically to the indigent care and ambulance services, but are also used for the general operation of the hospital. Accordingly, we find Preferred is receiving public funds not only with respect to the indigent care and ambulance services it provides to the district

but also for its general support. Thus, because Preferred receives public funds for its general support, it is a governmental body for purposes of the Act and the requested records are subject to the Act.

Because we have determined that Preferred is a governmental body, we must address Preferred's obligations under section 552.301 of the Government Code. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e)(1)(D). Preferred received the four requests for information between April 10, 2008 and June 26, 2008. Preferred did not request a ruling from this office until June 26, 2008. You have not stated any exceptions that apply to the requested information, nor have you submitted a copy of the specific information requested or representative samples of it. Thus, Preferred failed to comply with the requirements mandated by section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because Preferred did not provide a compelling reason to withhold the requested information from disclosure in this instance, it must be released to the requestors.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

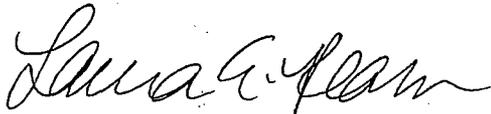
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 320734

Enc. Submitted documents

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