



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2009

Mr. Glen A. Yale
Stumpf Farrimond PC
Attorney for Spring Branch Comal County Volunteer Fire Department Company
112 East Pecan Street, Suite 700
San Antonio, Texas 78205

OR2009-07305

Dear Mr. Yale:

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# 343210.

The Spring Branch Volunteer Fire Department (the "department"), which you represent, received two requests for (1) the names and addresses of the members, directors, and officers of the department, (2) documents that discuss a named individual, (3) the names and addresses of all dues-paying members of the department and the amount the members paid in dues and contributions, (4) Form 990 tax returns for the years 2004-2007, (5) any letter to the IRS asking that penalties for late filing be waived, (6) any reply received from the IRS, and (7) copies of statements from the director of legal services, Texas Municipal League, and Texas Attorney General's office that state the department is not subject to the Open Meetings Act. You assert the requested membership list is not public information subject to the Act.¹ We have considered your arguments and reviewed the submitted representative sample of information.² We have also received and considered comments submitted by the requestors.

¹The department argues release of the requested information is governed by the Texas Non-Profit Corporations Act, V.T.C.S. art. 1396-2.23A(c). We note, however, this office does not construe the Non-Profit Corporations Act, and this ruling does not address the extent to which the requested records are subject to disclosure under it.

² We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

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. 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 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; see Open Records Decision No. 1 (1973). Rather, the *Kneeland* court noted 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."

Kneeland, 850 F.2d at 228. The *Kneeland* court ultimately concluded 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.* 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 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 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* ORD 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 “[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 [the predecessor to section 552.003].” *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 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 “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 the City of Dallas provided general support to the DMA facilities and operation, making the DMA a governmental body to the extent 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. However, those areas for which the city had not provided support were not subject to the Act. *Id.*

We note 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.*

“Whether or not a particular nonprofit volunteer fire department [is a governmental body subject to the Act] depends on the circumstances in each case, including the terms of the contract between the department and the public entity.” *Id.* at 5 (1987) (citation omitted). Because fire protection is one of the services traditionally provided by governmental bodies, different considerations apply to fire departments that set them apart from private vendors of goods and services who typically deal with governmental bodies in arms-length transactions and make them more likely to fall within the Act. *Id.* In Attorney General Opinion JM-821, this office held the Cy-Fair Volunteer Fire Department (“Cy-Fair”) was a governmental body for purposes of the Act’s predecessor to the extent it was supported by public funds received pursuant to its contract with the Harris County Rural Fire Prevention District No. 9 (“RFPD”). *See id.* In issuing that opinion, this office analyzed the contract between Cy-Fair and RFPD, noting Cy-Fair received public funds to provide all of RFPD’s needed services. *See id.* This office also noted the contract provided Cy-Fair must submit one-year operating budgets and a three-year capital expenditure budget to RFPD for approval. Consequently, this office found the contract provided for the general support of Cy-Fair for purposes of the Act’s predecessor. *Id.*

You state the department is a private Texas non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code. You inform us the department contracts with the Comal County Emergency Services District 4 (the “ESD”) to provide fire protection and other emergency services to the ESD. You state “[t]he majority of [the department’s] funding is ad valorem taxes collected by the ESD.” One of the requestors has provided us with a copy of the contract between the department and the ESD that was in effect when the department received the requests for information. The contract between the department and the ESD involves the general support of the activities of the department with public funds. The contract provides:

The [department] shall provide fire prevention, protection and fighting operation program to the geographic area of the community as identified by the [ESD] Map, which is publicly available.

Thus, the department receives public funds to provide all of the ESD's needed services. Additionally, the contract involves the submission by the department to the ESD of a detailed budget of the upcoming fiscal year and an "Annual Strategic Development Plan" covering the upcoming fiscal year plus four consecutive years. This proposed budget details planned income and expenses and is used by the ESD to establish its own budget. The contract also provides for a form of continuing monthly renewals until a new contract or agreement supersedes it. Consequently, based on your representations, our review of the contract between the department and the ESD, and our holding in Attorney General Opinion JM-821, we find the ESD provides general support to the department, making the department a governmental body pursuant to section 552.003. See Attorney General Opinion JM-821 at 5 (1987); see also Gov't Code § 552.003(1)(A)(xii); Open Records Decision No. 621 (1993) (although Arlington Economic Development Foundation receives private contributions, entire foundation is governmental body under section 552.003 because city's public funds provide general support for operation of foundation and all information in foundation's possession must be released unless Act's exceptions apply). Accordingly, the department's records are subject to the disclosure requirements of the Act.

We turn to the information at issue. The department also receives funding from property owners within the ESD. You inform us property owners can become members of the department for an annual donation of thirty dollars. The department website states the membership dues "make it possible for your fire department to maintain equipment and adequate personnel for the district." The department website also states membership "allows [members] to play a role in the future of the fire department." You argue the requested list of member names, addresses, and donation information is not related to the ESD contract or public funding received under the ESD contract, and assert "[t]he private funding of the solicitation of the members and the voluntary labor of its assembly removes the membership list from consideration as public information under the [Act]." However, the question under the Act is whether the information concerns the activities of a governmental body. In this case, you have not argued the information concerns activities funded solely by the private funds. We find the information at issue is related to the operations of the department, such as its personnel and fire protection services. We further find the public funds received by the department support such operations. Thus, we determine that, in this case, the information requested is subject to disclosure under the Act and must be released to the requestors unless an exception applies.

Although you assert no exceptions to disclosure, you explain you provided an opportunity for those renewing or joining membership with the department to indicate on their information form their preferences as to the distribution of their name and personal information, and a majority of the members indicated they do not want their personal information distributed. We note information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. See Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 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.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, notwithstanding any expectation or agreement to the contrary, the information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/rl

Ref: ID# 343210

Enc. Submitted documents

c: Requestor (2)
(w/o enclosures)