



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 9, 2009

Ms. Vanessa A. Gonzalez  
Allison, Bass & Associates, L.L.P.  
402 West 12th Street  
Austin, Texas 78701

OR2009-12689

Dear Ms. Gonzalez:

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# 354953.

The Texas Schools Property & Casualty Cooperative Intergovernmental Risk Pool (the "cooperative"), which you represent, received a request for the following: (1) formation documents; (2) the latest audited financial statement for fund years ending in 2008 and 2009; (3) the last quarterly balance sheet and income statement; and (4) copies of the current property and liability reinsurance/excess insurance contracts. You state you have released some of the requested information to the requestor. You also state that you do not maintain information responsive to category 2 of the request.<sup>1</sup> You contend that the cooperative is not a "governmental body" subject to the Act. Alternatively, you claim that the requested information is excepted from disclosure under sections 552.104, 552.110, and 552.116 of the Government Code. Further, you state that release of this information may implicate the proprietary interests of third parties. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the cooperative has notified the interested third parties of the request and of their right to submit arguments to this office

---

<sup>1</sup>We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

explaining why their information should not be released.<sup>2</sup> See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). Pursuant to section 552.305(d), Heartland and Evanston have submitted comments to this office objecting to the release of their information. We have considered the submitted arguments and reviewed the submitted information.

Initially, you argue that the requested information is not subject to the Act because the cooperative is not a governmental body. 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[.]" Gov't Code § 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; see 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

---

<sup>2</sup>The notified third parties are: Heartland Risk Management ("Heartland"); Markel Corporation/Evanston Insurance Company ("Evanston"); and Travelers Insurance ("Travelers").

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 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.* 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* 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 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 [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 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 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 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.*

You have provided a copy of the cooperative's bylaws, which state that the cooperative is an administrative agency created by school districts, community college districts, or education service centers of the State of Texas ("members") who have entered into interlocal agreements to form a joint self-insurance fund as authorized under Chapter 504 of the Labor Code and Chapter 791 of the Government Code. Chapter 791, the Interlocal Cooperation Act, authorizes a local government to contract with another local government "to perform governmental functions and services in accordance with this chapter." Tex. Gov't Code Ann. § 791.011(a) (Vernon Supp. 2008), *see id.* §§ 791.001-.033 (Vernon 2004 & Supp. 2008); *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Prop./ Cas. Joint Self Ins. Fund*, 212 S.W.3d 320 (Tex. 2006) (addressing self insurance pools authorized by chapter 791 and other statutes). A local government includes a "county, municipality, special district, junior college district, or other political subdivision of this state or another state." Tex. Gov't Code Ann. § 791.003(4)(A) (Vernon Supp. 2008). The term "government function" includes administrative functions for purposes of chapter 791. *See id.* § 791.003(3).

The cooperative's goals, as defined in its bylaws, are to "formulate, develop, and administer programs of self-insurance for the school districts of this state that will achieve lower costs for property and casualty coverage and minimize the exposure to risks of school districts and their employees." Each member is required to pay into the cooperative. You inform us that the members elect the governing board to carry out the business of the cooperative and to control the funds. The board is comprised of senior management employees and superintendents from participating members. You state that the members contract with the cooperative and under the contract terms, the members are provided liability coverage and/or workers compensation coverage and property coverage. You argue that "the public funds paid to the cooperative by the member school districts is for a specific and definite obligation...to provide a measurable amount of service in exchange for a certain amount of money." However, upon review we conclude that the cooperative is funded through public funds and the cooperative is governed by a governmental body, namely the member school districts through its governing board. We find that the members share a common purpose and objective, such that an agency-type relationship exists between the parties. *See* Open Records Decision No. 621 at 7 n.10 (1993). Accordingly, we conclude that the cooperative falls within the definition of a "governmental body" under section 552.003(1)(A)(xii) of the Government Code. As we conclude that the cooperative is a governmental body for purposes of the Act, we will next address the cooperative's alternative arguments to withhold the submitted information pursuant to the Act.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You argue that release of the information at issue would harm the interests of the cooperative in a competitive situation. You inform us that the cooperative determines premium rates and coverage limits to ensure that the cooperative remains actuarially sound and that other intergovernmental risk pools, as well as private insurance carriers, compete with the cooperative to provide liability coverage for Texas school districts and other governmental entities. You state that the requested contracts contain the negotiated and reinsurance rates obtained by the cooperative and reveals the cooperative's basis for calculating member

contributions and its underwriting formula. You therefore argue that release of this information would likely result in the cooperative being underbid by competitors, causing specific harm to the cooperative's marketplace interests in a particular competitive situation. You also argue that a competitor could utilize loss fund numbers from the requested balance sheet and income statement to compete with the cooperative for its members or misrepresent the numbers as being indicative of a weak financial standing. Based on these representations and our review, we find that the cooperative has demonstrated that it has specific marketplace interests and may be considered a "competitor" for purposes of section 552.104. Further, we find that you have demonstrated that release of the information at issue would cause specific harm to the cooperative's marketplace interests. We therefore conclude that the cooperative may withhold the submitted information under section 552.104 of the Government Code. As our ruling is dispositive, we need not address the remaining arguments against disclosure.

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](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, toll free, at (888) 672-6787.

Sincerely,



Adam Leiber  
Assistant Attorney General  
Open Records Division

ACL/rl

Ref: ID# 354953

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

cc: Mr. D. Michael Jones  
Vice President  
Evanston Insurance Company  
Ten Parkway North  
Deerfield, Illinois 60015  
(w/o enclosures)

---

~~Mr. W. David Floyd~~  
Director and General Counsel  
Heartland Risk Management  
5316 Highway 290 West, Suite 480  
Austin, Texas 78735  
(w/o enclosures)

Ms. Susan Bencher  
Managing Director  
Travelers National Property  
One Town Square, 11GS  
Hartford, Connecticut 06183  
(w/o enclosures)