



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 27, 2010

Mr. Shawn D. Twing
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P.O. Box 15008
Amarillo, Texas 79105-5008

OR2010-05998

Dear Mr. Twing:

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# 377095.

The Texas Panhandle Heritage Foundation (the "foundation"), which you represent, received a request for the foundation's (1) legal and current bylaws, (2) last three audited financial reports, (3) last three income tax returns, and (4) meeting minutes from a specified period of time. You state the foundation has provided the requestor with access to the requested financial reports and income tax returns in accordance with section 22.353 of the Business Organizations Code. *See* Bus. Orgs. Code § 22.353 (requiring a non-profit corporation to make the records, books, and reports of its financial activity available for public inspection). You claim the foundation is not a governmental body subject to the Act with regards to the requested bylaws and meeting minutes. We have considered your 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 have previously 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 [Open Records Decision No.] 228. 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 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, 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 [c]ommission 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* ORD 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 3. 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. 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.*

We further note that an organization is not necessarily a "governmental body" in its entirety. "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" is a governmental body. Gov't Code § 552.003(1)(A)(xii) (emphasis added); *see also* ORD 602 (only the records of those portions of the Dallas Museum of Art that were directly supported by public funds are subject to the Act). Accordingly, records relating to those parts of the foundation's operations that are directly supported by public funds are subject to the disclosure requirements of the Act.

In the present case, you inform us that the foundation is "a non-profit organization that annually presents the outdoor drama 'Texas' in Palo Duro State Park." You acknowledge that the foundation receives some public funds in the form of a grant from the Texas Commission on the Arts and a portion of an occupancy tax collected by the City of Canyon (the "city"). Pursuant to section 552.303(c) of the Government Code, on April 14, 2010, this office sent a notice to you via facsimile requesting that you provide additional information regarding the amounts and use of public funds by the foundation, which was necessary for this office to render a decision. You were required to submit the necessary additional information to this office not later than the seventh calendar day after the date the notice was received. Gov't Code § 552.303(d). As of the date of this letter, we have not received your response. Consequently, we are forced to address your claim and render a decision based on the information we have received to date.

We note section 351.101(a) of the Tax Code states the "[r]evenue from the municipal hotel tax may be used only to promote tourism and the convention and hotel industry," which includes "the encouragement, promotion, improvement, and application of the arts, including ... drama[.]" Tax Code § 351.101(a)(4). After reviewing your arguments and the applicable law, we conclude that the city and the foundation share a common purpose and objective such that an agency-type relationship is created. *See* Open Records Decision No. 621 (1993) at 9; *see also* Local Gov't Code § 380.001(a), (b) (providing that governing body of municipality may establish and provide for administration of one or more programs, including programs for making loans and grants of money and providing personnel and services of the municipality, to promote state or local development and to stimulate business and commercial activity on the municipality). Accordingly, we conclude that the foundation falls within the definition of a "governmental body" under section 552.003(1)(A)(xii) of the Government Code for the part, section, or portion of the foundation that spends or that is supported in whole or in part by public funds.

In this instance, the submitted information consists of bylaws and meeting minutes. You argue that nothing in the information at issue "mentions the receipt, use, or disposition of public funds." Further, you state the bylaws and meeting minutes are not subject to public

disclosure because "they are not in any way related to the public funds received by the [foundation], causing the [foundation] to be subject to the provisions of [the Act]." However, we note that the Act requires information about the foundation's operations that are directly supported by public funds be released, not just whether the information at issue mentions public funds. Thus, to the extent the bylaws and meeting minutes relate to the part, section, or portion of the foundation that spends or that is supported in whole or in part by public funds, this information is public information subject to disclosure under the Act. Because you have not submitted any additional arguments against disclosure of this information under the Act, it must be released to the requestor. *See* Gov't Code §§ 552.301(e)(1)(A), .302. To the extent the bylaws and meeting minutes do not relate to the part, section, or portion of the foundation that spends or that is supported in whole or in part by public funds, this information is not subject to disclosure under the Act and need not be released to the requestor.

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

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eeg

Ref: ID# 377095

Enc. Submitted documents

c: Requestor
(w/o enclosures)