



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 24, 2011

Ms. Karen S. Best
Law Office of Karen S. Best, PLLC
122 South Irving
San Angelo, Texas 76903

OR2011-07316

Dear Ms. Best:

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# 418431.

The Children's Advocacy Center of Tom Green County, Texas (the "center"), which you represent, received a request for information pertaining to travel expenses for the center's executive director over a specified time period. You claim that the center is not a governmental body subject to the Act. You also contend some of the submitted information is not public information subject to disclosure under the Act. Alternatively, you claim that the submitted information is excepted from disclosure under sections 552.103 and 552.136 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you assert the center is not a governmental body, and therefore its records are not subject to the Act. 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[.]" 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 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 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 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 288. 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* 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 the center is an umbrella organization for four divisions, which are supported by a combination of public and private funding. You argue that the private grants and donations are maintained in the center's general fund, and the public funding is "directly obligated to specific and definite service performance." Upon review of the center's contract and grant information, however, we find that although the center must meet certain performance measures to be eligible for the public funding, the public funding is used for the general support of the center. Accordingly, we conclude that the center is a governmental body for purposes of the Act.

However, you assert, and we agree, 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); *see also* ORD 602 (only the records of those portions of the DMA that were directly supported by public funds are subject to the Act). Accordingly, only those records relating to those parts of the center's operations that are directly supported by public funds are subject to disclosure requirements of the Act.

In this instance, the submitted information consists of travel reimbursement forms and information documenting travel expenses. You argue that the center is "uncertain as to whether the requested information regarding travel reimbursements involved public or private funds, and whether the funding was derived from administrative services by [the executive director] in her administrative capacity as Executive Director of the [center] on a fee-for-service basis, or in her service under one of the four programs under the [center] umbrella." You argue that any portion of the requested information pertaining to travel funded by private dollars does not constitute public information under the Act. Upon review of your arguments and the submitted information, we agree that any requested information that pertains solely to travel for those portions of the center funded solely by private funds is not public information subject to disclosure under the Act. However, to the extent the requested information pertains to travel for the portions of the center that are funded in whole or part by public funds, this information is public information subject to the Act. Accordingly, we will address your other arguments against disclosure of this information.

You also assert the requested information is not public information and, thus, not subject to the Act. The Act is applicable to "public information," as defined by section 552.002 of the Government Code. Section 552.002(a) provides that "public information" consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). The submitted information is maintained by the center and pertains to travel made in connection with the transaction of the official business of the center. You do not explain, and the documents do not reveal on their face, how this information is not public information under the Act. Accordingly, we find that, to the extent the submitted information pertains to travel for the portions of the center that are funded in whole or part by public funds, the submitted information is subject to the Act.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. This section provides, in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code. § 552.022(a)(3). In this instance, portions of the submitted information consist of information in a voucher or contract relating to the expenditure of public funds by a governmental body, and thus are subject to section 552.022(a)(3) of the Government Code. Therefore, this information, which we have marked, must be released under section 552.022 unless it is confidential under other law. *See id.* You claim this information is subject to section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests. Thus, section 552.103 is not "other law" that makes information expressly confidential for purposes

of section 552.022(a)(3). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W. 3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, the center may not withhold the information subject to section 552.022(a)(3) pursuant to section 552.103 of the Government Code. However, you also claim section 552.136 of the Government Code as an exception to disclosure for this information. Because section 552.136 is other law for purposes of section 552.022(a)(3), we will consider the applicability of this section to the information subject to section 552.022(a)(3), as well as the remaining information.

We will now consider your claim under section 552.103 of the Government Code for the information not subject to section 552.022(a)(3). Section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated

may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You assert the center reasonably anticipates litigation involving the center's executive director. You state the center has placed the executive director on administrative leave pending an investigation and audit of the center's financial records, and the executive director has "already retained legal counsel to represent her in anticipation of litigation related to the investigation and audit." You also state the executive director has resigned from her position. You have not, however, informed us the executive director or her legal counsel has taken any concrete steps toward the initiation of litigation. *See* ORDs 452, 555. Therefore, after reviewing your arguments, we find you have not established the center reasonably anticipated litigation when it received the request for information. Consequently, the center may not withhold any portion of the submitted information under section 552.103.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). Upon review, we find the center must withhold the account number we have marked under section 552.136 of the Government Code. The remaining information is not subject to section 552.136 and may not be withheld on that basis.

We note portions of the remaining may be subject to section 552.117 of the Government Code.¹ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We have marked the cellular telephone number of an employee. We have also marked a telephone number that may be this employee's home telephone number. To the extent the employee paid for the cellular telephone number with her own funds, the marked telephone number is the employee's home telephone number, and the employee made a timely election under section 552.024, the center must withhold the telephone numbers we have marked under section 552.117(a)(1). However, to the extent the center paid for the cellular telephone we have marked, the marked telephone number is not the employee's home telephone number, or the employee did not make a timely election under section 552.024, this information may not be withheld under section 552.117(a)(1).

We also note a portion of the remaining information consists of a personal e-mail address subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail address at issue is not a type specifically excluded by section 552.137(c). Accordingly, the center must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its disclosure.²

In summary, to the extent the requested information pertains to travel for the portions of the center that are funded in whole or part by public funds, this information is public information subject to the Act. The center must withhold the account number we have marked under section 552.136 of the Government Code. To the extent the employee paid for the cellular telephone number with her own funds, the marked telephone number is the employee's home telephone number, and the employee made a timely election under section 552.024 of the Government Code, the center must withhold the telephone numbers we have marked under section 552.117(a)(1) of the Government Code. Unless the owner of the marked e-mail address has affirmatively consented to its disclosure, the center must withhold the marked

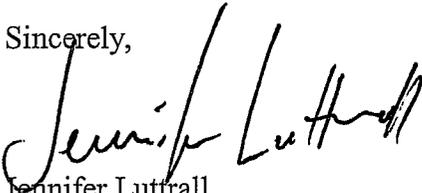
²Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

e-mail address under section 552.137 of the Government Code. The remaining 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, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 418431

Enc. Submitted documents

c: Requestor
(w/o enclosures)