



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 1, 2011

Mr. Ruben Gallegos, Jr.
Chief Operations Officer
International Educational Services, Inc.
P.O. Box 112
Los Fresnos, Texas 78566

OR2011-12716

Dear Mr. Gallegos:

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# 428929.

International Educational Services, Inc. ("IES") received a request for the most recent audited financial statements and the names and contact information for the Executive Director, Assistant Executive Director, and Board Members. You contend that IES is not a governmental body, and therefore IES is not subject to the requirements of the Act. We have considered your argument. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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 id.* §§ 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 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 (quoting 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.”

Id. 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* Open Records Decision No. 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 section 2(1)(F).” *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 inform this office that IES receives funds from the Texas Department of Agriculture (“TDA”), an agency of the State of Texas. You have submitted an agreement between IES and TDA. Pursuant to the submitted agreement, IES receives funds from TDA as a contractor in the National School Lunch Program (the “NSLP”). We note the NSLP is a federally-assisted meal program that provides nutritionally balanced, low-cost or free lunches to children each school day and is administered by TDA in Texas. Accordingly, we examine the specific nature of the funding received from TDA.

We note that in Open Records Decision No. 509 (1988), this office concluded that a private nonprofit corporation established under the Job Training Partnership Act and supported by federal funds appropriated by the state was a governmental body for the purposes of the Act. In that case, we analyzed the state’s role under the federal statute and concluded the state acted as more than a simple conduit for federal funds, in part because of the layers of decision-making and oversight provided by the state in administering the programs. *Id.* at 2. The decision noted that federal funds were initially distributed to the state and then allocated among the programs at issue. Citing Attorney General Opinions JM-716 (1987) and H-777 (1976), the decision observed that federal funds granted to a state are often treated as the public funds of the state. Furthermore, in Open Records Decision No. 563 (1990), this office held that “[f]ederal funds deposited in the state treasury become state funds.” *Id.* at 5 (citing Attorney General Opinions JM-118 (1983); C-530 (1965)).

In this case, IES receives federal funding through TDA. In section II of the submitted agreement between IES and TDA, IES agrees to operate the NSLP and School Breakfast Program and must provide TDA with advance written notice if IES decides to discontinue operating the programs or begin operating additional programs. Section III.C.5. requires IES to “[s]ubmit claims for reimbursement in accordance with procedures established by TDA . . .” and, in section III.C.6., “make all accounts and records pertaining to [IES’s] school food services program available to TDA and USDA for audit or review[.]” Finally, the agreement gives TDA the right to unilaterally terminate the agreement in the best interests of the state of Texas. We find that provisions such as these demonstrate that TDA has oversight over the distribution of the funds. Accordingly, IES receives public funds in connection with NSLP.

As previously noted, however, the Act does not apply to private persons or businesses simply because they receive public funds from a governmental body. *See* Attorney General Opinion JM-821 (1987); Open Records Decision Nos. 1 (1973), 228 at 2. On the other hand, where a governmental body makes an unrestricted grant of funds to a private entity to use for its general support, the private entity is a governmental body subject to the Act. *See* Attorney General Opinion JM-821 (1987); ORD 228 at 2. However, if only a distinct part of an entity is supported by public funds within section 552.003(1)(A)(xii) of the Government Code, only

the records relating to that part supported by public funds are subject to the Act, and records relating to parts of the entity not supported by public funds are not subject to the Act. ORD 602.

You inform us that TDA provides IES some reimbursement for the number of meals served to eligible children by IES. You state this reimbursement is only for the meals served and does not provide general support for IES. We note section III.C.2. specifically states IES must “[u]se [NLSP] income only for [NLSP] purposes.” Based upon your representations and our review of the submitted materials, we find that IES did not receive public funds from TDA for IES’s general support. Rather, IES provided “specific and gaugeable services” in return for the funds that it received from TDA. *See Kneeland*, 850 F.2d at 231. We conclude, therefore, that IES is not a governmental body subject to the Act, and it need not comply with its disclosure provisions with regard to the instant request.

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# 428929

No enclosures

c: Requestor