



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 10, 2011

Mr. Dan Dunlap
Southwest Texas Municipal Gas Corporation
P.O. Box R
Marfa, Texas 79843

OR2011-14625

Dear Mr. Dunlap:

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# 431423.

The Southwest Texas Municipal Gas Corporation (“Southwest”) received requests from two separate requestors for specified contracts and agreements, specified financial information, and information pertaining to Southwest’s board of directors meetings.¹ You claim Southwest is not a governmental body subject to the Act.² We have considered your arguments. We have also considered comments submitted by the requestors. *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 part, in section 552.003(1)(A)(xii) of the Government Code. This section defines a “governmental body” as “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). We note the phrase “public funds” means funds

¹As you did not submit the requestors’ written requests for information, we take our description from comments submitted by the requestors.

²We note Southwest did not make this argument in the previous ruling issued by this office in Open Records Letter No. 2010-19327 (2010).

of the state or of a governmental subdivision of the state. *Id.* § 552.003(5). “Public funds” from a state or governmental subdivision of the state can be in various forms and can include free office space, utilities and telephone use, equipment, and personnel assistance. *See* Att’y Gen. Op. No. MW-373 (1981).

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 (internal quotations omitted) (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 [Open Records Decision No.] 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. (omissions in original). 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. *Id.* at 230-31. Both the NCAA and the SWC were associations made up of both private and public universities. *Id.* at 226. 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. *Id.* at 231. Rather, the NCAA and the SWC provided “specific and gaugeable services” in return for the funds that they received from their member public institutions. *Id.*; *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 Southwest Conference did not receive or spend public funds and thus were not governmental bodies for purposes of Act).

We further 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, as noted above, 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.*

In the present case, you argue that Southwest is a non-profit corporation that is not controlled by a governmental body. Additionally, you state Southwest is not supported in whole or in part by public funds. You have provided a copy of Southwest’s Restated Articles of Incorporation, Restated By-Laws, and a 2009 executed Interlocal Governmental Agreement for our review. Article II of the Articles of Incorporation states the “purposes for which [Southwest] is organized are to construct, acquire, own, lease and operate natural gas transmission pipelines and distribution systems and facilities, all in behalf and for the benefit of the Cities of Alpine and Marfa, Texas[.]” The Restated By-Laws state that the Mayors of Alpine and Marfa must sit on Southwest’s Board of Directors at all times. Further, the By-Laws indicate that some of the Board of Directors shall be appointed from the city council members of the respective cities. In addition, the 2009 Interlocal Governmental Agreement states “it is provided in the instruments authorizing the financing of [Southwest’s] Bonds and Notes that once the indebtedness of [Southwest] is retired the title to the [municipal gas utility and transmission system]” owned by Southwest shall be vested in the cities of Marfa and Alpine. You acknowledge the bonds were paid off in 1998, thus title to the gas utility and transmission system has vested with two governmental bodies, the cities of Marfa and Alpine. This same agreement states that Southwest must obtain the approval of both cities to change the rates and requirements of the gas system.

Upon review, we find Southwest is a corporation supported in whole by public funds and, thus, is a governmental body under section 552.003(1)(A)(xii) of the Government Code.

Gov't Code §§ 552.003(1)(A)(xii), .003(5). Furthermore, we find that Southwest is controlled by the cities of Marfa and Alpine and the three share a common purpose and objective such that an agency-type relationship is created. *See* Open Records Decision No. 621 at 9 (1993); *see also* Local Gov't Code § 402.001(a)-(d) (providing that a municipality may operate a gas system). Accordingly, we determine Southwest is a governmental body subject to the Act.

We note section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is exempted from public disclosure. Pursuant to section 552.301(b), the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. Gov't Code § 552.301(b). Pursuant to section 552.301(e), a governmental body that receives a request for information it wishes to withhold under the Act is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, the requestors state, and provide documentation confirming, that the requests for information at issue were submitted to Southwest in May 2011. However, you did not submit your request for a ruling from this office until July 2011. Furthermore, you have not submitted copies of the requestors' written requests for information, any evidence showing the date Southwest received these requests, or a copy or representative sample of the specific information requested. Therefore, we find Southwest has failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed to be public); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). We note that a compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). However, as you raise no exceptions to the disclosure of the requested information, it must be released to the requestors. If you believe the requested information is confidential and may not lawfully be

released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/agn

Ref: ID# 431423

c: Requestors (2)