



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2011

Mr. Gregory T. Mays
General Counsel
LoneStar Multifamily Housing Solutions, Inc.
3939 North Hampton Road
Dallas, Texas 75212

OR2011-17015

Dear Mr. Mays:

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# 436272.

LoneStar Multifamily Housing Solutions, Inc. ("LoneStar") received a request for proposal documents submitted to the United States Department of Housing and Urban Development ("HUD") for the "2011 Section 8 Project Based Contract Administration Rebid for the [S]tate of Texas." You claim LoneStar is not a governmental body subject to the Act. In the alternative, you claim the requested information is excepted from disclosure under section 552.104 of the Government Code. We have considered your arguments.

You argue that the requested information is not subject to the Act because LoneStar is not a governmental body. 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[.]" Gov't Code. § 552.003(1)(A)(xii). We note the phrase "public funds" means funds 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.*

You state LoneStar is a Texas nonprofit corporation. You also state LoneStar has not received public funds. You have provided a “Certificate of Formation” (the “certificate”) for our review. This certificate reflects LoneStar was formed in 2011 “for the sole purpose of providing contract administrative services, and to address all related matters concerning the management of Section 8 vouchers throughout the State of Texas, as an instrumentality of the Housing Authority of the City of Dallas, Texas [the “DHA”].” The certificate also states that the DHA has the authority to (1) appoint or remove directors; (2) approve any project, contract, or agreement considered by LoneStar; and (3) approve amendments to LoneStar’s certificate or bylaws. Furthermore, the certificate provides that upon dissolution or liquidation, all of the funds, properties and assets, including full legal title to all property of the corporation, shall vest in and be conveyed to DHA or an entity designated by DHA. We also note that LoneStar and DHA share the same address and business telephone number. Thus, we find LoneStar is a corporation supported in whole or in part by public funds. Furthermore, based upon our review of the submitted certificate, we conclude that the DHA and LoneStar share a common purpose and objective such that an agency-type relationship is created. *See* Open Records Decision No. 621 (1993) at 9; *see* Loc. Gov’t Code §§ 392.011 (providing for the creation of a municipal housing authority), .051 (establishing general powers of a housing authority), .052 (allowing for the operation, construction, and leasing of housing projects by a housing authority); *see also id.* § 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 public money and providing personnel and services of the municipality, to promote state or local economic development and to stimulate business and commercial activity in the municipality). Accordingly, we conclude that LoneStar falls within the definition of a “governmental body” under section 552.003(1)(A)(xii) of the Government Code.

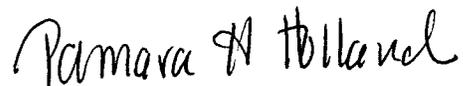
We note section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), the governmental body must request a ruling from this office 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). You state LoneStar received the request for information on August 26, 2011. Therefore, LoneStar's ten and fifteen business deadlines were September 12, 2011 and September 19, 2011, respectively. However, you did not raise section 552.104 as an exception to disclosure until September 19, 2011. Furthermore, as of the date of this letter, you have not submitted a copy or representative sample of the specific information requested. Therefore, we find LoneStar 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 unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *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, 381-82 (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); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Although you raise section 552.104 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Furthermore, as you have not submitted the requested information for our review we have no basis for finding any of the information confidential by law. Accordingly, we find LoneStar must release the requested information to the requestor pursuant to section 552.302 of the Government Code. If you believe the 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 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,

A handwritten signature in black ink that reads "Tamara H. Holland". The signature is written in a cursive style with a large initial 'T'.

Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/ag

Ref: ID# 436272

c: Requestor