ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

December 29, 2011

Ms. Tonya B. Webber
For C2 Global Professional Services, L.L.C.
Porter, Rogers, Dahlman & Gordon, P.C.
800 North Shoreline, Suite 800
Corpus Christi, Texas 78401

OR2011-19128

Dear Ms. Webber:

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# 440761 (Company Complaint No. 427909).

C2 Global Professional Services, L.L.C. (the "company") received two requests from the same requestor for information related to "a recently posted and filled position for NCP Career Counselor."[1] The first request is for (1) the demographic of applicants; (2) the demographic of the company's current employees; (3) the "meets/exceeds requirements" matrix for applicants selected to be interviewed; (4) the demographics regarding applicants who were required to engage in a court hearing process; (5) redacted copies of all resumes for interviewed applicants; and (6) all interview notes and response documents for interviewed applicants. The second request is for (1) the title of the position that the successful candidate vacated to fill the position of NCP Career Counselor; (2) the original date of hire of the successful candidate; (3) the age and gender of the successful candidate; (4) the original date the successful candidate begin his or her tenure in the vacated position; and (5) the date the offer of employment was extended to the successful candidate. You state "copies of the application and resume received from the requestor," which you have submitted as Exhibit 7, are being released. You claim the company is not a governmental body subject to the Act. In the alternative, you claim the requested information is excepted

[1]The first request was received on May 19, 2011, while the second request was received on May 25, 2011.

from disclosure under section 552.102 of the Government Code. We have considered your arguments.

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). "Public funds" means funds of the state or of a governmental subdivision of the state. *Id.* § 552.003(5). The determination of whether an entity is a governmental body for purposes of the Act requires an analysis of the facts surrounding the entity. *See Blankenship v. Brazos Higher Educ. Auth., Inc.*, 975 S.W.2d 353, 360-62 (Tex. App.—Waco 1998, pet. denied). In Attorney General Opinion JM-821 (1987), this office concluded that "the primary issue in determining whether certain private entities are governmental bodies under the Act is whether they are supported in whole or in part by public funds or whether they expend public funds." Attorney General Opinion JM-821 at 2 (1987). Thus, the company would be considered a governmental body subject to the Act if it spends or is supported in whole or in part by public funds.

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 Ass'n*, 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" 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)) (internal quotations omitted). 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. *See id.* at 230-31.

Both the NCAA and the SWC were associations made up of both private and public universities. The NCAA and the SWC both 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 Southwest Conference 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. *Id.* 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 under the Act of the Dallas Museum of Art (the "DMA"). 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. *Id.* 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 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 involves 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. Structuring a contract that involves public funds to provide a formula to compute a fixed amount of money for a fixed period of time will not automatically prevent a private entity from constituting a "governmental body" under section 552.003(1)(A)(xii). 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 this instance, you assert that the company is an independent contractor that performs the staffing and operational duties for the Lower Rio Grande Valley Workforce Development Board (the "board"), which you note is a governmental body. You have submitted the contract between the company and the board. You state the company "does not receive public funds or come into contact with public funds." However, in the affidavit of the company's President and CEO, it states that the company "receives payment from public funds" under the contract with the board and "the public funds are provided in consideration for [the company] providing the management services" to the board. Additionally, in Part III, Section 1 of the company's contract with the board, it states "the method of payment for services rendered under this Contract" may be "from grant funds made available to the Board by the State of Texas." Accordingly, we conclude that the company receives public funds

pursuant to its contract with the board. We will next determine whether the company's receipt of such funds makes it a governmental body for purposes of the Act.

Section 1 of the Statement of Work in Attachment B of the contract provides that, among other things, the board "provides employment services to the general public and targeted populations, including career counseling, assessment, job readiness and preparations, job training and job placement for our residents whether unemployed or employed. [The board] also provides placement services for businesses looking to hire skilled, pre-qualified workers, as well as planning for businesses facing layoffs or plant closures." The Statement of Work also provides that the company's purpose is the effective management and operation of the local workforce development system in Hidalgo, Starr and Willacy counties, and that the company, as the "Workforce System Contractor," will accomplish operational management and performance improvements "that will meet or exceed contracted performance measures resulting in a successful workforce system for our customers and community." The company is to manage and operate six workforce centers, and in so doing, "is responsible for implementing Board Policies as established by the Board, including amendments, state rules, workforce development letters and other Agency (Texas Workforce Commission) issuances. [The company] must ensure procedures are developed and incorporated timely. Furthermore, [the company] is responsible to ensure all appropriate staff is apprised of the Board Policies." Section 2 of the Statement of Work provides that "[the company] assures it will provide services that are in compliance with all local, state, and federal regulations as well as . . . established Board policies." Section 2 also provides that "[the company's] organizational structure, *developed after extensive consultation with Board staff* and a thorough assessment of the workforce system, is streamlined for efficiency with an emphasis on workforce experience, program knowledge, strategic planning and accountability." [Emphasis added]. Finally, the contract states that the company "understands substantial involvement of board and board staff may occur during the performance period of this contract."

On the basis of the above-noted provisions, we disagree with your contention that the contract is a typical arms-length contract for services. Rather, the contract establishes a "common purpose or objective or...creates an agency-type relationship" between the company and the board by requiring the company to perform services that would otherwise be provided by a governmental body. We therefore conclude that the company is a "governmental body" for purposes of section 552.003(1)(A)(xii) of the Government Code to the extent of its contractual involvement with the board's workforce and job training programs for which it is receiving public funds. As the requested information pertains to the hiring process, and the successful candidate selected, for the position of NCP Career Counselor, a position related to the workforce and job training services the company provides the board pursuant to the contract, we conclude the requested information is subject to required public disclosure under the Act.

Because we conclude, based on the preceding analysis, that the requested information is subject to the Act, we now consider your argument that the submitted information is excepted from public disclosure by section 552.102 of the Government Code.

First, however, we must address the company's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires a governmental body to ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). We note the company received the requests for information on May 19, 2011 and May 25, 2011. Therefore, the company's ten-business-day deadline to request a ruling was June 9, 2011. The company did not submit its request for a ruling to this office until October 24, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents via first class United States mail, common or contract carrier, or interagency mail). Accordingly, the company did not request a decision from this office within the ten-business-day period prescribed by subsection 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See 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); *see also* Open Records Decision No. 630 (1994). Because sections 552.102, 552.137, and 552.147 of the Government Code are compelling reasons, we will address these exceptions.

Next, we note you have redacted portions of the submitted information. You do not assert, nor does our review of our records indicate, that you have been authorized to withhold any such information without seeking a ruling from this office. *See* Gov't Code§ 552.301(a); Open Records Decision No. 673 (2000). As such, this type of information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. Because we are able to discern the nature of the redacted information, we will address its public availability. In the future, the company should refrain from redacting responsive information that it submits to this office in connection with a request for an open records ruling. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You claim that the submitted information is confidential under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal

privacy." Gov't Code § 552.102(a). Upon review, we find none of the submitted information is excepted under section 552.102(a) of the Government Code. Accordingly, none of the submitted information may be withheld on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code.[2] Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *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. To the extent the successful applicant for the position of NCP Career Counselor timely elected confidentiality under section 552.024, the company must withhold the types of information we have marked under section 552.117(a)(1) of the Government Code.

Section 552.137 of the Government Code 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).[3] *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the company must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, to the extent the successful applicant for the position of NCP Career Counselor timely elected confidentiality under section 552.024, the company must withhold the types of information we have marked under section 552.117(a)(1) of the Government Code. The company must withhold the personal e-mail addresses we have marked under

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[2]The 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).

[3]The 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).

section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The remaining information must be released.[4]

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,

Sean Opperman
Assistant Attorney General
Open Records Division

SO/dls

Ref: ID# 440761

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[4]We note the remaining information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).