ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 17, 2012

Mr. John L. Foster
Foster Ramsey P.C.
400 West 15th Street, Suite 404
Austin, Texas 78701

OR2012-07436

Dear Mr. Foster:

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# 453988.

Intercare Corporation ("Intercare") and Interment Services, Inc. ("Interment"), which you represent, received a request for information pertaining to Intercare's and Interment's finances, any audits performed of Intercare and Interment since a specified date, contracts between Intercare, Interment, and certain specified companies or governmental bodies other than the city, accounts receivable for purchase of a cemetery plot in any cemeteries owned by the City of Austin (the "city"), and a property inventory list for each city owned cemetery. You claim Intercare and Interment are not governmental bodies. In the alternative, you raise section 552.110 of the Government Code.[1] We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

We address the threshold issue of whether Intercare and Interment are 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. That section contains the following description of an entity as within the meaning of a "governmental body":

[1]Although you also raise section 552.101 of the Government Code, you have provided no arguments regarding the applicability of this section. Therefore, we assume you no longer assert section 552.101o f the Government Code. *See* Gov't Code §§ 552.301(b), (e), .302.

> [T]he 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 term "public funds" is defined in the Act as "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).

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, 360-362 (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, Intercare 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 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).

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. ORD 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, "[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, this office determined the commission to be a governmental body for purposes of the Act. *Id.*

In Open Records Decision No. 602 (1992), this office 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. ORD 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 one would expect to find 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 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. 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 us Intercare is a for-profit corporation created for the purpose of responding to the city's request for proposal for the management of the city's cemeteries. You state Interment is a subcontractor for Intercare providing grave-digging, grave filling, and other graveside services. You also state that, pursuant to the contract with the city (hereafter the "contract"), the city and Intercare agree on a contract price for the coming year, which is generated by the previous agreed annual compensation with a consumer price index adjustment. The contract price will be received by Intercare at the end of the contract year and Intercare pays its costs and expenses for operation and maintenance of the city cemeteries, which includes the costs for Interment's services, from the contract price. You inform us revenues obtained from the cemeteries are applied to the Intercare contract and that the prices for cemetery services are set by the city. On the basis of the foregoing, we conclude that Intercare receives public funding for the purposes of section 552.003 of the Government Code. Further, we find Interment, as Intercare's subcontractor, also receives public funding for the purposes of section 552.003.

We next determine whether the receipt of public funding by Intercare and Interment makes these entities governmental bodies for purposes of the Act. You state that under the contract, Intercare has contracted to provide specific services to the city in an arms-length transaction. However, upon review, we disagree with your contention that the contract is a typical arms-length contract for services. The contract between the city and Intercare generally states that its objective is "[t]o provide the most efficient and economical cemetery service to the general public." The contract provides that Intercare perform administration, interment activities, grounds maintenance, sales activities, and tree maintenance for the city's cemeteries. We understand that Intercare has subcontracted out the interment activities required of it under the contract to Interment. Thus, Intercare is acting as the manager and

operator of the city's cemeteries, and it and Interment are performing functions that would otherwise be performed by the city as owners of the cemeteries at issue. *See* Health and Safety Code § 713.011 (providing that municipality that operates or has jurisdiction over a public cemetery shall maintain the cemetery in a condition that does not endanger the public health, safety, comfort, or welfare). Accordingly, based on our review, we find the contract establishes that the city and Intercare and Interment share a common purpose and objective such that an agency-type relationship between these entities has been created. *See* Attorney General Opinion JM-821 at 4. We therefore conclude that Intercare and its subcontractor Interment are governmental bodies for purposes of section 552.003(1)(A)(xii) of the Government Code to the extent they are supported by public funds.

We note, however, 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 Dallas Museum of Art that were directly supported by public funds are subject to the Act). Accordingly, only those records relating to those parts of Intercare's and Interment's operations that are directly supported by public funds, such as those addressed by the contract at issue, are subject to the disclosure requirements of the Act. Next, we address your argument for the responsive information.

Section 552.301 of the Government Code prescribes the procedures a governmental body must follow if it seeks to withhold requested information from required public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(b) requires the governmental body to ask for the attorney general's decision and claim its exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish the date of receipt; and (4) the specific information the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *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 (Tex. App.—Austin 1990, no writ).

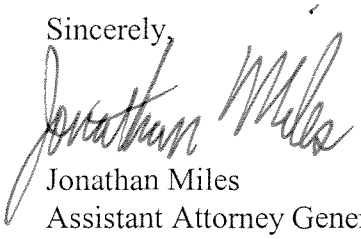
You inform us Intercare and Interment received the instant request for information on March 2, 2012; therefore, Intercare's and Interment's deadlines under subsections 552.301(b) and 552.301(e) were March 29, 2012 and April 5, 2012 respectively. As of the date of this decision, neither Intercare nor Interment has submitted to our office any information responsive to this request for information. Thus, Intercare and Interment have not fully complied with section 552.301, and the responsive requested information is therefore

presumed to be public under section 552.302. This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). You contend the responsive requested records contain information subject to section 552.110 of the Government Code. But as you have not submitted any of the responsive requested information to this office, we have no basis to conclude any of the information is confidential by law. Thus, we have no choice but to order you to release any information relating to those parts of Intercare's and Interment's operations that are directly supported by public funds in accordance with 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 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 453988

Enc. Submitted documents

c: Requestor
(w/o enclosures)