



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 11, 2012

Mr. W. Stephen Hemsberger
Counsel for Aliviane, Inc.
Attorney at Law
16238 Highway 620, Box F-171
Austin, Texas 78717

OR2012-10751

Dear Mr. Hemsberger:

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# 458415.

Aliviane, Inc. ("Aliviane"), which you represent, received a request for rosters of Aliviane's employees and their pay for each of the past three years. You contend Aliviane is not a governmental body subject to the Act. In the alternative, you claim the requested information is exempted from disclosure under section 552.152 of the Government Code. We have considered your arguments and reviewed the information you submitted.

Initially, we must determine whether Aliviane is subject to the Act. 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 Gov't Code §§ 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). "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 have addressed the scope of the definition of "governmental body" under the Act and its statutory predecessor. In *Kneeland v. Nat'l 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” that are subject to the Act “simply because [the persons or businesses] provide specific goods or services under a contract with a government body.” 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(1)(A) 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 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 entities provided specific, measurable services in return for the funds. *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 the 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 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 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 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 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 “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 the City of Dallas provided general support to the DMA facilities and operation, making the DMA a governmental body to the extent it received the city’s financial support. *Id.* Therefore, the DMA’s records related to programs supported by public funds were subject to the Act. *Id.*

We note 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 indicates a common purpose or objective or 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 involving 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.*

You inform us Aliviane is a private, nonprofit corporation established in 1970. You explain Aliviane provides intervention and treatment in the areas of substance abuse, behavioral health, and education. You have provided a copy of Aliviane's Articles of Incorporation, Article Four of which states that "the purpose of [the] corporation is to alleviate the problems of delinquency and drug abuse." You also have provided copies of agreements with the Texas Department of State Health Services ("DSHS") and other state and local governmental entities under which Aliviane provides social services pertaining to substance abuse and other health-related matters. You contend Aliviane's contracts with governmental entities impose specific and definite obligations on the company, so that the funding Aliviane receives under the contracts does not constitute general support of the company's operations. Having considered your arguments and reviewed your documentation, we note the provision of social services is a traditional governmental function. *See* Health & Safety Code §§ 531.002 (b) (Texas Health and Human Services Commission is state agency with primary responsibility for ensuring delivery of state health and human services), 1001.071 (DSHS is responsible for administering human services programs regarding public health); Open Records Decision No. 621 at 7 n.10 (1993) (quoting *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 850 F.2d at 228) ("[S]ome entities . . . will be considered governmental bodies if they provide 'services traditionally provided by governmental bodies.'"). Pursuant to section 1001.073 of the Health and Safety Code, DSHS "is responsible for administering human services programs regarding substance abuse, including . . . contracting for the delivery of substance abuse prevention and treatment programs at the state and local level. Health and Safety Code § 1001.073. We also note Aliviane's contracts with DSHS and other governmental entities generally impose extensive obligations on the company, including conformity with the contracting entity's rules and policies, compliance with specified performance measures, and periodic reporting requirements. Accordingly, on review, we find Aliviane's contractual affiliations with state and local entities establish a "common purpose or objective or...create[] an agency-type relationship" between the company and the governmental entities concerned by authorizing Aliviane to deliver social services a governmental entity would otherwise provide. *See* Attorney General Opinion JM-821 at 3; ORD 621 at 7 n.10. We therefore conclude Aliviane is a "governmental body," for purposes of section 552.003(1)(A)(xii) of the Government Code, to the extent the company provides social services pursuant to its contracts with state and local governmental entities. Although you also have provided copies of contracts between Aliviane and federal agencies, we note federal funds are not "public funds" for purposes of section 552.003(5) of the Government Code. Thus, Aliviane is not a governmental body in connection with its contractual affiliations with federal agencies.

We next note a private entity is not necessarily a “governmental body” in its entirety by reason of a contractual relationship with a governmental entity. Rather, “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). Thus, Aliviane’s records are subject to the Act only to the extent they pertain to the company’s contractual affiliations with state and local governmental entities. In this instance, the information at issue consists of the names of Aliviane’s employees and their salaries for the past three years. Thus, to the extent these employees have responsibilities related to Aliviane’s contracts with state and local governmental entities, their names and salaries are subject to the Act and must be released unless they fall within the scope of an exception to disclosure. Accordingly, we will address your claim for the submitted information under section 552.152 of the Government Code.

Section 552.152 of the Government Code provides as follows:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

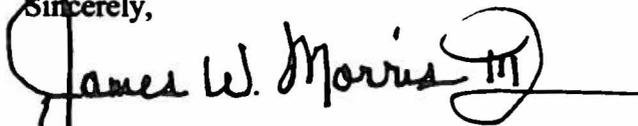
Gov’t Code § 552.152. You contend that because the purpose of Aliviane is to discourage the community’s involvement with drugs and gangs, employees of Aliviane can be exposed to physical harm. You explain many of Aliviane’s clients are addicted to illegal narcotics, which they obtain from criminal organizations. You state that if the identities and salaries of Aliviane’s employees become public, “outreach workers would be in a position to be identified by name and subjected to criminal action by such criminal organizations.” You inform us Aliviane does not disclose employee information to clients or third parties, except to governmental and related entities as necessary, and does not mark business locations that provide direct services with the name of the company. You also inform us Aliviane provides services to individuals and families on a residential basis, so that identification of employees would allow them to be followed to places of business, thereby exposing both employees and clients to possible harm. Finally, you inform us several employees of Aliviane have received death threats and a drug treatment entity that was not affiliated with Aliviane but was using the name “El Aliviane” was the target of an attack in which 18 individuals were killed. Based on your representations, we conclude that to the extent the submitted information pertains to employees of Aliviane who have responsibilities related to the company’s contracts with state and local governmental entities, so as to be subject to the Act, Aliviane must withhold the employees’ names pursuant to section 552.152 of the Government Code. We conclude you have not demonstrated that the release of the employees’ salaries would subject them to a substantial threat of physical harm. Therefore, to the extent the submitted

information pertains to employees who have responsibilities related to Aliviane's contracts with state and local governmental entities, the employees' salaries may not be withheld under section 552.152 and must be released. To the extent the submitted information does not pertain to employees who have responsibilities related to Aliviane's contracts with state and local governmental entities, the information is not subject to the Act, and Aliviane need not release any such information.

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,

A handwritten signature in black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large, stylized initial "J" and a flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bhf

Ref: ID# 458415

Enc: Submitted documents

c: Requestor
(w/o enclosures)