



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 23, 2012

Mr. Marc J. Schnall
Attorney for Retama Entertainment Group, Inc.
Langley & Banack, Inc.
745 East Mulberry, Suite 900
San Antonio, Texas 78212-3166

OR2012-13391

Dear Mr. Schnall:

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# 463322.

Retama Entertainment Group, Inc. ("REG"), which you represent, received a request for the draft proposed term sheet presented at a specified meeting. You state release of the requested information may implicate the proprietary interests of Retama Development Corporation ("RDC") and Pinnacle Entertainment, Inc. ("Pinnacle"). Accordingly, you state you have notified Pinnacle of the request and its right to submit arguments to this office. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Pinnacle. In addition, you inform us that you represent RDC in addition to REG, and you have submitted comments on behalf of RDC. You argue REG is not a governmental body subject to the Act. In the alternative, you claim the submitted information is excepted from disclosure under sections 552.104, 552.107, 552.110, and 552.111 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

REG argues that it is not a governmental body subject to the requirements of the Act. 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). The phrase “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 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; *see* 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 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.”

Kneeland, 850 F.2d at 228. 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. 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. 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 SWC 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. *See* 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 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 [the predecessor to section 552.003].” *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 to maintain, operate, and manage an art museum. *See* 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 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 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. 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 case, RDC, which is a Texas local governmental corporation created by the City of Selma (the “city”), entered into an agreement with REG to manage the horse racing track owned by RDC. We have reviewed the management contract at issue. We note that in addition to a flat monthly fee from RDC, a portion of REG’s compensation is dependent on the revenue of the race track owned by the city through RDC. Management Agreement § 6.1; Third Amendment to Management Agreement § 2. Thus, REG’s compensation consists of public funds. Although the contract imposes an obligation on REG to provide some certain services in exchange for a certain amount of money, the agreement generally requires REG to “optimize financial performance” of the race track and grants to REG “absolute control and discretion in the operation, direction, marketing, maintenance and management of the Racetrack, including the authority to enter into agreements and take such other actions, as an independent contractor, but on behalf of [RDC] as [REG] shall reasonably deem appropriate[.]” Management Agreement §§ 3.1, 3.2. Further, the agreement provides that REG and RDC have joint access to bank accounts for the track, and RDC is authorized to inspect the operating reports, books, and records of REG pertaining to the race track. *Id.* § 4.2(b), 5.1.

Based upon our review of the submitted contract, we conclude that REG shares common purposes and objectives with RDC and the city such that an agency-type relationship is created. *See* Open Records Decision No. 621 at 9 (1993). Accordingly, we conclude REG falls within the definition of a “governmental body” under section 552.003(1)(A)(xii) of the Government Code. Consequently, the requested information is subject to the Act and must be released unless it is subject to an exception to public disclosure under the Act. *See* ORD 602 at 5; *see also* Gov’t Code §§ 552.002(a), .006, .021. Accordingly, we will address your claimed exceptions under the Act.

Section 552.104 of the Government Code excepts from required public disclosure “information which, if released, would give advantage to competitors or bidders.” Gov’t Code § 552.104(a). The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990).

You state the submitted information pertains to a proposed substantial investment by Pinnacle in the race track owned by RDC and managed by REG. You state efforts to find

an investor have been ongoing for several years. You state an agreement has not yet been reached with Pinnacle. You assert release of the proposed terms at this time would given an advantage to other potential investors in the event an agreement is not reached with Pinnacle. Based upon your representations and our review of the information, we find you have demonstrated that release of the submitted information would harm RDC's interests in a competitive situation. Accordingly, REG may withhold the submitted information under section 552.104 of the Government Code until a contract is executed.¹

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 463322

Enc. Submitted documents

c: Requestor
(w/o enclosures)

¹Because our ruling is dispositive, we do not address the remaining arguments against disclosure.