



ATTORNEY GENERAL OF TEXAS
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November 30, 2012

Ms. Ramona Soto
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OR2012-19337

Dear Ms. Soto:

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# 471006 (File No. 11344.0036).

The North Central Texas Regional Certification Agency (the "agency"), which you represent, received a request for records that identify individuals and companies certified by the agency as a Minority Business Enterprise, Woman-Owned Business Enterprise, Airport Concessionaire Disadvantaged Business Enterprise, or Disadvantaged Business Enterprise, and records that identify individuals or companies removed from these certification lists, including records that explain why they were removed. You state the agency does not maintain responsive information for a portion of the request.¹ You contend the agency is not a "governmental body" subject to the Act. In the alternative, you claim the requested information is excepted from disclosure under section 552.110 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of

¹The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

information.² We have also considered comments submitted to this office by the requestor. See Gov't Code § 552.304 (interested third party may submit written comments stating why information should or should not be released).

The Act applies to "governmental bodies" as that term is defined in section 552.003(1)(A) of the Government Code. You assert the agency is not a governmental body, and, therefore, its records are not subject to 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[.]" *Id.* § 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 have previously 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 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.'"

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"),

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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.*

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. 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 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. 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 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.*

You state that the agency is a non-profit entity as defined under 26 U.S.C. § 501(c)(3), which was “created and organized to provide certification and other related services for the Disadvantaged, Minority and/or Women-Owned Business Enterprises programs of private and public entity members.” The agency’s website states the agency was created in June 1989 when nine founding member entities entered into an Interlocal Cooperation Agreement “for the purpose of jointly providing certification and other related services for the Disadvantaged Business Enterprise, Minority and/or Women-Owned Business Enterprise (D/M/WBE) of the participants.”³ Chapter 791, the Interlocal Cooperation Act, authorizes a local government to contract with another local government “to perform governmental functions and services in accordance with this chapter.” Gov’t Code § 791.011(a), *see id.* §§ 791.001-.033. The term “government function” includes administrative functions, which are “functions normally associated with the routine operation of government,” as well as “other governmental functions in which the contracting parties are mutually interested.” *See id.* § 791.003(1), (3)(K), (N).

³http://www.nctrca.org/index.php?option=com_content&view=article&id=48&Itemid=48

You indicate the agency is funded through annual membership fees paid to the agency by its members. You state the agency has two types of membership: associate membership for non-governmental private business entities and general membership for governmental entities. You state associate members "may serve as an ex-officio member or as a member on a...standing committee with no voting rights and must pay an annual fee in exchange for a secured access" to the agency's certification database. You inform us before a governmental entity may become a member of the agency, it must execute an application and "qualify for membership consistent with [c]hapter 791 of the Texas Interlocal Agreement." You further state member governmental entities must serve on the agency's board of directors, may serve as elected officers, have voting rights, and must pay an annual fee, which must be set and approved by a majority of the agency's board of directors, in exchange for access to the agency's certification database.

You argue that the public funds received by the agency from its member governmental entities in the form of the annual membership fee is for a specific obligation, which is to receive access to the agency's vendor pool of certified business enterprises. However, upon review, we conclude that the agency is primarily funded through public funds,⁴ and that the agency is governed by a governmental body, namely, the member governmental entities acting through the agency's board of directors, all of whom are representatives of governmental bodies. We find that the member governmental entities and the agency share a common purpose and objective, such that an agency-type relationship exists between the parties. *See* Open Records Decision No. 621 at 7 n.10 (1993). Further, we find the service provided by the agency to its members in exchange for public funds constitutes a traditional governmental function. *See* Gov't Code § 791.011(a); *see also* ORD 621 at 7 n.10 (1993).⁵ Accordingly, we conclude that the agency falls within the definition of a "governmental body" under section 552.003(1)(A)(xii) of the Government Code. As we conclude that the agency is a governmental body for purposes of the Act, we will next address the agency's alternative arguments to withhold the submitted information pursuant to the Act.

⁴We note that according to the agency's website, of the agency's 20 member entities, 17 of these entities are governmental bodies. (These governmental bodies are the cities of Dallas, Fort Worth, Irving, Lancaster, and Mesquite, Dallas Area Rapid Transit, Dallas County, the Dallas Community College District, Dallas County Schools, D/FW International Airport, the Dallas and Irving Independent School Districts, the Fort Worth Housing Authority, the Fort Worth Transportation Authority, the North Texas Tollway Authority, the Tarrant County College District, and the Tarrant Regional Water District. *See* http://www.nctrca.org/index.php?option=com_content&view=article&id=49&Itemid=62

⁵In this regard, we note that of the six agencies authorized to perform certifications for the Federal Disadvantaged Business Enterprise Programs in Texas under the Texas Unified Certification Program, of which the agency is one, at least four of these entities, namely, the City of Austin, the City of Houston, the Texas Department of Transportation, and the Corpus Christi Regional Transportation Authority, are governmental bodies. *See* http://www.dot.state.tx.us/business/business_outreach/tucp.htm

We note some of the submitted information appears to consist solely of statistical information that does not identify any individual or company certified or denied certification by the agency. Thus, information that does not identify any individual or company certified or denied certification by the agency, or specifically relate to any such individual or company, is not responsive to the request. This ruling does not address the public availability of any non-responsive information, and the agency need not release any such information in response to this request.

Next, we must address the agency's procedural obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), a 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 for information. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving a request (1) 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. *Id.* § 552.301(e). You state the agency received the request for information on June 26, 2012. Thus, the agency was required to request a decision from this office by July 11, 2012, and to submit the information required by section 552.301(e) by July 18, 2012. However, you did not request a ruling from this office until September 10, 2012. Further, you did not submit a representative sample of the information requested to this office until November 28, 2011. Consequently, we find the agency failed to comply with the requirements of section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of the Act results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason 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); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can be overcome by demonstrating that the 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 raise section 552.110 of the Government Code for the requested information. Although section 552.110 can provide a compelling reason for non-disclosure, we note this exception protects the interests of third parties, not governmental bodies. Therefore, as no third party raises section 552.110 for the submitted information, the agency may not withhold any of the

submitted information under that section. We note, however section 552.128 of the Government Code can also provide a compelling reason for non-disclosure, and we will thus address the applicability of that section to the submitted information.⁶

Section 552.128 of the Government Code provides:

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from the requirements of Section 552.021, except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant's status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant's agent.

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Gov't Code § 552.128. You state the submitted information consists of the agency's vendor pool of businesses which the agency has certified as Disadvantaged, Minority, and/or Women-Owned Business Enterprises. You further state the submitted information was

⁶The 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).

created by the agency after factually auditing the firms' applications throughout the certification process, which involves "an extensive review of the firm's day-to-day operations, internal structure, corporate governance, capital investments, licenses, vendor contracts, control aspects, net worth, payroll and compensation structure, and if applicable, certificates of authorization through the firm's application, supporting documentation, and site visits." Thus, as we understand the submitted information consists of information submitted to the agency in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program, we find that section 552.128 is applicable in this instance. We note the requestor is not a state or local governmental entity, and we have no indication the applicants or applicants' agents have given written permission to release their information. Further, we find that subsection 552.128(c) does not apply in this instance. We therefore conclude the agency must withhold the submitted information under section 552.128 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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/ag

Ref: ID# 471006

Enc. Submitted documents

c: Requestor
(w/o enclosures)