



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2014

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Ms. Kimberly R. Jessett
Counsel for Cypress Creek Emergency Medical Services
Litchfield Cavo, LLP
One Riverway, Suite 1000
Houston, Texas 77056

OR2014-23170

Dear Ms. Jessett:

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# 548132.

Cypress Creek Emergency Medical Services ("CCEMS"), which you represent, received a request for (1) all e-mails sent or received by a named individual to or from any employee or officer of Koronis, another named individual, any member of the CCEMS Board of Directors, or any person associated with "Friends of CCEMS"; and (2) the cellular telephone records of the previously named individuals, including call records and text messages. You state you will release some information to the requestor. In regards to the remaining requested information, you claim CCEMS is not a governmental body, and thus, the remaining requested information is not subject to the Act. In the alternative, you claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.108 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

¹We 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.

Initially, we will address your claim CCEMS is not a governmental body 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. 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 term “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 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 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. HM-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 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 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 229-231. The *Kneeland* court concluded, although the NCAA and SWC received public funds from some

of their members, neither entity was a “governmental body” for purposes of the Act because the NCAA and the 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 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 “[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 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 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 a 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 that related to programs supported by public funds were subject to the Act. *Id.* However, those areas for which the city had not provided support were not 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.*

Additionally, Attorney General Opinion JM-821 addressed whether a volunteer fire department was a governmental body. “Whether or not a particular nonprofit volunteer fire department [is a governmental body subject to the Act] depends on the circumstances in each case, including the terms of the contract between the department and the public entity.” *Id.* at 5 (citation omitted). Because fire protection is one of the services traditionally provided by governmental bodies, different considerations apply to fire departments that set them apart from private vendors of goods and services who typically deal with governmental bodies in arms-length transactions and make them more likely to fall within the Act. *Id.* In Attorney General Opinion JM-821, this office held the Cy-Fair Volunteer Fire Department (“Cy-Fair”) was a governmental body for purposes of the Act’s predecessor to the extent it was supported by public funds received pursuant to its contract with the Harris County Rural Fire Prevention District No. 9 (“RFPD”). *See id.* In issuing that opinion, this office analyzed the contract between Cy-Fair and RFPD, noting Cy-Fair received public funds to provide all of RFPD’s needed services. *See id.* This office also noted the contract provided Cy-Fair must submit one-year operating budgets and a three-year capital expenditure budget to RFPD for approval. Consequently, this office found the contract provided for the general support of Cy-Fair for purposes of the Act’s predecessor. *Id.*

You state CCEMS is a private nonprofit corporation that is partially funded by tax dollars received through Harris County Emergency Services District Number 11 (the “district”). As we noted above, you state you will release the requested information pertaining to CCEMS business reflecting the use of public funds. You state CCEMS allocates public funds to certain expense accounts within the budget: salaries of field staff personnel, insurance benefits for field staff personnel, and medical supplies. However, you state the present request encompasses documents pertaining to CCEMS business unrelated to field staff personnel and/or medical supplies. You argue these documents do not relate to the expenditure or support of public funds.

In Open Records Letter No. 2014-20999 (2014), our office previously ruled that CCEMS is a governmental body subject to the Act to the extent it is supported by district funds. In that ruling, we reviewed the contract between CCEMS and the district, and concluded to the

extent the requested information pertains to CCEMS operations not supported by public funds, the information at issue is not subject to the Act. In the alternative, we ruled to the extent the requested information pertains to CCEMS operations supported by public funds, the requested information is public information subject to the Act and must be released unless it falls within the scope of an exception to disclosure. We will rule similarly here. To the extent the requested information pertains to CCEMS business not funded by the district, the information at issue is not subject to the Act. To the extent the requested information pertains to CCEMS business supported by public funds, the requested information is public information subject to the Act and must be released unless it falls within the scope of an exception to disclosure. Accordingly, we will address your arguments against disclosure of this information.

We note a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date CCEMS received the request. This ruling does not address the public availability of any information that is not responsive to the request and CCEMS is not required to release non-responsive information in response to the request.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition

depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state Exhibit D consists of communications between CCEMS and its counsel. Based on your representations and our review, we find a portion of Exhibit D, which we have marked, consists of privileged attorney-client communications CCEMS may withhold under section 552.107(1) of the Government Code. However, upon review, we find some of the communications you seek to withhold were sent to or received from individuals you have not demonstrated are privileged parties. Therefore, we conclude you have failed to establish these communications constitute privileged communications for the purposes of section 552.107(1). Thus, CCEMS may not withhold these communications under section 552.107(1).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”² Gov’t Code § 552.101. Section 552.101 of the Government Code encompasses section 261.201 of the Family Code. Section 261.201(a) provides as follows:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). Upon review, we find a portion of the information in Exhibit C consists of files, reports, records, communications, audiotapes, videotapes, or working papers

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).*

used or developed in an investigation by the Harris County Constable's Office, Precinct 4, under chapter 261 of the Family Code. *See id.* § 261.001(1), (4) (defining "abuse" and "neglect" for purposes of chapter 261 of Fam. Code); *see also id.* § 101.003(a) (defining "child" for purposes of section 261.201 as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). Therefore, we conclude the information at issue is confidential under section 261.201(a). Accordingly, CCEMS must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.³

We understand CCEMS to assert the remaining information in Exhibit C is excepted from disclosure under section 552.108(a)(1) of the Government Code. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). By its terms, section 552.108 applies only to a law enforcement agency or prosecutor. CCEMS is not a law enforcement agency. This office has concluded, however, section 552.108 may be invoked by the proper custodian of information relating to a pending investigation or prosecution of criminal conduct. *See Open Records Decision No. 474 at 4-5 (1987)*. Where a non-law enforcement agency has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld. Although you raise section 552.108(a)(1) for the remaining information in Exhibit C, you have not provided our office with a representation from any law enforcement agency that wishes the information to be withheld. Accordingly, CCEMS has failed to demonstrate section 552.108(a)(1) of the Government Code is applicable to the remaining information in Exhibit C, and CCEMS may not withhold any portion of it under that exception.

Section 552.136 of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). An access device number is one that may be used to 1) obtain money, goods, services, or another thing of value, or 2) initiate a transfer of funds other than a transfer originated solely by a paper instrument, and includes an account number. *See id.*

³As our ruling is dispositive, we need not address your remaining argument against disclosure of the information at issue.

§ 552.136(a) (defining “access device”). CCEMS must withhold the account number we have marked under section 552.136 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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See id.* § 552.137(a)-(c). Accordingly, CCEMS must withhold the e-mail addresses we have marked, unless the owners affirmatively consent to their public disclosure, pursuant to section 552.137 of the Government Code.

In summary, to the extent the requested information pertains to CCEMS business not supported by public funds, the requested information is not subject to the Act. To the extent the responsive information pertains to CCEMS business supported by public funds, CCEMS may withhold the information we have marked under sections 552.107 of the Government Code and must withhold (1) the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code; (2) the account number we have marked under section 552.136 of the Government Code; and (3) unless the owners affirmatively consent to their disclosure, the e-mail addresses we have marked under section 552.137 of the Government Code. CCEMS must release the remaining responsive information pertaining to CCEMS business supported by public funds.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Abigail T. Adams
Assistant Attorney General
Open Records Division

ATA/ac

Ref: ID# 548132

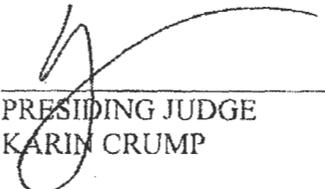
Enc. Submitted documents

c: Requestor
(w/o enclosures)

Summary Judgment. After reviewing the parties' respective motions and responses thereto, the summary judgment evidence and objections thereto, the pleadings on file, the arguments of counsel, and the applicable law, the Court enters the following declarations and orders:

1. IT IS ORDERED that Plaintiff CCEMS' objections to the Affidavit of Chris Feldman and Exhibit E attached thereto are OVERRULED. IT IS FURTHER ORDERED that Plaintiff CCEMS' Motion to Strike Intervenor's Summary Judgment Evidence is DENIED.
2. IT IS ORDERED that Plaintiff CCEMS' Motion for Summary Judgment is GRANTED. IT IS FURTHER ORDERED that Intervenor's Motion for Summary Judgment is DENIED.
3. IT IS ORDERED, ADJUDGED, AND DECLARED that Plaintiff CCEMS is not a governmental body under the Texas Government Code section 552.003(1)(A)(xii) and is not subject to the Texas PIA. Accordingly, CCEMS is not required to release the requested information to the requestor.
4. It is FURTHER ORDERED that all attorney's fees and costs incurred are to be borne by the parties incurring the same.
5. All relief not expressly granted herein is denied.
6. This Final Judgment disposes of all claims between the parties in each of the consolidated cases and is a final and appealable judgment.

SIGNED this 4th day of March, 2016.



PRESIDING JUDGE
KARIN CRUMP