



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

May 26, 1995

David R. Smith, M.D.
Commissioner of Health
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

Letter Opinion No. 95-036

Re: Whether the Open Meetings Act, Government Code chapter 551, applies to an HIV health services planning council established pursuant to 42 U.S.C. § 300ff-12 or an HIV care consortium established pursuant to 42 U.S.C. § 300ff-22(a)(1) (ID# 31331)

Dear Dr. Smith:

You have asked whether the Open Meetings Act (the "act"), chapter 551 of the Government Code, applies to an administration and planning council established pursuant to 42 U.S.C. § 300ff-12 or an HIV care consortium established pursuant to 42 U.S.C. § 300ff-22(a)(1). The answer to your question ultimately depends upon whether either of these entities constitutes a governmental body for purposes of the act. Section 551.001(3) of the Government Code defines "governmental body" to encompass the following:

(A) a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members;

(B) a county commissioners court in the state;

(C) a municipal governing body in the state;

(D) a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;

(E) a school district board of trustees;

(F) a county board of school trustees;

(G) a county board of education;

(H) the governing board of a special district created by law; and

(I) a nonprofit corporation . . . that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation

An entity is a governmental body under the act only if it fits within one of the specific descriptions listed in section 551.001(3). Furthermore, this office has interpreted the act to apply only to governmental bodies that supervise or control public business or policy. A purely advisory body, lacking all authority over public business or policy, is not subject to the act. Attorney General Opinions H-994 (1977) at 2-3, H-772 (1976) at 6, H-467 (1974) at 3-4. Accordingly, to determine whether a particular entity is a governmental body for purposes of the act, we must examine both the composition and function of the entity. See Attorney General Opinion JM-1185 (1990) at 3.

Both of the entities about which you ask are established in accordance with the federal HIV Health Care Services Program, 42 U.S.C. chapter 6A, subchapter XXIV. The purpose of subchapter XXIV is

to provide emergency assistance to localities that are disproportionately affected by the Human Immunodeficiency Virus epidemic and to make financial assistance available to States and other public or private nonprofit entities to provide for the development, organization, coordination and operation of more effective and cost efficient systems for the delivery of essential services to individuals and families with HIV disease.

42 U.S.C. § 300ff. Part A of subchapter XXIV establishes HIV health services planning councils, which we understand you to refer to as "administration and planning councils." Part B establishes HIV care consortia.

Part A of subchapter XXIV, which consists of sections 300ff-11 through 300ff-18, provides emergency relief for areas with a substantial need for services. Section 300ff-11(a) requires the secretary of Health and Human Services, *see id.* § 201(c), acting through the administrator of the Health Resources and Services Administration, to make grants primarily for the purpose of assisting in the provision of outpatient and ambulatory health and support services for individuals and families with HIV disease and inpatient case management services that keep individuals with HIV disease out of the hospital as much as is medically appropriate. *See id.* § 300ff-14(b)(1). The secretary may award a grant only to a metropolitan area¹ with more than 2,000 cases of acquired immune deficiency syndrome ("AIDS") as of March 31 of the most recent fiscal year or with a "per capita incidence of cumulative cases of" AIDS of at least 0.0025.² *Id.* § 300ff-11(a).

¹Section 300ff-17(2), 42 U.S.C., defines "metropolitan area" consistent with the definition of "metropolitan area" in the HIV/AIDS Surveillance Report of the Centers for Disease Control and Prevention.

²Throughout this letter, we will refer to a metropolitan area with the requisite incidence of AIDS cases in the population as an "eligible metropolitan area."

To qualify for a grant, the chief elected official of an eligible metropolitan area, *see id.* § 300ff-17(1) (defining “eligible area”), must, among other things,

establish or designate an HIV health services planning council that shall include representatives of--

- (A) health care providers;
- (B) community-based and AIDS service organizations;
- (C) social service providers;
- (D) mental health care providers;
- (E) local public health agencies;
- (F) hospital planning agencies or health care planning agencies;
- (G) affected communities, including individuals with HIV disease;
- (H) non-elected community leaders;
- (I) State government;
- (J) grantees under subpart II of Part C of this subchapter;³ and
- (K) the lead agency of any Health Resources and Services Administration adult and pediatric HIV-related care demonstration project operating in the area to be served.

Id. § 300ff-12(b)(1). In the alternative, the chief elected official may designate an existing entity, preferably one that has demonstrated experience in planning for the HIV health care service needs within the eligible metropolitan area and in implementing such plans, to serve as the HIV health services planning council. *Id.* § 300ff-12(b)(2).

The HIV health services planning council has three duties. *See id.* § 300ff-12(b)(3). First, the council must establish priorities for the allocation of grant monies within the eligible metropolitan area. *Id.* § 300ff-12(b)(3)(A). Second, the council must develop a comprehensive plan to organize and deliver health services for individuals with HIV disease. *Id.* § 300ff-12(b)(3)(B). Third, the council must “assess the efficiency of the administrative mechanism in rapidly allocating funds to the areas of greatest need within the” eligible metropolitan area. *Id.* § 300ff-12(b)(3)(C).

³Part C, subpart II of subchapter XXIV creates a grant program for the purposes of providing, on an outpatient basis, certain early intervention services for individuals with HIV disease. *See* 42 U.S.C. § 300ff-51(a), (b)(1).

Furthermore, the secretary may not make a grant to the chief elected official of an eligible metropolitan area unless the chief elected official agrees to, among other things, allocate grant funds and services within the eligible metropolitan area only in accordance with the priorities the HIV health services planning council has established. *Id.* § 300ff-14(a)(1). In addition, the chief elected official may not use grant funds directly to assist appropriate entities⁴ in recruiting, training, and compensating qualified personnel to care for individuals with HIV disease unless the HIV health services planning council has determined that such personnel are necessary. *Id.* § 300ff-14(c)(2)(A), (3).

Part B of subchapter XXIV, which consists of sections 300ff-21 through 300ff-30, creates a care grant program. Section 300ff-21 requires the secretary of Health and Human Services, if appropriations are available, to make grants to states to enable them to improve the quality, availability, and organization of health care and support services for individuals and families with HIV disease. A state that receives a grant under part B may use the funds "to establish and operate HIV care consortia within areas most affected by HIV disease that shall be designed to provide a comprehensive continuum of care to individuals and families with HIV disease," among other permissible uses. *Id.* § 300ff-22(a)(1).

Section 300ff-23 describes an HIV care consortium as an association of at least one public and at least one nonprofit, private health care and support service provider or community based organization operating within an area the state has determined is one of the regions most affected by HIV disease. *Id.* § 300ff-23(a)(1). The consortium must agree to use the assistance to plan, develop, and deliver comprehensive outpatient health and support services for individuals with HIV disease,⁵ either by directly providing such

⁴Section 300ff-14(b)(2)(A) lists as generally appropriate institutions and entities to receive grant funds "public or nonprofit private entities, including hospitals (which may include Veterans Administration facilities), community-based organizations, hospices, ambulatory care facilities, community health centers, migrant health centers, and homeless health centers."

⁵Comprehensive outpatient health and support services for individuals with HIV disease may include

(A) essential health services such as case management services, medical, nursing, and dental care, diagnostics, monitoring, and medical follow-up services, mental health, developmental, and rehabilitation services, home health and hospice care; and

(B) essential support services such as transportation services, attendant care, homemaker services, day or respite care, benefits advocacy, advocacy services provided through public and nonprofit private entities, and services that are incidental to the provision of health care services for individuals with HIV disease including nutrition services, housing referral services, and child welfare and family services (including foster care and adoption services).

services or by contracting with other entities to provide such services. *Id.* § 300ff-23(a)(2). The consortium periodically must evaluate its success and its cost-effectiveness, and the consortium must submit the results of its evaluations to the state. *Id.* § 300ff-23(c)(1)(D), (E).

We believe the HIV health services planning council is a governmental body pursuant to section 551.001(3)(D), which includes in the definition of the term "governmental body" "a deliberative body that has rulemaking . . . power and that is classified as [an] . . . agency . . . of a municipality." Subsection (3)(D) contains two requirements. First, to be a governmental body, an entity must have control over governmental action. *See City of Austin v. Evans*, 794 S.W.2d 78, 81-84 (Tex. App.--Austin 1990, no writ); Attorney General Opinion H-467 (1974) at 3-4. Second, the entity must exercise delegated governmental powers. *See* Attorney General Opinions JM-794 (1987) at 2, JM-596 (1986) at 3, JM-4 (1983) at 2.

Because an HIV health services planning council, among other things, establishes priorities for the use of grant money, it controls governmental action. In addition, an HIV health services planning council exercises delegated governmental powers as an agent of the municipality. The chief elected official of an eligible metropolitan area appoints the members of the council. *See City of Austin*, 794 S.W.2d at 83 (noting that city grievance committee is not classified as department, agency, or political subdivision of city; neither the city manager nor the city council appoints its members). Moreover, a municipality is authorized reasonably to exercise its police powers for the protection of the public health, safety, and welfare. *John v. State*, 577 S.W.2d 483, 484 (Tex. Crim. App. 1979) (citing *Texas Power & Light Co. v. City of Garland*, 431 S.W.2d 511 (Tex. 1968)); *see* Health & Safety Code §§ 122.005, .006(1) (authorizing type A general-law municipality and home-rule municipality, respectively, to act to protect health of municipal residents). Thus, a municipality may itself perform functions related to the provision of services to individuals with HIV disease. Pursuant to federal law, however, an eligible metropolitan area must assign to an HIV health services planning council those public health duties specified in 42 U.S.C. § 300ff-12(b)(3) if the metropolitan area wishes to receive a grant from the secretary of Health and Human Services under 42 U.S.C. chapter 6A, subchapter XXIV, part A. In our opinion, the HIV health services planning council thus acts as an agent of the municipality in executing the duties specified in 42 U.S.C. § 300ff-12(b)(3). *Cf. Gulf Regional Educ. Television Affiliates v. University of Houston*, 746 S.W.2d 803, 808-09 (Tex. App.--Houston [14th Dist.] 1988, writ denied) (concluding that Gulf Regional Education Television Affiliates, auxiliary enterprise of University of Houston, is governmental body subject to act).

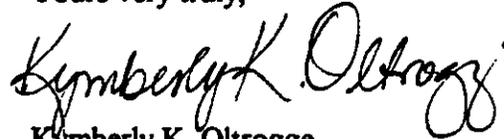
On the other hand, we do not believe that an HIV care consortium is a governmental body under any definition set forth in the act. A consortium is not "within the executive or legislative branch of state government" and thus does not constitute a governmental body under section 551.001(3)(A) of the Government Code. It is not "classified as a department, agency, or political subdivision of a county or municipality,"

as section 551.001(3)(D) requires of a governmental body, nor is it "the governing board of a special district created by law," as subsection (H) requires. Clearly, it is not a county commissioners court, *see* Gov't Code § 551.001(3)(B), a municipal governing body, *see id.* § 551.001(3)(C), a school district board of trustees, *see id.* § 551.001(3)(E), or any other governmental body specifically listed in section 551.001(3).⁶ Consequently, the act does not apply to an HIV care consortium.⁷

S U M M A R Y

An HIV health services council established pursuant to 42 U.S.C. § 300ff-12 is a governmental body for purposes of the Open Meetings Act, Government Code chapter 551, because it is "a deliberative body that has rulemaking . . . power and that is classified as a[n] . . . agency of a . . . municipality." An HIV care consortium established pursuant to 42 U.S.C. § 300ff-23 is not a governmental body for purposes of the Open Meetings Act.

Yours very truly,



Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee

⁶You do not ask, and we therefore do not consider, whether an HIV health services planning committee or an HIV care consortium is a governmental body for purposes of the Open Records Act, Gov't Code ch. 552. *See* Attorney General Opinion JM-596 (1986) at 4 (observing that Open Meetings Act does not include provision comparable to definition of "governmental body" found in statutory predecessor to Government Code section 552.003(a)(10)).

⁷Compare *Weaver v. AIDS Servs.*, 835 S.W.2d 798 (Tex. App.—Austin 1992, writ denied), in which the Texas Court of Appeals considered whether AIDS Services of Austin, a private, nonprofit corporation created to provide services to people with AIDS and to educate both the general public and target groups about AIDS prevention, was a state actor when it excluded the plaintiff from a "safer sex" workshop. AIDS Services of Austin conducted the workshop pursuant to a contract it had with the city of Austin and Travis County that obligated AIDS Services of Austin to perform several AIDS education services and public health and welfare services for individuals with AIDS and their families. *Id.* at 799. The court concluded that AIDS Services of Austin was not a state actor in the instance before it. *Id.* at 802.