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Attorney General of Texas
Open Records Opinion Committee
209 West 14th Street
Suite 700
Austin, Texas 78701

RE: Arlington Economic Development Foundation
and the Arlington Chamber of Commerce, Inc.

Dear Sir:

Our firm represents the Arlington Economic Development Foundation ("Foundation") and the Arlington Chamber of Commerce ("Chamber") with regard to an open records request submitted to both organizations by Roger D. Walton. The open records request does not request documents from the City of Arlington. A copy of the request is attached hereto as Exhibit "A".

Since the request assumes that the Foundation and the Chamber are "governmental entities" and that certain of their employees are "public employees", we are requesting a decision from the Texas Attorney General as required under the Texas Open Records Act ("TORA"), Tex. Rev. Civ. Stat. Ann. Art. 6252-17a, Section 7(a) (Vernon Supp. 1993).

This request is made on behalf of Mr. Richard Greene, the head of the Arlington Economic Development Foundation and on behalf of the Board of the Arlington Economic Development Foundation, pursuant to Texas Government Code 402.042(b)(4).

In this regard, we ask the following questions:

1. Is the Arlington Economic Development Foundation a "governmental body" subject to the Texas Open Records Act?
2. Are employees of the Arlington Economic Development Foundation "public employees"?

3. Is the Arlington Chamber a "governmental body" subject to the Texas Open Records Act?
4. Are employees of the Arlington Chamber "public employees"?
5. If either the Foundation or the Chamber is a governmental body subject to the Open Records Act, are the specific documents which are sought under Exhibit "C" excepted from disclosure under the Texas Open Records Act?

BACKGROUND INFORMATION

The Arlington Economic Development Foundation is a non-profit eleemosynary corporation which was incorporated on May 28, 1987. It employed its first full-time Economic Development Director in 1987. To facilitate private contributions to the Foundation, it sought and received tax exempt status under 26 U.S.C.S. ~~Section 501(c)(3)~~, which remains in effect to this day. From 1987 until 1989, the Foundation's revenues were derived from private donations and from the Chamber.

In 1989, the City of Arlington ("City") and the Chamber entered into an Agreement, attached hereto as Exhibit "B". The Agreement established the framework or parameters for the provision of specific economic development services to the City in order to enhance the City's tax base.

~~To ensure that the City received sufficiently identifiable and measurable quantities of services,~~ the Agreement required the Foundation and Chamber to do the following:

1. The Chamber President to also serve in the role of Economic Development Director, with seventy-five percent (75%) of his time spent on economic development activities.
2. The Foundation to serve economic development functions as specified.

3. The addition of five (5) staff members to be employed by the Foundation to perform economic development activities.
4. The development of a yearly strategic plan for economic development, along with a detailed work program and detailed budget to support implementation of the strategic plan.
5. The use of eleven (11) different techniques and initiatives to accomplish the objectives of retaining and expanding existing Arlington businesses.
6. The development of six (6) different programs associated with business recruitment.
7. The development of an automated data base in order to support research and data generation.
8. The expenditure of all authorized funds to be used for economic development activities of the Foundation as specifically required by the City, and not for Chamber activities.
9. The City to authorize funds conditioned upon a delineated budget from the Foundation and Chamber, along with an annual work program to support the budget, for acceptance by the City, prior to any annual budget appropriation.
10. Quarterly reports to the City on known, specific and measurable services being performed by the Foundation and Chamber.
11. An annual financial audit at the end of each fiscal year, along with an annual written and verbal performance report of compliance with the prior year's annual work program and delineated budget.

The Agreement provided for the City to pay a fixed sum of money to the Foundation in exchange for the above services. These funds were to be supplemented and/or reduced based upon the

performance of the Foundation and the Chamber in providing sufficiently identifiable and measurable quantities of service. The Agreement in no way contemplated that the funds paid by the City were to be considered unrestricted grants for general support of the Foundation or the Chamber.

DISCUSSION OF QUESTIONS NUMBER ONE AND THREE

To determine whether the Foundation and Chamber are subject to TORA, a determination must be made whether either entity is a "governmental body" under Section 2 of the Act.

TORA defines public funds as "funds of the State of Texas or any governmental subdivision thereof". Section 2(1)(G). There is no question that funds paid to the Foundation by the City are public funds. There is also no question that funds received by the Foundation from private donations are not public funds.

The threshold question, however, is whether these public funds are used to "support" either organization as envisioned by TORA in Section 2(1)(G). A reading of the Court cases and Attorney General opinions on the "support" issue reveals that the question is not whether an organization receives public funds. The issue is whether public funds are used to generally support the organization or whether they are expended in exchange for services rendered. Organizations generally supported by governmental entities are covered by the Act. Organizations that receive money to perform services for a governmental body are not subject to the Open Records Act. For example, while a private law firm or accounting firm may be retained by a City to perform legal work or to audit City financial reports, the law firm or accounting firm does not, by virtue of that relationship, then become a governmental body.

After sifting through the various and sundry formal opinions of the Texas Attorney General interpreting the "support" test in TORA, the 5th Circuit Court of Civil Appeals recently concluded that the standard in addressing the support issue is whether the City received a "quid pro quo" and sufficiently identifiable and measurable quantities of services in exchange for the funds paid to the organization. Kneeland v. National Collegiate Athletic Association, 850 F.2d 224 (5th Cir. 1988).

Tab 3 of Exhibit "C", attached, shows the reports from the Foundation and Chamber to the City, from 1989 through 1992, which set out services to be performed, services which were performed, and the line item budgets of each year showing where the funds were spent by the Foundation. In each instance, the City of Arlington received specific services and benefits for the funds paid. These budgets, along with the work plans, spell out specific and measurable services which are known to the City before each year's work plan and budget are approved by the City. Funds are appropriated for those specific functions.

The bottom line to the City, in terms of a quid pro quo, is set out on the last page of the memorandum dated August 25, 1992, wherein the return on City funds for the fiscal year 1991-92 was \$5.72 for each dollar paid to the Foundation. Total tax revenue added to the City was \$2,163,306.00, which is a sufficiently identifiable and measurable result of the economic development services furnished by the Foundation and the Chamber. The City definitely benefited in using its funds to pay for economic development services of the Foundation and Chamber.

This business relationship is squarely on point with the Kneeland v. National Collegiate Athletic Association case, *supra*, wherein it was held that the NCAA and the Southwest Conference were not governmental entities subject to the Open Records Act, even though they received public funds. Because quid pro quo services were provided, in sufficiently identifiable and measurable quantities, no unrestricted grants of public funds were made. Therefore, the NCAA was not supported by public funds and was, therefore, not a governmental body. Other similarities to that case are: (1) economic development is not considered a traditional governmental function (see, for example, Civil Practice and Remedies Code Section 101.0215(a)(1 through 33)); (2) the services provided by the Foundation and Chamber are "sufficient metage for evaluating exchange" between the City and the Foundation (Kneeland at 230); and (3) the City funding has decreased while the Chamber private donations have increased as shown by Tab 6 of Exhibit "C". Therefore, the Foundation and Chamber are not "governmental entities" and are not subject to TORA.

DISCUSSION OF QUESTIONS NUMBER TWO AND FOUR

Although the Agreement between the City and the Chamber is entitled "Economic Development Partnership Agreement", the relationship is clearly one of an independent contractor, not a partnership. In an employer-employee relationship, the employer has the immediate control and direction over an employee not only in the ultimate result, but in all of the details of the work. An independent contractor, on the other hand, is not under the immediate direction of the employer and controls its own progress, means, details and methods for performing the service. Newspapers, Inc. v. Love, 380 S.W.2d 582 (Tex. 1964); Thompson v. Travelers Indemnity Co. of Rhode Island, 789 S.W.2d 277 (Tex. 1990); Dunlop v. Dr. Pepper-Pepsi Cola Bottling Co. of Dyersburg, Tennessee, Inc., 529 F.2d 298 (6th Cir. 1976); Broussard v. L. H. Bossier, Inc., 789 F.2d 1158 (5th Cir. 1986); IRS Publication 937 (1992).

Under the Agreement between the City and Chamber, the control of direction and details of services performed by employees of the Foundation lies entirely with the Foundation and the Chamber.

Under Tab 14 of Exhibit "C", it is evident that on all W-2 Wage and Tax Statements for each employee in question, the employer's name is listed as either the Foundation or the Chamber. These employees are not employees of the City. They do not receive civil service benefits, are not officed with the City, and receive no day-to-day direction from the City.

DISCUSSION OF QUESTION NUMBER FIVE

In the event the Attorney General determines that either the Arlington Economic Development Foundation or the Arlington Chamber are governmental bodies subject to the Texas Open Records Act, which we deny, we ask you to review the enclosed documents and make a determination regarding whether or not these documents are excepted from disclosure under the Act. All documents are included herein under Exhibit "C", and separated by 16 tabs.

1. Copy of any contract between the Arlington Economic Development Foundation, Inc. (Foundation) and the Arlington Chamber of Commerce, Inc. (Chamber), including, but not limited to, any contract for services and lease agreement.

No such documents exist. However, since both are private entities, these documents are not subject to disclosure.

2. Copy of any employment agreement between the Foundation or Chamber and any of their employees whose compensation is paid primarily from public dollars (public employees).

First, as stated above, we deny that any of the employees of the Foundation or the Chamber are public employees.

Second, we deny that, as a contract between two private entities, these documents are subject to disclosure.

Further, no such documents exist.

3. Copy of any performance standards, goals, guidelines or policies related to the performance, oversight, review or expectations of the economic development efforts of the Chamber or its public employees. Please include the performance evaluations of the public employees.

First, it is our opinion that these employees are not public employees, as discussed above.

Second, it is our opinion that if they were public employees, the performance evaluations would be excepted from disclosure under Section 3(b)(11) inter-agency or intra-agency memorandum or letters which would not be available by law to a party in litigation with the agency; as inter-office memorandum and working papers which reflect advice, opinions and recommendations, rather than facts regarding employees. See Attorney General Open Records Decisions. ORD-174 (1981); ORD-284 (1981); ORD-285 (1981); ORD-334 (1983); ORD-464 (1987); ORD-450 (1987); ORD-468 (1987); ORD-470 (1987); ORD-538 (1990) and ORD-600 (1992).

Third, documents relating to the Foundation's performance have been made available to the City of Arlington and are available from the City of Arlington, without going through the Chamber or the Arlington Economic Development Foundation. Further, as Mr. Walton is a City Councilman, he already has access to that information. JM-119 (1983).

4. **Copy of anything in writing related to the job duties of the public employees.**

Again, we deny that these people are public employees or that the documents are subject to disclosure. However, we include job descriptions of Foundation and Chamber employees for your review.

5. **Copy of the resume of all the public employees. Copy of any document relating to the protection or control of the public funds allocated for economic development paid to the Chamber.**

This request is too vague to be answered with any degree of specificity. ORD-304 (1982). Documents which may satisfy the request and which relate to protection or control of public funds are also included for your review. However, these documents have been provided regularly to the City of Arlington and are available for the City on request, so there is no need to request these of the Foundation or the Chamber.

We deny these employees are public employees, and we deny that the funds are public funds once expended by the Foundation. However, employee resumes are included for your review.

6. **Copy of all documents relating to the attempts and success by the Foundation or Chamber to raise money for the purpose of economic development during the last twelve months.**

While we deny that these are public documents, documents reflecting attempts and success to raise money for the purpose of economic development by the

Foundation or the Chamber are enclosed for your review.

7. **Copy of all financial reports, progress reports and all other reports concerning the financial condition of the Foundation and the economic development efforts of the public employees for the last twelve months. Please include audited and unaudited reports.**

Such reports are enclosed; however, we deny that these are public employees. Further, such reports are regularly provided to the City and so are available from the City without going through the Foundation or the Chamber.

8. **Copy of the check register of the Foundation for the preceding twelve months, showing amount and date of each check, payee and purpose of each expenditure.**

Check register copies are enclosed. However, we deny that these are public documents.

9. **Copy of the last bank statement of the operating account of the Foundation and the Chamber.**

The last bank statement of the operating account of the Foundation and Chamber is enclosed. However, we deny that it is a public document.

10. **Copy of each Notice of Public Meeting of the Foundation during the last twelve months.**

These documents do not exist.

We deny that the Foundation is a governmental body as defined in the Open Meetings Act, Article 6252-17 Section 1(c). The Foundation does not fit in any way under the definition of a governmental body.

11. **Copy of all letters and memos related to lobbying efforts done by public employees.**

No lobbying efforts were conducted by public employees. No lobbying was conducted by the Foundation. However, letters reflecting lobbying efforts by the Chamber of Commerce are included herein.

12. **Copy of all surveys paid in whole or in part with public money.**

Copies of surveys conducted by the Foundation are enclosed.

13. **Copy of the day calendar of Ted Willis, David Sampson and Dean Dauley for the past twelve months.**

We contend that these personal calendars are excepted from disclosure under Section 3(a)(11) in that they are inter-agency memorandum which contain advice, opinions and recommendations and are not subject to disclosure, and Sections 3(a)(1) and 3(a)(2) regarding privacy. Further, these are not public employees and their personal documents are not subject to disclosure. Finally, these are only used for their personal benefit and are not used by the Foundation itself. Therefore, the Foundation has no legal right to these calendars. ORD-327 (1982); ORD-77 (1975).

Copies of the day calendars of Ted Willis, David Sampson and Dean Dauley for the past twelve months are enclosed.

14. **Copy of the last W-2 statements for public employees.**

We deny again that these are public employees. However, even if they are public employees, W-2 forms are excepted from disclosure. ORD-226 (1979); ORD-481 (1987); ORD-600 (1992); Tex. Atty. Gen. Op. No. H-1274 (1978).

15. **Copy of all documents of the Foundation or Chamber related to computer software for political purposes.**

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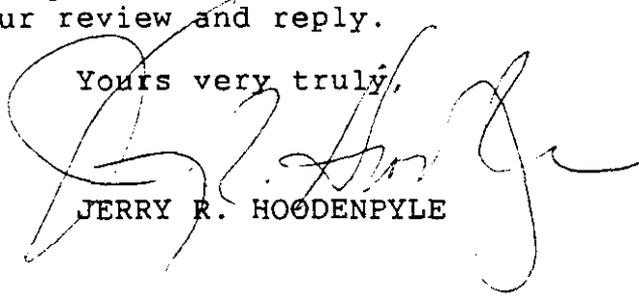
No such documents exist.

16. Copy of all letters or memos written on Foundation stationary, if any.

No such documents exist.

Thank you for your cooperation and consideration of this matter. We look forward to your review and reply.

Yours very truly,



JERRY R. HOODENPYLE

JRH/tmc
Enclosures