



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

DAN MORALES
ATTORNEY GENERAL

March 13, 1992

**Ms. Laura Peterson House
Locke Purnell Rain Harrell
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776**

Open Records Decision No. 602

**Re: Whether the Dallas Museum of Art
is a "governmental body" under section
2(1)(G) of the Texas Open Records Act,
V.T.C.S. article 6252-17a, and related
questions (RQ-228)**

Dear Ms. House:

The Dallas Museum of Art (the DMA), which you represent, has received a request for information under the Texas Open Records Act (the act), V.T.C.S. article 6252-17a. The requestor seeks the following information:

All agreements, contracts and/or letters or memoranda of understanding pertaining directly or indirectly to the conveyance of any part of the estate of Wendy Reves, whether already conveyed or which is intended to be conveyed in the future, and whether singular or multiple or at one time or over an extended period of time, to the Dallas Museum of Art.

In response to the request, the DMA asserts that sections 3(a)(1), 3(a)(4), 3(a)(7), and 3(a)(10) of the act except the requested documents from required public disclosure. As a threshold issue, however, the DMA asserts that it is not a governmental body under section 2 or section 3(a) of the act and is therefore not subject to the act. In the alternative, the DMA asserts that the section of the DMA that maintains the requested documents is not a governmental body pursuant to section 2 or section 3(a) and therefore is not subject to the act. We will consider the threshold issues first.

You have informed us that the DMA is a private nonprofit corporation that receives approximately 85 percent of its funding from membership fees, auxiliary activities, and private corporate, individual, and foundation donations. The DMA

and the City of Dallas (the city) have entered into an agreement (the city contract), the preamble of which states that the parties have entered into the contract

in consideration of the services provided on behalf of the City by DMA for the maintenance, operation and management of the Art Museum, the . . . construction for the City of the Hamon Building, and the professional services related to the care and preservation of the City's works of art.

Second Amendment to Contract: Dallas Museum of Art at 2.

In conformity with the city contract, the city holds title to the land and buildings the DMA occupies, located at 1717 North Harwood Street in Dallas. *Id.* at 1. The city contract requires the city to maintain the buildings and grounds housing the DMA, including making minor nonstructural improvements to the buildings, *id.* para. 9(A)(1), (3), at 3-4, paying the DMA's gas, electric, water, and wastewater bills, *id.* para. 9(A)(4), at 4, and insuring the buildings and grounds, *id.* para. 9(A)(2), at 4. Additionally, pursuant to the city contract, the city holds title to all artworks purchased by, or given to, the city or the DMA prior to September 12, 1984. *Id.* at 1. The DMA holds title to all art objects bought by, or given to, the DMA on or after September 12, 1984. *Id.* The city contract requires the city to pay half of the salaries and benefits the DMA pays to security personnel, *id.* para. 9(B)(1)(i), at 4, half of the salaries and benefits, as well as some expenses, the DMA pays to curators, preparators, registrars, conservators, and photographers, *id.* para. 9(B)(1)(ii), at 4-5, and a *pro rata* portion of the costs of fine arts insurance coverage the DMA obtains on the city's behalf, *id.* para. 9(B)(1)(iii), at 5.

With these facts in mind, we must determine whether the DMA is a "governmental body" for purposes of the act. The definition of "governmental body," found in section 2 of the act, includes the following:

the part, section, or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends public funds. Public funds as used herein shall mean funds of the State of Texas or any governmental subdivision thereof.

V.T.C.S. art. 6252-17a, § 2(1)(G) (emphasis added). The DMA admits, for purposes of the definition of "governmental body" in section 2(1)(G), that it receives "public

funds" from both the City of Dallas and state agencies.¹ The DMA argues, however, that the public funds it receives do not constitute *general* support of the organization, thereby excluding the DMA from "governmental body" status.

Courts, as well as this office, previously have considered the scope of the act's definition of "governmental body." In *Kneeland v. National Collegiate Athletic Ass'n*, 850 F.2d 224 (5th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989), the United States Court of Appeals for the Fifth Circuit recognized that opinions of the Texas Attorney General do not automatically declare private persons or businesses "governmental bodies" 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. Rather, when interpreting section 2(1)(F) (now section 2(1)(G)) of the act, the *Kneeland* court noted that the attorney general'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."

¹You have informed us that for the fiscal year ending September 30, 1990, the DMA received grants from the Texas Commission on the Arts (TCA) and the Texas Commission for the Humanities (TCH) in amounts totalling less than one percent of the DMA's total expenditures during the same fiscal year. You state that the DMA applies for and uses TCA and TCH grants in connection with special projects and exhibits, not in connection with its permanent collection.

Id. In *Kneeland*, the court found that although the National Collegiate Athletic Association (NCAA) and the Southwest Athletic Conference (SWC) receive public funds, the two organizations do not qualify as governmental bodies under section 2(1)(F) (now section 2(1)(G)) of the act because the funds the NCAA and the SWC received were not for their general support, but rather were received in exchange for known, specific, and measurable services. *Id.* at 225-31. In regard to the funds the DMA receives from the city, the DMA contends that it, like the NCAA and the SWC, falls within that category of organizations providing "a measurable amount of service in exchange for a certain amount of money," *id.* at 228, because of the statement in the preamble to the city contract that the city's obligations to the DMA are in consideration of the DMA's maintenance, operation, and management of the art museum and maintenance and preservation of the city's art collection. *See* city contract, *supra*, at 2.

As the *Kneeland* court noted, when considering the breadth of the act's definition of "governmental body," this office has distinguished between private entities receiving public funds in return for specific, measurable services and entities receiving public funds as general support. For example, 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, constituted a "governmental body" under the act. Open Records Decision No. 228 at 1. The contract existing between the commission and the City of Fort Worth obligated Fort Worth to pay the commission \$80,000 per year for three years. *Id.* The contract obligated the commission to, among other things, "continue 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. We found that this broad provision failed to impose on the commission a specific and definite obligation to provide a measurable amount of service in exchange for a certain amount of money, as one would expect to find in a typical arms-length contract for services between a vendor and a purchaser, and thus failed to provide adequate consideration flowing to the cities supporting the commission. *Id.* The contract therefore placed Fort Worth, and other cities engaged in identical contracts with the commission, in the position of providing general support for the operation of the commission. *Id.* Accordingly, we found the commission to be a governmental body for purposes of the act. *Id.*; *see also* Attorney General Opinions JM-821 (1987) (volunteer fire department received general support from rural fire prevention district because department received public funds from district to provide all of district's needed services, as well as other close ties); JM-116 (1983) (Gulf Star

Conference, intercollegiate athletic conference, was governmental body subject to act because funds member colleges pay to Conference used for general support); MW-373 (1981) (University of Texas Law School Foundation, nonprofit corporation that solicits donations and expends funds to benefit University of Texas Law School, was governmental body because university provided foundation with office space, utilities and telephone, and reasonable use of university's equipment and personnel); Open Records Decision No. 302 (1982) (Brazos County Industrial Foundation, nonprofit corporation, was governmental body subject to act because it received unrestricted grant from City of Bryan).

The city contract obligates the city to fulfill certain specified obligations in exchange for the DMA's obligations to care for and preserve the city's art collection, and to maintain, operate, and manage the art museum. The services DMA provides to the city are highly specialized, unique services that are difficult to value. Consequently, we believe the city 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 cannot be known, specific, or measurable. Thus, we believe that the city is providing support of the DMA facilities and city's art collection. To the extent that the DMA receives the city's support, it is a governmental body subject to the act. Accordingly, records related to those parts of the DMA's operation directly supported by the city, such as records regarding maintenance and ownership of the building and grounds, the city's art collection, utility bills, salaries of those employees for whom the city pays a portion, and insurance policies on which the city has paid part of the premium, are subject to the act. However, those areas of the DMA for which the city has not provided direct support are not subject to the act.

The requestor seeks documents related to the Wendy and Emery Reves Collection (the collection), a collection of artworks the Wendy and Emery Reves Foundation, Inc., donated to the DMA in 1985. The whole of the collection is part of the DMA's permanent collection; no part of the collection belongs to the city.² Furthermore, the city's support benefits the collection only in that the city owns the building in which the collection is housed, the city pays the DMA's utility bills, a portion of which the operation of the collection incurred, and the city pays a portion of some of the salaries of DMA employees who spend some of their work time on projects related to the collection. Such a tangential connection is insufficient to

²Additionally, it is our understanding that the DMA has not applied for, nor used, any of the grant money it received from TCA and TCH to pay any costs associated with the collection.

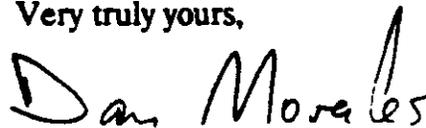
bring documents relating specifically to the collection within the scope of the act. Thus, the section of the DMA that maintains the requested documents is not a governmental body, and records pertaining to the collection are not public information subject to the act.³

We have examined the records you have submitted as responsive to the request. We find that all of the material relates specifically to the collection, which we have concluded is not a portion of the DMA that is subject to the act. Accordingly, the DMA may withhold the information from public disclosure.

SUMMARY

The Dallas Museum of Art is a "governmental body" within the meaning of the Texas Open Records Act only to the extent that it receives support from the City of Dallas and the State of Texas. Thus, only documents relating to those sections of the museum that are supported by the city or state are public documents subject to the Open Records Act. Documents related to areas of the DMA that are not supported with public funds are not subject to the Open Records Act.

Very truly yours,



DAN MORALES
Attorney General of Texas

³On the other hand, records pertaining to the DMA buildings and operations, to employees whose salaries are partially funded by the city, the city's art collection, and insurance on the city's art collection may be public documents under the act.

WILL PRYOR

First Assistant Attorney General

MARY KELLER

Deputy Assistant Attorney General

JUDGE ZOLLIE STEAKLEY (Ret.)

Special Assistant Attorney General

RENEA HICKS

Special Assistant Attorney General

MADELEINE B. JOHNSON

Chair, Opinion Committee

Prepared by Kimberly Oltrogge

Assistant Attorney General