



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 7, 1997

Mr. Thomas G. Ricks
President and Chief Executive Officer
The University of Texas Investment
Management Company
210 West Sixth Street, Second Floor
Austin, Texas 78701

OR97-1776

Dear Mr. Ricks:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 107132.

The University of Texas Investment Management Company ("UTIMCO") received a request for information concerning UTIMCO and its directors and employees. You state that you have released all of the requested information except the following:

- (1) a copy of the report prepared by Cambridge Associates, Inc. ("Cambridge Associates") that recommended or reviewed the creation of a nonprofit corporation to handle investments (the "Cambridge Study");
- (2) draft audit reports of the State Auditor's Review of Controls Over Investment Practices at Six Major State Investing Entities (the "Draft Audit Reports");
- (3) all correspondence between the University of Texas System (the "UT System") or UTIMCO and the State Auditor regarding the Draft Audit Reports and the final audit report (the "Correspondence"); and
- (4) financial statements and conflict of interest filings by UTIMCO employees, directors and regents (the "Financial Statements").

You assert that UTIMCO is not a governmental body for purposes of the Open Records Act, and request an opinion from this office as to UTIMCO's obligation regarding open records. In the alternative, you claim that the above-enumerated requested information is excepted from disclosure under sections 552.101, 552.102, 552.110, and

552.116 of the Government Code. We have considered your arguments and reviewed the submitted information.

The Open Records Act requires "governmental bodies" to make public, with certain exceptions, information in their possession. Section 552.003 of the Government Code defines "governmental body," in part, as

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(a)(10). Courts, as well as this office, previously have considered the scope of the Open Records 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 declare private persons or businesses "governmental bodies" subject to the Open Records 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 (quoting Open Records Decision No. 1 (1973)). Rather, when interpreting the predecessor to section 552.003 of the Government Code, the *Kneeland* court noted that the Attorney General's office generally examines the facts of the relationship between the private entity and applies 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."

Id.

As the *Kneeland* court noted, when considering the breadth of the Open Records 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 Open Records Act. Open Records Decision No. 228 (1979) 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, "[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. In response to this provision, we 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 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.* (Emphasis added.) Accordingly, we found the commission to be a governmental body for purposes of the Open Records Act. *Id.*

You explain that the U.T. Board of Regents (the "U.T. Board") entered into a contract with UTIMCO, a nonprofit corporation, for the purpose of contracting with the U.T. Board to invest funds under the control and management of the U.T. Board, including the Permanent University Fund, as authorized by section 66.08 of the Education Code.¹ We have reviewed the "Investment Management Services Agreement" (the "agreement") executed by the U.T. Board of Regents of the University of Texas System (the "U.T. System") and UTIMCO. In summary, the contract provides that in exchange for "continuous investment management services," the U.T. Board will provide UTIMCO with, among other things, the following:

fees and expenses, including the reimbursement of expenses incurred in organizing UTIMCO;

a "working capital reserve" to pay UTIMCO's operating expenses;

a transfer of title to certain U.T. System equipment; and

an unspecified annual management fee based on UTIMCO's annual budget, consisting of, among other things "all operating expenses associated with the general management of the Accounts, including, without limitation, salaries, benefits and performance compensation of portfolio management and support personnel [. . .], expenses for consulting services, office space lease expenses, office furniture and equipment expenses, professional, legal, payroll and other general

¹Section 66.08(b) of the Education Code provides as follows:

(b) The board may enter into a contract with a nonprofit corporation for the corporation to invest funds under the control and management of the board, including the permanent university fund, as designated by the board. The corporation may not engage in any business other than investing funds designated by the board under the contract.

services expenses, travel, insurance, capital expenditures, and other miscellaneous expenses incurred by UTIMCO [. . .].”

You characterize the agreement as “a *quid pro quo* exchange of specific services for a contractually determined amount of money.” However, upon review of the submitted agreement, we conclude that UTIMCO and the U.T. Board of Regents of the University of Texas System with whom UTIMCO contracts have a common purpose and objective such that an agency-type relationship is created. Therefore, in the absence of other information from UTIMCO establishing that the funds received from the governmental body with whom it contracts are not used for the general support of UTIMCO, we conclude that UTIMCO is a governmental body for purposes of the Open Records Act.²

We now consider your arguments that the submitted information is excepted from public disclosure by sections 552.101, 552.102, 552.110, and 552.116 of the Government Code. We begin with section 552.116 of the Government Code, which excepts from disclosure “[a]n audit working paper of the state auditor.” In Open Records Decision No. 580 (1990), this office relied upon standards issued by the American Institute of Certified Public Accountants and the United States General Accounting Office in determining that the term “audit working paper” is a term of art used to describe specific types of records. You argue that the audit report drafts and the correspondence are “audit working papers,” as they were obtained by the State Auditor (the “auditor”) in the course of the auditor’s investigation.

You adopt the arguments the auditor submitted to this office in response to a request from the same requestor here for the same information enumerated above in categories 2 and 3. The auditor argued that the documents included the evidence prepared or obtained by the auditor. The auditor also claimed that the documents contained the auditor’s conclusions or findings and reflected the auditor’s evidence which was “supported by sufficient, competent, and relevant evidence.” The auditor further asserted that the drafts and related correspondence exchanged with the audited agency was the “process of collection of evidence during the audit” and was the “process of investigation, examination, and decision-making.” We note that the auditor also represented that the *completed audit report* regarding this information was released to the requestor. In response to the auditor’s claim for an exception under section 552.116, this office issued OR97-1295 (1997), which excepted from disclosure the type of documents requested in categories 2 and 3 here. Therefore, after reviewing the responsive documents, we conclude that the documents requested in categories 2 and 3 are excepted from disclosure under section 552.116 of the Government Code.

²In addition, we observe that, pursuant to section 66.08(b) of the Education Code, UTIMCO is prohibited from engaging in any business other than investing funds as designated by the U.T. Board under their contract. See Tex. Educ. Code § 66.08(b). Other provisions of section 66.08 of the Education Code impose additional structural constraints by the U.T. Board upon UTIMCO. See, e.g., Tex. Educ. Code §§ 66.08(c), (d), (e), and (f). UTIMCO’s reason for existence and its means of support appear to derive solely from the governmental body.

Regarding category 4 of the requested information, you claim that the financial statements of the directors who are not Regental Directors (the "Outside Directors") and those employees who provided Financial Statements (the "Employees") are excepted from public disclosure by sections 552.101, 552.102, and 552.110 of the Government Code. You state that the financial statements of the directors of UTIMCO who also serve as members of the Board of Regents of the University of Texas System or the Board of Regents of the Texas A&M System, or the director who also serves as Chancellor of the U.T. System (the "Regental Directors") are available to the requestor from the Texas Ethics Commission.³ In this regard, we note that a governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. Open Records Decision No. 561 (1990) at 8. We have determined that UTIMCO is a governmental body for purposes of the Open Records Act. Therefore, if UTIMCO holds records from which the requested financial information concerning the Regental Directors can be obtained, UTIMCO must provide that information to the requestor unless it is otherwise excepted from disclosure.⁴

We now address the applicability of section 552.101 to the Outside Directors and Employees. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision and incorporates the doctrine of common-law privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. You also raise section 552.102, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, *writ ref'd n.r.e.*). Consequently, we will consider these two exceptions together.

Common-law privacy generally protects information about an individual's overall financial status, financial history, and private investment decisions. Open Records Decision No. 373 (1983) at 3 (background financial information is type of intimate information generally protected under common-law privacy), Open Records Decision No. 523 (1989). Whether there is a public interest in this information sufficient to justify its disclosure must be decided on a case-by-case basis. Open Records Decision No. 523 at 4.

³You explain that UTIMCO is governed by a board of nine directors, eight of whom are appointed by the Board of Regents of the U.T. System, and the ninth is the Chancellor of the U.T. System.

⁴Chapter 572 of the Government Code specifically requires the public disclosure of the personal financial statements of, among others, "the governing board of a public senior college or university as defined by Section 61.003, Education Code [. . .]." See Gov't Code §§ 572.003(c)(17), 572.021, 573.032.

After reviewing the responsive documents, we conclude that this information is highly intimate or embarrassing. Moreover, we do not find in this submitted information any special circumstances, nor has the requestor made any demonstration, that these individuals' personal financial information is a matter of legitimate public concern. *Id.* (in particular cases, requestor may demonstrate public interest in access sufficient to justify disclosure). Therefore, UTIMCO must withhold the personal financial statements of the Outside Directors and Employees under sections 552.101 and 552.102 of the Government Code.

Finally, we address your argument that the requested report (the "study") prepared by Cambridge Associates, Inc. ("Cambridge") should be withheld from public disclosure. You indicate that UTIMCO has provided the requestor with a copy of a letter dated March 20, 1995, by Cambridge presenting their conclusions regarding the U.T. System office structure and asset allocation. In OR96-2039 (1996), this office, after considering the arguments raised by the U.T. System and reviewing the documents submitted by Cambridge, determined that the U.T. System must withhold from public disclosure the portions of the study which Cambridge delineated as confidential based on the commercial or financial information prong of section 552.110 of the Government Code. We, therefore, conclude that UTIMCO may withhold this particular information from disclosure.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/glg

Ref.: ID# 107132

Enclosures: Submitted documents

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