



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 15, 1998

Ms. Brenda C. Salhanick
Settle & Pou, P.C
Comerica Bank Building, Suite 1000
4131 North Central Expressway
Dallas, Texas 75204

OR98-0130

Dear Ms. Salhanick:

On behalf of the Denton County Historical Museum, Inc. (the "museum"), you ask whether certain information is subject to required public disclosure under the Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 111840.

The museum received a request for various information, including records concerning donations, a list of its inventory and receipts for expenditures. In addition, the requestor seeks "[a]ll records of the museum." You assert that the museum is not a governmental body subject to the act. In the alternative, you assert that portions of the requested information are excepted from required public disclosure based on Government Code sections 552.101, 552.104, 552.108, 552.120, 552.121 and 552.124.

The act applies to "governmental bodies" as that term is defined in section 552.003(1)(A) of the Government Code. That section lists several entities as "governmental bodies," none of which, we believe, applies to the museum. However, the provision also contains the following description of an entity as within the meaning of a "governmental body":

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.

"Public funds" means funds of the state or of a governmental subdivision of the state. Gov't Code § 552.003(5).

You inform us, and the museum's Articles of Incorporation confirm, that the museum is a nonprofit corporation. According to the Articles of Incorporation, the museum was organized "for historical and literary purposes, and the particular objects and business thereof shall be the discovery, collection and preservation of books, pamphlets, maps, genealogies, portraits, paintings, artifacts, manuscripts, letter journals, and any and all memorabilia and materials which pertain and relate to the history of Denton and Denton County, Texas." You inform us that the museum's 1997-1998 proposed budget provides that the museum will receive \$72,952.00 from the city and \$43,160.00 from the county, for a total of \$116,112.00 in government funds. You state that this amount represents 35% of the museum's revenue. The bulk of the museum's nongovernment funds in cash includes, according to the information you provided, grants and gift shop sales. The total in nongovernment cash is \$49,500.00. You also list \$129,750.00 for "volunteers." Additionally, you submitted to this office a copy of the lease agreement by which the museum leases from Denton County approximately 4635 square feet of floor space of the Denton County Courthouse-on-the-Square for the sum of \$1.00 per year. The lease's term is ten years beginning January 1, 1997, and ending December 31, 2006. The lease also provides that the county will furnish building services and maintenance.

Based on these facts, we believe the museum receives "public funds." We must decide whether the museum is "supported" by these funds.

Decisions of this office have found an entity receiving public funds to be a governmental body under the act unless its relationship with the governmental body 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. *See, e.g.,* Open Records Decision Nos. 602 (1992), 228 (1979). In Open Records Decision No. 602 (1992), this office examined the Dallas Museum of Art ("DMA"), which received partial funding from the City of Dallas (the "city") in exchange for the DMA's obligation to care for and preserve the city's art collection and to maintain, operate, and manage the art museum. The decision determined that the nature of the services the DMA provided the city could not be known, specific, or measurable. Thus, to the extent the DMA received the city's support, the DMA was a governmental body subject to the act. *See* Open Records Decision No. 602 (1992) at 5.

We do not believe the museum is providing a specific and measurable amount of service in exchange for the public funds it receives. Rather, we believe the museum is "supported" in part by public funds and thus, is subject to the act.

We next consider the exceptions you raise. Section 552.101 of the Government Code excepts from required public disclosure information that is confidential by law. You raise this exception in order to protect the privacy of community service workers. Section 552.101 applies to information made confidential by the common-law right to privacy. *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with

the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.*

We have reviewed exhibit 23, the museum's community service worker file. We conclude that the community service worker's common-law privacy rights are not implicated by the release of the file.

You raise section 552.104 in regard to exhibit 24, the gift shop inventory. Section 552.104 states that:

Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

You state that local merchants within 200 feet of the museum compete with the museum gift shop. You also state that the museum sells some unique merchandise. You aver that the museum "would lose its competitive edge if local merchants had access to each item's cost and the vendor that produced the [unique] item."

The purpose of section 552.104 is to protect the interests of a governmental body usually in competitive bidding situations. *See Open Records Decision No. 592 (1991)*. This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See Open Records Decision No. 463 (1987)*.

Your arguments evidence your intention to assert section 552.104 to protect the museum as a "competitor." A governmental entity that seeks to withhold information as a "competitor" may do so only if the governmental body demonstrates that disclosure of the information would cause specific harm to its legitimate marketplace interest in a particular competitive situation. *See id.*

We conclude that in this instance the museum has not demonstrated that the disclosure of its inventory would harm its interest in a specific competitive situation. Accordingly, the museum may not withhold exhibit 24 from public disclosure based on section 552.104.

You raise section 552.108 in regard to information in records in a community service worker's file. Section 552.108 reads in pertinent part as follows:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;

Section 552.108 generally applies only to records of "a law enforcement agency or prosecutor." You have not established that the museum is a law enforcement agency. An agency that is not a law enforcement agency may, under limited circumstance, claim section 552.108 for records in its possession. *See, e.g.*, Open Records Decision Nos. 493 (1988), 272 (1981). For example, when an agency conducts an investigation that reveals possible criminal conduct that the agency reports to the appropriate law enforcement agency, section 552.108 will apply to the information gathered by the agency if its release would unduly interfere with law enforcement. *See* Open Records Decision No. 493 (1988) (applying predecessor statute prior to *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996)).

You have not established that the information in the community service worker's file relates to a pending criminal case or otherwise established that the release of the information would interfere with law enforcement or prosecution. Accordingly, the museum may not withhold the information from the requestor based on section 552.108 of the Government Code.

Section 552.120 of the Government Code reads as follows:

A rare book or original manuscript that was not created or maintained in the conduct of official business of a governmental body and that is held by a private or public archival and manuscript repository for the purpose of historical research is excepted from [required public disclosure].

You inform us that the museum has catalogued thousands of rare books and original manuscripts. As the museum appears to be an "archival and manuscript repository for the purpose of historical research," we conclude that the museum may withhold from disclosure its rare books and original manuscripts that were not created or maintained in the conduct of the museum's official business. However, this provision does not apply to video or cassette tapes of oral histories or information on microfiche, nor to other information unless it is considered to be a rare book or original manuscript.

You raise section 552.121 in regard to the museum's collection of approximately 40,000 cemetery records. Section 552.121 of the Government Code reads as follows:

An oral history interview, personal paper, unpublished letter, or organizational record of a nongovernmental entity that was not created or maintained in the conduct of official business of a governmental body and that is held by a private or public archival and manuscript repository for the purpose of historical research is excepted from [required public disclosure] to the extent that the archival and manuscript repository and the donor of the interview, paper, letter, or records agree to limit disclosure of the item.

This provision applies to certain information, *i.e.*, an oral history interview, personal paper, unpublished letter and organizational record of a nongovernmental entity, that was not created or maintained in the conduct of official business of a governmental body, to the extent the museum and the donor of such information agree to limit disclosure.

You have submitted to this office a cemetery log. You do not indicate that the museum and the donor of the cemetery records have entered into an agreement limiting the disclosure of the cemetery records. Thus, assuming the cemetery records are an “oral history interview, personal paper, unpublished letter, or organizational record of a nongovernmental entity that was not created or maintained in the conduct of the official business of a governmental body,” you may withhold those records from disclosure based on section 552.121.

Finally, we consider section 552.124, which reads as follows:

(a) A record of a library or library system, supported in whole or in part by public funds, that identifies or serves to identify a person who requested, obtained, or used a library material or service is excepted from [required public disclosure] unless the record is disclosed:

(1) because the library or library system determines that disclosure is reasonably necessary for the operation of the library or library system and the record is not confidential under other state or federal law;

(2) under section 552.023; or

(3) to a law enforcement agency or a prosecutor under a court order or subpoena obtained after a showing to a district court that:

(A) disclosure of the record is necessary to protect the public safety; or

(B) the record is evidence of an offense or constitutes evidence that a particular person committed an offense.

(b) A record of a library or library system that is excepted from required disclosure under this section is confidential.

You state that the museum is a library system. Thus, pursuant to section 552.125, the museum may withhold all records that identify or serve to identify a person who requested, obtained, or used a library material or service. We have reviewed the sample of the information for which the museum raises section 552.124 and conclude that the museum may

withhold all of exhibit 27, except the first letter from the volunteer coordinator, exhibits 28, 29, 30, 31, 32, and 33. Exhibits 22, 34 and 35 do not appear to identify a research or other user of the museum's library materials or services.

We are resolving this matter with this 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 may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/rho

Ref: ID# 111840

Enclosures: Submitted documents

cc: Ms. Mildred Hawk
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(w/o enclosures)