



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 23, 1998

Mr. S. Stephen Hilmy
Gary, Thomasson, Hall & Marks
P.O. Box 2888
Corpus Christi, Texas 78403

OR98-1026

Dear Mr. Hilmy:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 114117.

You represent Del Mar College (the "college"). The college received a request for:

- Any and all correspondence, memos, letters, inquiries, reviews and financial reports — including (but not limited to) those from internal auditors and external auditors — regarding any financial concerns, dealings or transactions of Del Mar College Foundation Inc. from July 1, 1994, to present.
- Any and all correspondence, memos, letters and inquiries relating to any investigation or inquiry by any government agency (state and local) from July 1, 1994 to present concerning Del Mar College Foundation Inc.

You indicate that some of the information requested has been provided to the requestor, namely, all schedules of disbursements received by Del Mar College from the foundation as well as any correspondence that has been directed to the college regarding financial concerns about the foundation, as well as documentation relating to any college audits relating to the foundation. However, you submitted certain information asserting that the remaining information does not come within the Open Records Act and in the alternative, the information at issue is protected from disclosure pursuant to sections 552.114 of the Government Code.

We first address whether the requested information is "public information" pursuant to section 552.002. This section provides that

“public information” means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov. Code §552.002(a).

We will next address whether the foundation is a governmental body. Section 552.003 of the Government Code defines “governmental body,” in part, as follows:

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 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.”

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.

You do not reference any Memorandum of Understanding between the college and the foundation nor any other indication that the foundation receives direct payment of public funds for its services. You mention that “the foundation solicits donations and expends funds to benefit Del Mar College, including the provision of certain scholarships to Del Mar College students. The relationship between Del Mar College and the Foundation is such that Del Mar College provides the Foundation with the sorts of items found to be permissible and discussed on page 5 of Attorney General Opinion MW-373 (1981).” However, in Attorney General Opinion MW-373 (1981), this office found that the University of Texas Law School Foundation (the “Law School Foundation”) was a governmental body subject to the Open Records Act. Pursuant to a Memorandum of Understanding, the university provided the Law School Foundation space in the law school building to carry out its obligations, utilities and telephone services, and reasonable use of university equipment and personnel as needed to coordinate the activities of the Law School Foundation with the educational operations of the Law School. The attorney general found such services amounted to support for purposes of the Open Records Act and concluded “[s]ince the foundation receives support from the university that is financed by public funds, its records relating to the activities supported by public funds will be subject to public scrutiny. *See* Open Records Decision No. 228 (1979).” As no information was provided to this office which establishes a *quid pro quo* relationship, we conclude that the foundation is a governmental body for purposes of the Open Records Act.

However, we note that you ask whether a foundation that received support from a public college subjects *all* records of such a foundation to public scrutiny. 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. Consequently, we conclude that such records are indeed subject to the Open Records Act as the entity that receives “support from a public college” without any further clarification or elaboration as to any specific, measurable services, is a governmental entity. Additionally, although you assert that the Texas Non-Profit Corporation Act, article 1396-2.23A(E)(3), V.T.C.S. provides for the nondisclosure of the foundation’s records, you do not explain how you have come to that conclusion.

Additionally, you claim that the students' identities are excepted from disclosure under sections 552.026 and 552.114 of the Government Code. In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. In this instance, however, you have submitted to this office copies of transmittal letters which specify the student awarded scholarships along with the source of the scholarship including the amount awarded. Section 552.026 of the Government Code incorporates the requirements of the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, into the Open Records Act. Open Records Decision No. 431 (1985). FERPA provides the following:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization

20 U.S.C. § 1232g(b)(1). "Education records" are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A); *see also* Open Records Decision Nos. 462 (1987) at 14-15, 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978).

Section 552.114(a) excepts student records at an educational institution funded wholly or in part by state revenue. This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990). Consequently, you must redact the student names and social security numbers and then release the remaining information.

Next, we address the issue of donor names. We observe that governmental bodies may not enter into agreements to keep information confidential except where specifically

authorized to do so by statute. Open Records Decision No. 444 (1986), 437 (1986). Additionally we note that information is not confidential under the Open Records Act simply because the party submitting it anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987), *see also* Open Records Decision No. 590 (1991). Thus, you must release the donor names to the requestor.

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 upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Janet I. Monteros', written over a horizontal line.

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/alg

Ref: ID# 114117

Enclosures: Submitted documents

cc: Ms. Diane La Morte
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(w/o enclosures)