



June 21, 2001

Mr. James R. Hines
Attorney
Brown McCarroll, L.L.P.
111 Congress Avenue, Suite 1400
Austin, Texas 78701-4043

OR2001-2647

Dear Mr. Hines:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148117.

The Upper Rio Grande Private Industry Council (the "URGPIC"), which you represent, received a request for four categories of information: (1) any and all documents pertaining to the resignation of prior URGPIC directors, (2) minutes from all URGPIC meetings held during the month of October 2000, (3) any and all financial accounting records from February 1999 to May 1999 and other dates which prove how finances changed under a new relationship with the Upper Rio Grande Workforce Development Board (the "Board"), and (4) proof of employment of Lorenzo Reyes. You assert that URGPIC is not a governmental body for purposes of the Public Information Act (the "Act"), and request an opinion from this office as to URGPIC's obligations regarding open records. In the alternative, you claim that (1) the requested records are not related to parts of URGPIC's contract with the Board and thus are beyond the scope of the Act, and (2) the requested information is excepted from disclosure under sections 552.101, 552.102, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

The 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 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(1)(A)(x).¹

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 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 (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 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, Open Records Decision No. 228 (1979) considered whether the North Texas Commission (the "commission"), a private, nonprofit corporation chartered for the

¹ We note that the Seventy-seventh Legislature amended section 552.003(1) of the Government Code. Act of May 17, 2001, H.B. 371, 77th Leg., R.S. Section 552.003(1) now includes in its definition of a "governmental body" "a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state." Gov't Code § 551.003(1). The purpose of this amendment appears to be to allow public oversight of nonprofit organizations that receive public funds. The effective date for this law is September 1, 2001.

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 (1979). 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. Noting this provision, Open Records Decision No. 228 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.* Accordingly, the decision found the commission to be a governmental body for purposes of the Act. *Id.*

However, the precise manner of funding is not the sole dispositive issue in determining whether an entity falls under the Act. Attorney General Opinion JM-821 at 3 (1987). Other aspects of a contract or relationship involving the transfer of public funds between a private and public entity must be considered in determining whether a private entity is a "governmental body" under the Act. *Id.* at 4. For example, 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 section 552.003(1)(A)(x) definition of a "governmental body." Structuring a contract that involves public funds to provide a formula to compute a fixed amount of money for a fixed period of time will not automatically prevent a private entity from constituting a "governmental body" under section 552.003(1)(A)(x) of the Act. The overall nature of the relationship created by the contract is relevant in determining whether the private entity is so closely associated with the governmental body that the private entity falls within the Act. *Id.*

You state URGPIC, a private, not-for-profit entity, entered into a contract with the Board to provide services relating to workforce development and job training programs. You also state that the Board was created by authority of the Texas Legislature and is a governmental body under the Act. We have reviewed the submitted contract, No. PY00-WFC-001, marked as Exhibit A, executed by the Board and URGPIC. The contract states that the Board "is responsible for the administration, funding, planning, oversight, and evaluation of the integrated workforce development system in the area, including job training, employment, and employment-related educational programs, and is the designated administrative entity responsible for the programs." Under the contract, URGPIC agrees to operate and maintain at least three full-service "career centers" workforce development centers and four satellite centers; manage overall operation for the service delivery of any and all programs approved pursuant to the contract; provide participant outreach, recruitment, eligibility, certification, intake, assessment, individual service strategies, supportive services, follow-up services, enrollment, and training termination services; and establish and implement procedures to

ensure the hiring, training, and maintenance of qualified staff. In consideration of URGPIC's full and satisfactory performance, the Board shall reimburse URGPIC in an amount equal to the actual costs for specific programs. We have also reviewed Exhibit B which contains the Restated Articles of Incorporation of URGPIC filed with the Office of the Secretary of Texas on August 5, 1998. Article Five states that the corporation is organized to:

- 1) establish and operate job training programs to prepare youth and adults for participation in the labor force by providing job training and other services and decrease welfare dependency, thereby improving the quality of the work force and enhancing the productivity and competitiveness of the local area, the State of Texas and the Nation;
- 2) promote increased involvement of the business community, including minority and woman owned enterprises, and labor organizations in employment and training activities, in order to expand private sector employment opportunities for economically disadvantaged persons;
- 3) serve as grant recipient and to provide administrative services to the Upper Rio Grande Workforce Development Board to the extent permitted by applicable law or contract; and,
- 4) engage in such other activities as may be lawful under the Texas Non-Profit Corporation Act.

As noted above, in Attorney General Opinion JM-821 (1987), the Attorney General stated, "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.'" Upon review of the submitted contract and articles of incorporation, we conclude that, to the extent that URGPIC is implementing and managing job training programs, URGPIC is receiving public funds and that URGPIC and the Board, with which URGPIC contracts, have a common purpose and objective such that URGPIC is providing services traditionally provided by the Board, a governmental body. Therefore, we conclude that URGPIC is a governmental body for purposes of the Act to the extent of its contractual involvement with the Board's workforce and job training programs for which it is receiving public funds.²

² We note that until February 28, 1999, URGPIC received substantially all of its grant revenue from state agencies and the U.S. Department of Labor. Subsequent to February 28, 1999, URGPIC entered into a contract with the Board and now receives substantially all grant revenues from the Board. In addition, as of March 1, 1999, all bank accounts of URGPIC became the property of the Board and the Board assumed all outstanding operating leases and responsibility for all fixed assets maintained at URGPIC. See Notes to the Financial Statements, 1 and 11.

Because this office has concluded, based on the preceding analysis, that URGPIC is a governmental body subject to the Act, we now consider your arguments that the submitted information is excepted from public disclosure by sections 552.101, 552.102, 552.111, and 552.116 of the Government Code.

Initially, we note that you have not submitted any information concerning the request for proof of employment of Lorenzo Reyes, nor have you indicated that you seek to withhold it. Therefore, you must release it to the requestor at this time provided the employment of Mr. Reyes relates to URGPIC's obligation to provide job training services pursuant to its contract with the Board. *See* Gov't Code §§ 552.301(a), .302.

First, you state that because of the voluminous nature of the financial records requested, Exhibit F is a representative sample of all the financial accounts and financial statements requested from URGPIC.³ Exhibit F contains a certified public accountant's audit report of URGPIC as of June 30, 1998 and 1999. You assert that "Exhibit F, as a document, is not excepted from the Act[.]" but rather that the information contained within the documents supporting all the financial accounts and financial statements listed in the audit report are a part of audit working papers and thus fall within the ambit of section 552.116. Section 552.116 of the Government Code excepts from disclosure "[a]n audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education." The audit working papers you have submitted are from an audit conducted by Kaufman, Edge & Co., P.C., certified public accountants, not the state auditor or the auditor of a state agency or institution of higher education. Therefore, section 552.116 is not applicable in this instance. Consequently, URGPIC must release the requested financial accounting records to the requestor.

However, as previously concluded, URGPIC is a governmental body only to the extent of its contractual involvement with the Board's workforce and job training programs. Here, the requestor seeks all financial accounting records from February 1999 to May 1999. Because URGPIC uses the accrual method of accounting for reporting purposes, there will be some financial accounting records that are maintained in one accounting period that record transactions occurring in another accounting period. Consequently, this office does not attempt to distinguish which financial accounting records URGPIC must release that fall between February 1999 and May 1999. All responsive financial accounting records subsequent to June 30, 1999 must be released to the requestor.

³ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Next, you assert Exhibit D, which contains the October 10, 2000, resignation of one of URGPIC's directors is excepted from disclosure under sections 552.101 and 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the act.⁴ See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. We have reviewed the submitted document and conclude it does not contain information protected by a common law right to privacy under section 552.102 of the Government Code. See Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

Lastly, you assert URGPIC's October 2000 minutes of the board of directors meetings, marked as Exhibit E, contain URGPIC's board's advice, opinion, and recommendation, and therefore, are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). However, an agency's policymaking functions do include administrative and personnel

⁴ Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

matters of broad scope that affect the governmental body's policy mission. *Compare* Open Records Decision No. 615 (1993) (correspondence relating solely to internal personnel matter does not implicate policymaking functions of university) *with* Open Records Decision No. 631 (1995) (report addressing university's affirmative action policies involves university's educational mission). Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; Open Records Decision No. 615 at 4-5 (1993). Accordingly, we have marked those portions of URGPIC's October 2000 minutes of the board of directors meetings that you may withhold under section 552.111 of the Government Code. The remainder of the minutes must be released to the requestor.

In summary, URGPIC is a governmental body for purposes of the Act only to the extent of its contractual involvement with the Board's workforce and job training programs. URGPIC must release to the requestor (1) portions of the requested financial accounting records; (2) the director's resignation; and (3) portions of URGPIC's board minutes for October 2000.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

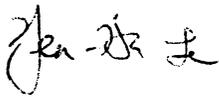
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DBF/seg

Ref: ID# 148117

Encl. Marked documents

cc: Mr. Neil Simon
News Channel 9
801 North Oregon
El Paso, Texas 79902
(w/o enclosures)