



July 16, 2002

Mr. Ray Martinez, III
Cantey & Hanger Roan & Autrey
400 West 15th Street, Suite 200
Austin, Texas 78701-1647

OR2002-3881

Dear Mr. Martinez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165717.

Child Care Associates (“CCA”), which you represent, received a written request for certain information pertaining to an RFP issued by CCA for equipment and materials for its various childcare, Head Start, and Early Head Start centers. You state that the requestor has clarified that she seeks only the names of the successful bidders and the prices they submitted in connection with the RFP. You contend that the requested information is not subject to public disclosure because the CCA is not a “governmental body” for purposes of the Public Information Act (the “Act”). Alternatively, you contend that the requested pricing information is excepted from required public disclosure pursuant to section 552.104 of the Government Code. You have also requested a decision from this office pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information should be withheld from the public.

You explain that CCA

is a private, non-profit corporation that provides services to children and families throughout Tarrant County, North, North Central, and West Central Texas with financial support from a variety of public and private sources. A portion of CCA’s revenue is derived from state funds, as CCA has entered into contractual agreements with . . . workforce development boards to administer the Child Care Management Services program (“CCMS”) Additionally, CCA receives federal funding for the administration of Head Start and Early Head Start programs.

The CCMS program administered by CCA is an open market, parent choice system of providing subsidized quality childcare for Texas Families, and is funded through both state and federal sources. Under the CCMS program, an eligible applicant selects a childcare provider from a network of commercial vendors and non-profit centers. The Texas Workforce Commission (“TWC”) is authorized under section 44.001 of the Texas Human Resources Code, as “the state agency designated to administer a day-care program established by federal law and financed partially to totally by federal funds.”

CCA has entered into contractual agreements with . . . local workforce development boards in its capacity as a private, non-profit Texas corporation Under the terms [of such contracts], CCA assists applicants in determining whether they qualify for services through the CCMS program, and provides the applicant with a list of local childcare providers under contract with CCA.

We first address the threshold issue of whether the requested information is subject to the Act. 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

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, have previously considered the scope of the Act’s definition of “governmental body.” For example, in *Kneeland v. National Collegiate Athletic Association*, 850 F.2d 224 (5th Cir. 1988), *cert. denied*, 488 U.S. 1042 (1989), an appellate court examined the financial relationship between Texas public universities and the National Collegiate Athletic Association (“NCAA”) to determine whether the NCAA was a governmental body within the statutory predecessor to section 552.003(1)(A)(x). The court below had concluded that the NCAA was subject to the Act, finding that its receipt of dues, assessments of television rights fees, and unreimbursed expenses from state universities constituted general support with public funds. The appellate court reversed, holding that the NCAA fell outside the definition of a governmental body in the Act because the public university members received a quid pro quo in the form of specific, measurable services. *See also A. H. Belo Corp. v. Southern Methodist Univ.*, 734

¹This provision was also recently numerated as section 552.003(1)(A)(xi) in House Bill No. 936. *See Act of May 24, 2001, 77th Leg., R.S., ch. 1004, § 2, 2001 Tex. Gen. Laws 2067, 2068.*

S.W.2d 720 (Tex. App.--Dallas 1987, writ denied) (finding that funds distributed by Southwest Conference to private university members were not public funds; thus, private universities were not governmental bodies).

Thus, the *Kneeland* court 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, 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.”

We have reviewed a sample contract between the CCA and the West Central Texas Workforce Development Board (the “board”) to examine the terms under which the CCA receives support from the board. The contract provides for, among other things, an annual budget under which the CCA operates, repayment of costs incurred by CCA for services rendered under the contract, and a provision for “advance payment funding” “to cover [CCA’s] working capital needs relating to [CCA’s] own CCMS expenses.” The contract also requires CCA to “ensure that the quality of child care is improved by using quality improvement activities.” There is also a provision in the contract that provides that CCA must “transfer title and deliver to the Board any property or products [CCA] acquired or produced in performance of’ the contract in the event the contract is terminated.

We disagree with your contention that the sample contract is a typical arms-length contract for services. The contract does not require CCA to provide a “measurable amount of service” to the board nor does it provide that CCA be compensated by a “certain amount of money.” Rather, the contract establishes a “common purpose or objective or . . . creates an

agency-type relationship” between CCA and the board by requiring CCA to perform a service that would otherwise be provided by a governmental body. We therefore conclude that the CCA is a “governmental body” for purposes of section 552.003(1)(A)(x) of the Government Code and that the requested information is subject to required public disclosure under the Public Information Act.

Thus, we must address whether the requested information comes under the protection of an exception to required public disclosure. As noted above, you requested a decision from this office pursuant to section 552.305 of the Government Code. In accordance with section 552.305(d), CCA was required to notify the interested third parties of the records request and of their right to submit arguments to this office as to why their pricing information should not be released to the public. *See* Gov’t Code § 552.305(d); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). An interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B). This office did not receive a response from any of the bidders indicating that they wished to have their pricing information withheld from the public. This office therefore has no basis for concluding that the bidder have a proprietary interest in the requested pricing information.

However, you raise section 552.104 of the Government Code, which protects from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). Governmental bodies may withhold this type of information while the governmental officials are in the process of interpreting the proposals and the competitors are free to furnish additional information. *Cf.* Open Records Decision No. 170 (1977). You stipulate that the names of the successful bidders would not be excepted from public disclosure under this exception. Consequently, CCA must release the names of the successful bidders.

Generally, section 552.104 does not except bids or proposals from disclosure once the bidding is over and the contract is in effect, Open Records Decision Nos. 306 (1982); 184 (1978), or where no contract is awarded. Open Records Decision No. 201 (1978). However, in Open Records Decision No. 541 at 5 (1990), this office concluded that the statutory predecessor to section 552.104 may apply to bidding information pertaining to an awarded contract where the governmental body solicits bids for the same or similar goods or services on a recurring basis. In this regard, you inform us that “[t]his particular RFP is generated by CCA on a recurring, year-to-year basis, with the bid specifications and circumstances

pertaining to this RFP remaining substantially similar from year to year.” Furthermore, you contend that the release of the requested pricing information would give advantage to bidders in connection with future RFPs issued by CCA because it would allow them “to accurately estimate and thereby undercut [the] future bids.” Given your representations, we conclude that you have met your burden of establishing the applicability of section 552.104 to the pricing information contained in the proposals received by CCA. Accordingly, CCA may withhold the pricing information in this instance. *But see* Gov’t Code § 552.022(a)(3) (“information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body” must be released to public unless expressly made confidential under other law).

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CMN/RWP/sdk

Ref: ID# 165717

Enc: Submitted documents

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