OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 16, 2007

Ms. Monique Sharp
Assistant General Manager
Finance and Administration
The Woodlands Fire Department
9951 Grogans Mill Road
The Woodlands, Texas 77380

OR2007-06080

Dear Ms. Sharp:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 279538.

The Woodlands Fire Department (the "department") received a request for "a copy of the check register for The Woodlands Fire Department for all checks issued (including payroll) from December 1, 2006 through December 31, 2006. The register should include the following for each check issued: check number, check date, payee name, and check amount. The check register should be in numerical order by check number." You claim that the requested records "are not subject to the Act as the department, at least in its entirety, is not a governmental body" subject to the Act. As responsive to the request, you have submitted Enclosure A, which you say is a copy of the check register for the department's operating account, and enclosure B, which you say is a copy of the payroll check register prepared by the company, Ceridian. We have considered your arguments and the comments of the requestor and reviewed the submitted information.

The Act applies to "governmental bodies" as that term is defined in section 552.003(1)(A) of the Government Code. That section 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[.]

Gov't Code § 552.003(1)(A)(xii). "Public funds" means funds of the state or of a governmental subdivision of the state. *Id.* § 552.003(5). "Public funds" from a state or governmental subdivision of the state can be in various forms and can include free office space, utilities and telephone use, equipment, and personnel assistance. *See* Att'y Gen. Op. No. MW-373 (1981).

In *Kneeland v. National Collegiate Athletic Association*, 850 F.2d 224 (5th Cir. 1988), the United States Court of Appeals for the Fifth Circuit recognized that opinions of this office do not declare private persons or businesses to be "governmental bodies" that are 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, the *Kneeland* court noted that in interpreting the predecessor to section 552.003 of the Government Code, this office'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. The *Kneeland* court ultimately concluded that the National Collegiate Athletic Association (the "NCAA") and the Southwest Conference (the "SWC"), both of which received public funds, were not "governmental bodies" for purposes of the Act, because both provided specific, measurable services in return for those funds. *See Kneeland*, 850 F.2d at 230-31. Both the NCAA and the SWC were associations made up of both private and public universities. Both the NCAA and the SWC received dues and other revenues from their member institutions. *Id.* at 226-28. In return for those funds, the NCAA and the SWC provided specific services to their members, such as supporting various NCAA and SWC committees; producing publications, television messages, and statistics; and investigating

complaints of violations of NCAA and SWC rules and regulations. *Id.* at 229-31. The *Kneeland* court concluded that although the NCAA and the SWC received public funds from some of their members, neither entity was a "governmental body" for purposes of the Act, because the NCAA and SWC did not receive the funds for their general support. Rather, the NCAA and the SWC provided "specific and gaugeable services" in return for the funds that they received from their member public institutions. *See id.* at 231; *see also A.H. Belo Corp. v. S. Methodist Univ.*, 734 S.W.2d 720 (Tex. App.—Dallas 1987, writ denied) (athletic departments of private-school members of Southwest Conference did not receive or spend public funds and thus were not governmental bodies for purposes of Act).

In Texas Attorney General Opinion No. JM-821 (1987), this office determined that the Cy-Fair Volunteer Fire Department, a nonprofit corporation, is a governmental body under the Act to the extent that is supported by public funds received pursuant to its contract with the Harris County Rural Fire Prevention District No. 9. *See* Tex. Att'y Gen. No. JM-821 (1987). Because fire protection is one of the services traditionally provided by governmental bodies, different considerations apply to fire departments that set them apart from private vendors of goods and services who typically deal with governmental bodies in arms-length transactions and make them more likely to fall within the Act. *Id.* at 5. In JM-821, this office examined various statutes that recognize that volunteer fire fighters have strong affiliations with public agencies, reviewed the contract between the Cy-Fair Volunteer Fire Department and the Harris County Rural Fire Prevention District No. 9, and determined that the contract provided for the general support of the Cy-Fair Volunteer Fire Department for purposes of the definition of "governmental body" under the Act. *See id.*

You state that the department is a private Texas non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code. You acknowledge that the department receives some public funds, but argue that those funds are not for the department's general support. However, before we consider whether the public funds the department receives are for its general support, we first consider the department's function.

You acknowledge that fire protection service is a service traditionally provided by a political subdivision, but state that the department's creation is unique in that it was created to serve property owners' associations rather that a governmental body. You state that no governmental agency is obligated to provide fire protection service to The Woodlands and that the obligation is solely that of the property owners' associations. You also explain that the statutes referenced in JM-821 as providing a volunteer fire department a strong affiliation with public agencies- statutes which allow a political subdivision to provide volunteer fire fighters workers compensation coverage and relief and retirement benefits, and which allow the legislature to provide volunteer firefighters survivor benefits- are not applicable to the department. *See* Tex. Att'y Gen. No. JM-821 (1987) at 5. You acknowledge, however, that certain property owners' associations which contract with the department for fire and emergency services are covered by the Act pursuant to section 552.0036 of the Government

Code.[1] You inform us that those associations, which you say include The Woodlands Community Association, Inc., The Woodlands Association, Inc., and The Woodlands Commercial Owners, Inc., collectively fund approximately 93% of the department's expenses, estimated to be 13.5 million for the year 2007.

Section 552.0036 states that the property owners' associations to which it applies are "subject to the Act in the same manner as a governmental body." Gov't Code §552.0036. Thus, had the property associations here provided the fire protection services themselves, their records about providing such services would be subject to required public disclosure under the Act. *See id.* Consequently, with regard to the department's function, we find that the department is affiliated with entities that are considered governmental bodies for the purposes of the Act. Further, the department is providing a service traditionally provided by a governmental body and is doing so for entities in the role of a governmental body under the Act.[2] *See id.* § 791.003(3) (defining "government function" to include fire protection for purposes of the Interlocal Cooperation Act, chapter 791 Government Code).

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[1]Section 552.0036 provides as follows:

> A property owners' association is subject to [the Act] in the same manner as a governmental body if:
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> > (1) membership in the property owners' association is mandatory for owners or for a defined class of owners of private real property in a defined geographic area in a county with a population of 2.8 million or more or in a county adjacent to a county with a population of 2.8 million or more;
> >
> > (2) the property owners' association has the power to make mandatory special assessments for capital improvements or mandatory regular assessments; and
> >
> > (3) the amount of the mandatory special or regular assessments is or has ever been based in whole or in part on the value at which the state or a local governmental body assesses the property for purposes of ad valorem taxation under Section 20, Article VIII, Texas Constitution.

Gov't Code § 552.0036.

[2]You inform us that the department is comprised of six stations, a dispatch center, 107 employees, 13 fire apparatus and various types of equipment. We note that the Fire Protection and Emergency Medical Services Agreement between the Woodlands Community Association and the department references a written contract the department entered into with Montgomery County, Texas, which provides that Montgomery County is not furnishing fire protection services in the service area and which provides that the department shall be obligated to furnish such fire protection services.

We next consider the department's funding and its contracts. As mentioned above, the property owners' associations collectively fund 93% of the department's expenses. While these associations are subject to the Act under section 552.0036, they are not governmental subdivisions of the state. Thus, the funds from these associations are not "funds of the state or of a governmental subdivision of the state" and, so, are not "public funds." *Id.* § 552.003(5). You also inform us that the United States Department of Homeland Security awarded the department $34,104 under the Fire Act for the purchase of alarm systems for fire stations 1, 2 and 3. These federal funds are not "public funds" as defined in section 552.003(5).

However, several governmental subdivisions of the state do provide public funds to the department. The first of these is the Town Center Improvement District of Montgomery County, Texas (the "District"), which was formed in 1993 by the Texas Legislature. The District's mission according to its website is "to promote, develop, encourage, and maintain economic development for the public benefit of The Woodlands area." You state that the funds the department receives from the District represent approximately 5% of the department's 2007 budget. The department's contract with the District, "Service Agreement Relating to The Woodlands Fire Department, Inc.," states that the department requested that the District provide funds necessary to provide enhanced services within the District "to a higher degree than would otherwise be required of the department for Basic Fire and Emergency Services in order to better meet the particular needs and requirements of the businesses, building occupants and retailers within the District." The District pays the department $472,905 during the one year term of the service agreement for the provision of such enhanced services within the district and its impact area. Enhanced services include (1) additional trained and certified firefighting personnel to meet the high daytime population within the District; (2) additional trained and certified firefighting personnel necessary to meet operational demands of high rise and other target hazards within the District; (3) fire prevention services during special events, including fireworks and lighting displays; (4) inspection services, including but not limited to life safety inspections, evacuation plan reviews, pre-fire surveys and any preconstruction plan reviews to the extent requested and/or required by occupants of the District; and (5) additional resources needed to maintain a minimum property protection class rating of three as defined by the Insurance Service Office.

You state that "[f]unds received from the District are used mainly to hire, equip and train six additional firefighters needed to provide additional services." You state that these firefighters are stationed at Fire Station No. 1, the station that normally responds to occurrences within the district. You argue that because the contract restricts the department's use of the funds to expenses actually incurred by the department in the provision of the

enhanced services within the District, the funds the District provides the department are not for the department's general support.[3]

You have submitted a second contract between the department and the District, a Facilities Funding Agreement entered into January 1, 2007, under which the District funds the following purchases: (1) 37% of the actual cost of purchase of a replacement fire engine at Station One, but not to exceed $144,300; (2) 37% of the actual costs of purchase of firefighting tools and equipment, specifically replacement items for the new fire engine, but not to exceed $20,350; (3) 37% of the actual cost of purchase of extraction tools, but not to exceed $12, 950; (4) 37% of the actual costs of purchase of protective clothing, but not to exceed $7,410; and (5) 12% of the actual cost of purchase of a radio console controller, but not to exceed $3,480.

The requestor submitted two additional Facilities Funding Agreements between the department and the District. Under the agreement executed on January 1, 2004, the District provided funding assistance to the department for the purchase of (1) a new service vehicle described as a "Haz-Mat Response Vehicle" at the level of 30% of the actual cost, but not to exceed $52,000 and (2) specialized firefighting, communications and rescue equipment at the level of 40%, but not to exceed $94,000. Under the other agreement the requestor submitted, which was executed on December 4, 2002, the District provides funding assistance to the department for the purchase of (1) a new rescue vehicle at the level of 50% of the actual cost of purchase but not to exceed $135,000, and (2) specialized firefighting and rescue equipment for use in mid- and high-rise buildings at the level of 100% not to exceed $60,000.

The Montgomery County Hospital District (the "MCHD") pays the department $1,875.00 monthly or $22,500 annually for housing three MCHD medic units at Station No. 5. You state that the funds from the MCHD represent less than 1% of the department's budget. You argue that under the department's agreement with MCHD, MCHD is providing a measurable service rather than general support for the department.

The department budget you submitted to this office lists $7,036,500 as revenue from the Town Center Economic Development Zone No. 4 (the "development zone") for the department's 2006 budget. However, in your brief to this office, you do not address this entry in the department's 2006 budget, but instead state that the development zone will be a source of public funds the third or fourth quarter of this year (2007) for payment of the costs associated with an improvement project. Under the project's financing plan, the development zone funds the costs of construction of a fire station, technical training tower and education building, the cost of additional equipment, land costs, and related fees, for a

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[3]Section 1 of the contract states in part: "The department agrees that the funds will be used solely for expenses actually incurred by the department in the provision of such Enhanced Services within the district and its impact area."

total estimated project cost of $11,670,000 for a duration of 25 years. You do not inform us what percentage of the department's total 2007 budget the expected development zone funds will represent. You contend the development zone's funding of the project represents a specific payment for a specific, measurable service and does not constitute general support for the department.

The Texas Commission on Environmental Quality ("TCEQ") reimburses the department for a remediation system installation after an underground fuel leak at Fire Station No. 1. You argue this reimbursement is not for the department's general support.

The department budget you submitted includes $98,063 in funds from another Homeland Security Grant. However, you state that Montgomery County received the funds and with them purchased hazardous materials equipment, which the county allows the department and other fire departments in the county to use.

You state that the Montgomery County Fire Chief's Association (the "Association") provides approximately 1% of the department's revenue. The Association is a nonprofit corporation which you say is funded by public funds from the Association's members, which are fire departments that are political subdivisions of the state. Under the Fire Dispatch Services Agreement, the department provides dispatch services to the Association members and in exchange the Association pays the department in advance an annual contract fee plus other costs in certain circumstances. You explain that the funds are primarily used to hire three additional dispatchers to handle the increased call volume generated from the Association members. The requestor has provided information that shows that the department used funds from the Association to purchase a radio controller for the dispatch center.

Having determined that the department receives public funds from several sources, we now must decide whether the receipt of those funds constitutes the "support" of the department for purposes of section 552.003(1)(A). We find that MCHD and TCEQ are not providing funds for the general support of the department. The MCHD is making a specific payment for a specific, measurable service: housing three medic units. Similarly, the department's statutory claim for reimbursement from the petroleum storage tank remediation account for corrective action for a release from an underground tank is not for the department's support. *See* Water Code § 26.3573. However, we further find that the public funds the department receives from the District for equipment and from Montgomery County in the form of equipment use are for the general support of the department's activities. In addition, the public funds the department receives from the District for enhanced services, including personnel expenses, and from the Association are not for sufficiently identifiable and measurable quantities of service.[4] Thus, those funds are also for the general support of the department's activities.

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[4]Once received, the funds from the development zone will also be for the department's general support.

This office has stated that an entity, not otherwise subject to the Act, is a "governmental body" only to the extent that it receives "support" from public funds; only documents relating to those parts of a governmental entity which are thus "supported" are public documents. *See* Open Records Decision No. 602 (1992). However, in this case, the information at issue, payroll information of department firefighters as well as a department check register, is general information about the department as a whole and is not solely related to any specific part of the department. We find that the personnel and financial records at issue are related to basic, routine operations of the department and further find that the public funds received by the department support such operations. Thus, we determine that, in this case, the information requested is subject to disclosure under the Act and must be released to the requestor unless an exception applies.

You raise no exception to the required public disclosure of the information in the submitted records. However, we find that portions of the information are excepted from required public disclosure, as we will explain.[5]

The payroll information includes private financial information. Section 552.101 of the Act excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.,* 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). An employee's decisions with regard to insurance coverages and other deductions are personal financial decisions. *See* Open Records Decision No. 600 (1992). We have marked a representative sample of the kind of private payroll information that is excepted from disclosure under section 552.101 of the Government Code in conjunction with the common law right to privacy.

The payroll records also include account numbers. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. The department must, therefore, withhold the account numbers under section 552.136. We have marked a representative sample of the information the department must withhold under section 552.136.

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[5]The Office of the Attorney General will raise mandatory exceptions like sections 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Finally, we note that the submitted information contains social security numbers.[6] Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

In summary, the requested information is subject to disclosure under the Act. However, the department must withhold portions of the information based on sections 552.101 and 552.136. The department may withhold the social security numbers under section 552.147.[7] We have marked a representative sample of the information the department must or may withhold under sections 552.101, 552.136 and 552.147.

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, upon receiving this ruling, the governmental body

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[6]The submitted payroll records disclose only the last four digits of the social security numbers.

[7]The submitted payroll register includes employee home addresses. Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Section 552.024 permits each current or former employee or official of a governmental body to choose whether to allow public access to the section 552.117 confidential information in the custody of the governmental body. However, whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Although department employees and officials presumably have not had an opportunity to choose whether to allow public access to their information, in light of this ruling, the department must now provide its employees and officials that opportunity. Then, for future requests for information subject to the Act, the department must withhold information under section 552.117 on behalf of current or former department officials or employees who make a request for confidentiality under section 552.024 prior to the date on which a request for the information is made.

will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. 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 Office of the Attorney General 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,

Kay Hastings
Assistant Attorney General
Open Records Division

KH/sdk

Ref: ID# 279538

Enc: Marked documents

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