



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 27, 2007

Ms. Lisa R. McBride
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711 Louisiana Street, Suite 2300
Houston, Texas 77002-2770

OR2007-06348A

Dear Ms. McBride:

This office issued Open Records Letter No. 2007-06348 (2007) on May 22, 2007. We have examined this ruling and determined that it is incorrect. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on May 22, 2006.

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 278812.

The North Harris Montgomery Community College District Foundation (the "foundation"), which you represent, received a request for (1) "details of the contributors and donors [related to "Special Events" donations] for the 2005, 2004 and 2003 tax reporting years[;]" and (2) "the expenditures, expenses of the 'Special Event(s)' as listed for the same time periods as to the names, addresses and amounts for these totals." You contend that the foundation is not a governmental body subject to the Act. In the alternative, you claim that some of the requested information is excepted from disclosure under section 552.1235 of the Government Code. We have considered your claims and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

The Act defines “governmental body” in pertinent 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.

Id. § 552.003(1)(A)(xii). “Public funds” means funds of the state or of a governmental subdivision of the state. *Id.* § 552.003(5). The determination of whether an entity is a governmental body for purposes of the Act requires an analysis of the facts surrounding the entity. See *Blankenship v. Brazos Higher Educ. Auth., Inc.*, 975 S.W.2d 353, 360-362 (Tex. App.—Waco 1998, pet. denied). In Attorney General Opinion JM-821 (1987), this office concluded that “the primary issue in determining whether certain private entities are governmental bodies under the Act is whether they are supported in whole or in part by public funds or whether they expend public funds.” Attorney General Opinion JM-821 at 2 (1987). Thus, the foundation would be considered a governmental body subject to the Act if it spends or is supported in whole or in part by public funds.

Both the courts and this office previously have considered the scope of the definition of “governmental body” under the Act and its statutory predecessor. 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 exploring the scope of the definition of “governmental body” under the Act, this office has distinguished between private entities that receive public funds in return for specific, measurable services and those entities that receive public funds as general support. In Open Records Decision No. 228 (1979), we considered whether the North Texas Commission (the “commission”), a private, nonprofit corporation chartered for the purpose of promoting the interests of the Dallas-Fort Worth metropolitan area, was a governmental body. *See* Open Records Decision No. 288 at 1. The commission’s contract with the City of Fort Worth obligated the city to pay the commission \$80,000 per year for three years. *Id.* The contract obligated the commission, among other things, to “[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, this office stated that “[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 commission was determined to be a governmental body for purposes of the Act. *Id.*

In Open Records Decision No. 602 (1992), we addressed the status of the Dallas Museum of Art (the “DMA”) under the Act. The DMA was a private, nonprofit corporation that had contracted with the City of Dallas to care for and preserve an art collection owned by the city and to maintain, operate, and manage an art museum. *See* Open Records Decision No. 602 at 1-2. The contract required the city to support the DMA by maintaining the museum building, paying for utility service, and providing funds for other costs of operating the museum. *Id.* at 2. We noted that an entity that receives public funds is a governmental body

under the Act, unless the entity's relationship with the governmental body from which it receives funds 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." *Id.* at 4. We found that "the [City of Dallas] is receiving valuable services in exchange for its obligations, but, in our opinion, the very nature of the services the DMA provides to the [City of Dallas] cannot be known, specific, or measurable." *Id.* at 5. Thus, we concluded that the City of Dallas provided general support to the DMA facilities and operation, making the DMA a governmental body to the extent that it received the city's financial support. *Id.* Therefore, the DMA's records that related to programs supported by public funds were subject to the Act. *Id.*

In Attorney General Opinion MW-373 (1981), this office examined the University of Texas Law School Foundation (the "UT Law Foundation"), a nonprofit corporation that solicited donations and expended funds to benefit the University of Texas Law School (the "university"). Pursuant to a Memorandum of Understanding, the university provided the UT Law Foundation space in the law school building to carry out its obligations, utilities and telephone services, and reasonable use of university equipment and personnel to coordinate the activities of the UT Law foundation with the educational operations of the university. This office found such services amounted to support for purposes of the Act and concluded "[s]ince the [UT Law] 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). The opinion noted that the purpose of the UT Law Foundation was to raise funds and provide resources for the benefit of the university, and considered that the provision of office space and other assistance enhanced the cost effectiveness of operating the UT Law Foundation. Further, the opinion noted that the university retained control over the relationship of the UT Law Foundation and the university through the authority of the university board of regents to control the use of university property. *Id.* Thus, since the UT Law Foundation received general support from the university, and the university is financed by public funds, the UT Law Foundation was found to be a governmental body for purposes of the statutory predecessor of the Act. Therefore, the UT Law Foundation's records relating to the activities supported by public funds are subject to public disclosure. *Id.*

In the present case, you state that the foundation is a private, non-profit corporation that "does not receive any funds directly from the [North Harris Montgomery Community College] District [the "district"]." The articles of incorporation of the foundation, which you have submitted for our review, provide that the foundation is to be "operated exclusively for charitable, scientific, literary and educational purposes," and for the sole benefit of the district. The agreement between the foundation and the district, which you have also submitted for our review, states that the district provides the foundation with the following: (1) assignment of district employees to staff the foundation; (2) office space, access to necessary meetings space, and use of the district's telecommunications system, on-site copying machines, and electronic mail system; and (3) inclusion as an additional named

insured under the district's liability and insurance policies. The agreement further states that the district accepts funds from the foundation "for the purpose of promoting the well being and advancement of the [d]istrict[.]"

Although the foundation does not appear to receive direct payment of public funds for its operation, we find that the use of office space and services provided by the district amount to the general support of the operation of the foundation for purposes of the Act. *See* Attorney General Opinion MW-373; *see also* ORD 228. You claim that the foundation and the district have formalized an arms-length relationship in which the district provides operational services in exchange for the foundation's fundraising, scholarship, programmatic, and investment services. Upon review, we find that you have failed to demonstrate that the agreement between the foundation and the district provides for an arms-length relationship. The funds paid by the foundation to the district are not designated as reimbursement funds to cover the cost of the support provided by the district. Based on our review of the submitted information, we determine that the sole purpose of the foundation is to raise funds and provide resources for the benefit of the district. We also determine that the district supports the effective operation of the foundation. Thus, we determine that by accepting the district's operational support, the foundation is a "governmental body" for purposes of the Act. *See* Open Records Decision No. 602 at 5 (1992). Accordingly, the records of the foundation are public records subject to the Act. *See* Gov't Code § 552.002. We therefore will address the foundation's claimed exception to disclosure of the information at issue.

We note that you did not submit information responsive to the second part of the request for our review. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this aspect of the request exists, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

You seek to withhold donor name and address information pursuant to section 552.1235(a) of the Government Code, which excepts

[t]he name or other information that would tend to disclose the identity of a person, *other than a governmental body*, who makes a gift, grant, or donation of money or property to an institution of higher education or to another person with the intent that the money or property be transferred to an institution of higher education[.]

Gov't Code § 552.1235(a) (emphasis added). However, this section does not except from disclosure the amount or value of an individual gift, grant, or donation. *See* Gov't Code § 552.1235(b). For purposes of section 552.1235, "institution of higher education" is

defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 of the Education Code defines an “institution of higher education” as any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section. *See* Educ. Code § 61.003.

Upon review, we find that the foundation fails to demonstrate that it qualifies as an “institution of higher education” under section 61.003 of the Education Code. However, the foundation asserts that, “in accordance with its mission statement and the affiliation agreement between [the district] and the [f]oundation,” it collects donations only from donors who intend that the donation be transferred to the district. We find that the district meets the definition of an “institution of higher education” for purposes of section 552.1235. Based upon your representations and our review, we conclude that the foundation must withhold under section 552.1235 of the Government Code the name or other information that would tend to disclose the identity of a person, other than a governmental body, who made a gift, grant, or donation of money or property to the foundation with the intent that the money or property be transferred to the district. The remaining submitted information must be released to the requestor.

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 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 278812

Enc. Submitted documents

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