



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 3, 2009

Ms. Angela Robinson  
Law, Snakard, & Gambill, P.C.  
1600 West Seventh Street, Suite 500  
Fort Worth, Texas 76102

OR2009-02761

Dear Ms. Robinson:

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# 336144.

The Tarrant County College Foundation (the "foundation"), which you represent, received three requests from the same requestor for tax return information, the current contract or memorandum of understanding between the foundation and the Tarrant County College District (the "district"), the most recent financial/management audit, the investment account statements for named accounts during a specified time period, and information regarding the planned transfer of scholarship funds from the district to the foundation. We note you have withdrawn your request for a ruling with respect to the tax return information. You state you will release some of the information with redactions.<sup>1</sup> You state you do not have a contract or memorandum of understanding defining the relationship between the foundation and the district.<sup>2</sup> You contend the foundation is not a governmental body subject to the Act. In the alternative, you claim portions of the submitted information are excepted from disclosure under sections 552.116, 552.136, and 552.1235 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.<sup>3</sup> We have also received and considered comments

---

<sup>1</sup>The requestor has agreed to the redaction of portions of the requested information.

<sup>2</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>3</sup>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.

submitted by the requestor.<sup>4</sup> See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note you have marked some of the submitted information as not responsive to the requests. Further, the requestor has excluded account numbers from his request for investment account information. This ruling does not address the public availability of non-responsive information, and the department is not required to release non-responsive information in response to this request.<sup>5</sup> Accordingly, we will address your arguments with regard to the responsive information.

Next, we address your contention that the foundation is not a governmental body. 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

---

<sup>4</sup>The requestor argues for release of the requested information responsive to his second request for information under the Texas Non-Profit Corporations Act, V.T.C.S. art. 1396-2.23A(c). We note, however, this office does not construe the Non-Profit Corporations Act, and this ruling does not address the extent to which the requested records are subject to disclosure under it.

<sup>5</sup>We need not address your claim under section 552.136 of the Government Code as this information is not responsive to the request.

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 ORD 228 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* ORD 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." Attorney General Opinion MW-373 at 11 (citing ORD 228). 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 this instance, you state the foundation is a nonprofit corporation that is separately incorporated from the district. You inform us the foundation provides philanthropic support of critical needs of the district, such as scholarships, capital requirements, and staff enhancements. You also inform us the district provides office space to the foundation at no charge and employs personnel whose duties and responsibilities relate solely to the furtherance of the objectives of the foundation. According to the foundation's financial statement, which you have provided for our review, the fair value of these donated services and rent total \$397,734 for the fiscal year ending in August of 2008.

Although the foundation does not appear to receive direct payment of public funds for its operation, we find 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. Based on our review of your representations and the submitted information, we determine the sole purpose of the foundation is to raise funds and provide resources for the benefit of the district. We also determine the district supports the effective operation of the foundation. Thus, we determine by accepting the district's operational support, the foundation is a "governmental body" for purposes of the Act. *See* ORD 602 at 5. Accordingly, the records of the foundation are public records subject to the Act. *See* Gov't Code § 552.002. Therefore, we will address the foundation's claimed exceptions to disclosure of the information at issue.

Next, we address the requestor's contention that portions of the information at issue are subject to section 552.022(a)(3) of the Government Code. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

*Id.* § 552.022(a)(3). Exhibit 5 consists of information in an account relating to the receipt or expenditure of public funds and is subject to section 552.022(a)(3). Information subject to section 552.022 must be released, unless it is confidential under other law. You claim Exhibit 5 is excepted from disclosure under section 552.116 of the Government Code. However, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Consequently, you may not withhold the responsive information

in Exhibit 5 under section 552.116 of the Government Code. As you raise no further exceptions to disclosure of the responsive information in Exhibit 5, it must be released.

We now turn to your arguments for the submitted information that is not subject to section 552.022. You seek to withhold some of the donor name and address information in Exhibit 7 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). 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. The foundation asserts that, due to its relationship with the district, donations to the foundation are constructively donations to the district for purposes of the Act. We find the district meets the definition of an "institution of higher education" for purposes of section 552.1235. Accordingly, we find portions of Exhibit 7 contain identifying information of persons who made gifts, grants, or donations to an institute of higher education. The requestor states the information at issue was discussed during a public meeting.<sup>6</sup> We note, however, the requestor does not state the identities of the donors were discussed or revealed during this meeting. Based on your representations and our review, we conclude some of the information you have marked is subject to section 552.1235. However, we find some of the marked information pertains to individuals who do not appear to be donors and individuals who are deceased. This office has previously determined section 552.1235 is not applicable to the identifying information of deceased persons. Accordingly, this information, which we have marked for release, may not be withheld under section 552.1235. Therefore, except as we have marked for release, the foundation must withhold the donor information you have marked under section 552.1235 of the Government Code.

In summary, except as we have marked for release, the foundation must withhold the marked donor information under section 552.1235. The remaining information must be released.

---

<sup>6</sup>The notices and minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), 551.043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting).

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Olivia A. Maceo  
Assistant Attorney General  
Open Records Division

OM/eeg

Ref: ID# 336144

Enc. Submitted documents

c: Requestor  
(w/o enclosures)