ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 11, 2013

Ms. Sandra L. O'Neill
Executive Director
Central Texas Regional Advisory Council
2810 North Main Street, Suite H2
Belton, Texas 76513

OR2013-05846

Dear Ms. O'Neill:

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# 483666.

The Central Texas Regional Advisory Council (the "council") received a request for all documents pertaining to the requestor's employment and termination, including the requestor's complete employment file, letter of termination, evidence relating to the determination to terminate the employee, a specified written disciplinary plan and performance improvement plan, documents regarding termination appeal, and documents related to the denial of the requestor's request to resign. You claim the council is not a governmental body subject to the Act. Alternatively, you claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We first address the threshold issue of whether the council is subject to the Act. The Act applies to "governmental bodies" as that term is defined in section 552.003(1)(A) of the Government Code. Under the Act, the term "governmental body" includes several enumerated kinds of entities and "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). 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, 360-62 (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).

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* 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.*

We further note that the precise manner of public funding is not the sole dispositive issue in determining whether a particular entity is subject to the Act. *See* Attorney General Opinion JM-821 at 3 (1987). Other aspects of a contract or relationship that involves the transfer of public funds between a private and a public entity must be considered in determining whether the 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 definition of a "governmental body" under section 552.003(1)(A)(xii) of the Government Code. 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 inform us the council is a nonprofit organization, as defined under 26 U.S.C. § 501(c)(3). In response to a request for additional information this office sent pursuant to section 552.303 of the Government Code, you informed this office that the council receives state funds through the EMS County Assistance, EMS Tobacco, and EMS Regional Advisory Councils grant programs, as well as federal funds through the Hospital Preparedness Program of the Office of the Assistant Secretary for Preparedness and Response ("OASPR"). We understand that the OASPR federal grant funds, as well as the state grant funds, are distributed to the council by the Texas Department of State Health Services ("DSHS").

We note that in Open Records Decision No. 509 (1988), this office concluded that a private nonprofit corporation established under the Job Training Partnership Act and supported by federal funds appropriated by the state was a governmental body for the purposes of the Act. In that case, we analyzed the state's role under the federal statute and concluded the state acted as more than a simple conduit for federal funds, in part because of the layers of decision-making and oversight provided by the state in administering the programs. *Id.* at 2. The decision noted that federal funds were initially distributed to the state and then allocated among the programs at issue. Citing Attorney General Opinions JM-716 (1987) and H-777 (1976), the decision observed that federal funds granted to a state are often treated as the public funds of the state. Furthermore, in Open Records Decision No. 563 (1990), this office held that "[f]ederal funds deposited in the state treasury become state funds." *Id.* at 5 (citing Attorney General Opinions JM-118 (1983), C-530 (1965)).

You state, and provide documentation showing, in 2012 the council received $ 566,217 from the OASPR grant, $ 60,157 from the EMS County Assistance grant, $ 64,486 from the EMS Tobacco grant, and $ 25, 516 from the EMS Regional Advisory Councils grant, and these funds account for 90-95% of the council's overall funding. We note the council's agreements with DSHS impose extensive obligations on the council, including reporting and payment requirements, the rights to inspect all council records relating to the contracts and conduct audits and inspections, and the right to unilaterally terminate the contracts. Accordingly, we find that provisions such as these demonstrate DSHS has significant oversight over distribution of the state and federal funds. You state 75% of the position at issue is funded by OASPR grant funds, and the other 25% is funded by EMS Tobacco and EMS Regional Advisory Councils grant funds. Therefore, we determine the council receives public funds, and the position at issue is entirely funded through such public funds. Next, we will determine whether the council's receipt of public funds makes it a governmental body for purposes of the Act.

As previously noted, the Act does not apply to private persons or businesses simply because they receive public funds from a governmental body. *See* Attorney General Opinion JM-821; Open Records Decision Nos. 1 (1973), 228 at 2. You provided our office a copy of the council's by-laws, which states that the council's mission is "[t]o provide infrastructure and leadership necessary to sustain an inclusive healthcare system within" Trauma Service Area L. We note the state of Texas is divided into twenty-two trauma service areas, including Trauma Service Area L, as part of a statewide emergency services and trauma care system under chapter 773 of the Health and Safety Code.[1] *See generally* Health & Safety Code §§ 773.111-124; *see also* Tex. Admin. Code § 157.122. We further note the council was formed pursuant to section 157.123 of Title 25 of the Texas Administration Code in order to provide services to Trauma Service Area L. *See* 25 Tex. Admin. Code § 157.123. Additionally, section 773.1135 of the Health and Safety Code provides that DSHS "shall provide performance measures for regional advisory councils in trauma service areas" in order to promote the provision of a minimum level of emergency medical services in a trauma service area, promote the provision of quality care and service by the emergency medical services and trauma care system, and maximize the accuracy of information provided by a regional advisory council to DSHS or the Bureau of Emergency Management for increased council effectiveness. *See* Health & Safety Code § 773.1135(1)-(3). We also note the council's 2012 EMS Tobacco/Regional Advisory Councils grant program agreement with DSHS provides that DSHS "will provide funding from the Tobacco Fund Endowment . . . to assist the [council] in maintaining and improving the Texas Emergency Medical Services (EMS)/Trauma System to reduce morbidity and mortality due to injuries." The council's other agreements with DSHS contain similar provisions. Accordingly, we find

[1]We note Trauma Service Area L is made up of the following counties: Bell, Coryell, Hamilton, Lampasas, Milam, and Mills.

that the council and DSHS share a common purpose and objective such that an agency-type relationship is created. *See* Open Records Decision No. 621 (1993) at 9. Accordingly, we conclude the council falls within the definition of a "governmental body" under section 552.003(1)(A)(xii) of the Government Code. Consequently, the submitted information is subject to the Act and must be released unless it is subject to an exception to public disclosure under the Act. *See* ORD 602 at 5; *see also* Gov't Code §§ 552.002(a), .006, .021. Accordingly, we will address your claimed exceptions under the Act.

Next, section 552.301 prescribes procedures a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure. *See* Gov't Code § 552.301(a). Section 552.301(b) requires the governmental body to ask for the attorney general's decision and claim its exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request for information, a signed statement of the date of the governmental body's receipt of the request or evidence sufficient to establish the date of receipt. *See id.* § 552.301(e)(1)(C). Section 552.302 of the Government Code provides that if a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

In this instance, the submitted request for information is dated January 17, 2013. However, you have not provided this office with a signed statement or sufficient evidence showing the date the council received the written request. We note the envelope in which the council requested a ruling from this office was postmarked February 4, 2013, which is more than ten business days after January 17, 2013. Additionally, the envelope in which the council submitted the information required by section 552.301(e) to this office was postmarked February 12, 2013, which is more than fifteen business days after January 17, 2013. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we are unable to determine that the council complied with its deadlines pursuant to section 552.301. Therefore, the submitted information is presumed to be public under section 552.302. This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision No. 630 at 3 (1994). You claim section 552.103 of the Government Code for the submitted information. However, section 552.103 is discretionary in nature. This section serves to protect a governmental body's interests and may be waived; as such, it does not

constitute a compelling reason to withhold information. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, the submitted information may not be withheld under section 552.103 of the Government Code. However, as section 552.137 of the Government Code can provide a compelling reason for non-disclosure, we will address the applicability of that section to the submitted information.[2]

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)–(c). Accordingly, the council must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release. The remaining information must be released.[3]

---

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

[3]We note the information being released contains information regarding the requestor, which the council might be required to withhold from the public under section 552.117 of the Government Code. Because this exception protects personal privacy, the requestor has a right of access to her own information. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Should the council receive another request for this information from a different requestor, the council is authorized to withhold this information pertaining to the requestor under section 552.024(c) of the Government Code without requesting a decision under the Act if the requestor timely requested confidentiality for the information. *See* Gov't Code § 552.024(c). If the requestor did not timely request confidentiality, we further note section 552.147(b) authorizes the council to withhold the requestor's social security number without requesting a decision under the Act. *See* Gov't Code § 552.147(b). We also note the information being released contains the requestor's own e-mail addresses, to which the requestor has a right of access pursuant to section 552.137(b) of the Government Code. *See* Gov't Code § 552.137(b). Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision. Accordingly, if the council receives another request from an individual other than this requestor, the council is authorized to withhold this requestor's e-mail addresses under section 552.137 without the necessity of requesting an attorney general decision.

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, 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, toll free, at (888) 672-6787.

Sincerely,

Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/bhf

Ref: ID# 483666

Enc. Submitted documents

c: Requestor
(w/o enclosures)