



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 17, 2013

Mr. Clark Richards
Counsel for channelAustin
Richards, Rodriguez & Skeith, L.L.P.
816 Congress Avenue, Suite 1200
Austin, Texas 78701

OR2013-06275

Dear Mr. Richards:

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# 484386.

Public Access Community Television, Inc. d/b/a channelAustin ("channelAustin"), which you represent, received a request for (1) all employee drug screenings during a specified time period; (2) "all the names and contact information of any children who are at channel lost in the last [thirty-six] months"; and (3) names and contact information of children involved in specified incidents at channelAustin. You claim channelAustin is not a governmental body and, thus, the requested information is not public information under the Act. In the alternative, you claim some of the submitted information is excepted from disclosure under sections 552.101, 552.137, and 552.148 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, we address the threshold issue of whether channelAustin 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. That section contains the following description of an entity as within the meaning of a “governmental body”:

[T]he 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). The term “public funds” is defined in the Act as “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).

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 (internal quotations omitted) (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* [Open Records Decision No.] 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. (omissions in original). 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. *Id.* at 230-31. Both the NCAA and the SWC were associations made up of both private and public universities. *Id.* at 226. 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. *Id.* at 231. Rather, the NCAA and the SWC provided “specific and gaugeable services” in return for the funds that they received from their member public institutions. *Id.*; 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. 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, “Even 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 [c]ommission with public funds within the meaning of [the predecessor to section 552.003].” *Id.* Accordingly, this office determined the commission to be a governmental body for purposes of the Act. *Id.*

In Open Records Decision No. 602 (1992), this office 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. 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 one would expect to find 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 involve 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 channelAustin is a nonprofit organization. You state the majority of channelAustin's youth activities are not supported by public funds; rather, these programs rely on fee for service income and private donations. However, you acknowledge one event, iYouth Fusion Fest, is supported in part by a grant from the City of Austin (the "city") Cultural Arts Office. Based on your statements, we determine the funds provided to channelAustin for the iYouth Fusion Fest are public funds within the meaning of section 552.003. *See* Gov't Code § 552.003(1)(A)(xii).

As previously noted, however, the Act does not apply to private persons or businesses simply because they receive funds from a governmental body. *See* Attorney General Opinion JM-821; ORDs 1, 228 at 2. Nevertheless, if a governmental body makes an unrestricted grant of funds to a private entity to use for its general support, the private entity is a governmental body subject to the Act. *See* Attorney General Opinion JM-821; ORD 228 at 2.

Although you state channelAustin's youth recreational programming is provided under its own general charter supported by private donations and fee for service income and not pursuant to its contract with the city, we note that in Open Records Letter No. 2011-17967 (2011), our office previously ruled that channelAustin is a governmental body subject to the

Act. In that ruling, we reviewed the contract between channelAustin and the city, and concluded the public funding received by channelAustin is used for general support rather than payment for specific services. Furthermore, we found that channelAustin and the city share a common purpose and objective such that an agency-type relationship is created. *See* Open Records Decision No. 621 at 7 (1993); *see also* Local Gov't Code § 380.001(a), (b) (providing that governing body of municipality may establish and provide for administration of one or more programs, including programs for making loans and grants of public money and providing personnel and services of the municipality, to promote state or local economic development and to stimulate business and commercial activity in the municipality). Therefore, we concluded channelAustin falls within the definition of a "governmental body" under the Act. We are unaware of any change in the law, facts, and circumstances on which Open Records Letter No. 2011-17967 was based. Thus, we will adhere to our determination in the prior ruling that channelAustin is a governmental body subject to the Act. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)). Accordingly, we will address your arguments against disclosure of the submitted information.

Next, you state channelAustin does not maintain information responsive to items two and three of the request for information. The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). As you have submitted information for our review, we presume channelAustin has made a good faith effort to relate the request to information it maintains.

We note you have not submitted information responsive to category one of the request for information. To the extent any information responsive to this portion of the request existed on the date channelAustin received the request, we assume channelAustin has released it. If channelAustin has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the constitutional right to privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See* Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters

related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the information at issue, we find you have failed to demonstrate how any portion of the information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, channelAustin may not withhold any of the submitted information at issue under section 552.101 of the Government Code on the basis of constitutional privacy.

You raise section 552.148 of the Government Code for portions of the submitted information. Section 552.148 provides:

- (a) In this section, "minor" means a person younger than 18 years of age.
- (b) The following information maintained by a municipality for purposes related to the participation by a minor in a recreational program or activity is excepted from the requirements of Section 552.021:
 - (1) the name, age, home address, home telephone number, or social security number of the minor;
 - (2) a photograph of the minor; and
 - (3) the name of the minor's parent or legal guardian.

Gov't Code § 552.148. You state the submitted information includes the names and contact information of minors who participate in the channelAustin's youth recreational programming. You further state because the youth recreational programming is supported by funds from the city, the information at issue qualifies as information maintained for a municipality for purposes related to the participation by minors in a recreational program or activity. Accordingly, channelAustin must withhold the information we have marked pursuant to section 552.148 of the Government Code. However, upon review, we find the remaining information at issue does not consist of the types of information that must be withheld under section 552.148(b). Accordingly, none of the remaining information may be withheld under section 552.148 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c). *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to the work e-mail address of an employee of a

governmental body because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. Upon review, we find channelAustin must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. We note the remaining e-mail address at issue falls under subsection 552.137(c); therefore, channelAustin may not withhold this address under section 552.137 of the Government Code.

In summary, channelAustin must withhold the information we have marked under section 552.148 of the Government Code, and the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners consent to release. The remaining information must be released to the requestor.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 484386

Enc. Submitted documents

c: Requestor
(w/o enclosures)