



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 6, 2013

Mr. J. Mark Smith
Vice President of Administration and General Counsel
Harris County Emergency Corps
2800 Aldine Bender Road
Houston, Texas 77032

OR2013-13614

Dear Mr. Smith:

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# 495484.

The Harris County Emergency Corps (the "corps") received a request for information related to mutual aid requests for posting by Cypress Creek Emergency Medical Services ("EMS") to the corps during a specified period of time and information related to patient contacts by the corps within the Cypress Creek EMS district. You state you have no information responsive to portions of the request.¹ You claim the corps is not a governmental body subject to the Act. Alternatively, you claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered your arguments and reviewed the submitted information.

We first address the threshold issue of whether the corps 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,

¹The 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 dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

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).

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 id.* 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 SWC 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 [the predecessor to section 552.003].” *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.*

Additionally, Attorney General Opinion JM-821 addressed whether a volunteer fire department was a governmental body. "Whether or not a particular nonprofit volunteer fire department [is a governmental body subject to the Act] depends on the circumstances in each case, including the terms of the contract between the department and the public entity." *Id.* at 5 (citation omitted). 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.* In Attorney General Opinion JM-821, this office held the Cy-Fair Volunteer Fire Department ("Cy-Fair") was a governmental body for purposes of the Act's predecessor to the extent it was supported by public funds received pursuant to its contract with the Harris County Rural Fire Prevention District No. 9 ("RFPD"). *See id.* In issuing that opinion, this office analyzed the contract between Cy-Fair and RFPD, noting Cy-Fair received public funds to provide all of RFPD's needed services. *See id.* This office also noted the contract provided Cy-Fair must submit one-year operating budgets and a three-year capital expenditure budget to RFPD for approval. Consequently, this office found the contract provided for the general support of Cy-Fair for purposes of the Act's predecessor. *Id.*

In this instance, you inform us the corps is a private, non-profit corporation that entered into a contract to provide emergency services for Harris County Emergency Services District No. 1 (the "district"). You have submitted the "Ambulance and Emergency Services Agreement" (the "agreement") between the corps and the district. The agreement states the district "desires to utilize the services of [the corps] to provide such Emergency Medical Services, patient billing services, and other services as enumerated in . . . [the] [a]greement[.]" The agreement states the district will provide the corps with an initial refundable deposit of three million dollars. Further, the agreement provides the district the right to inspect patient care records, and the corps must provide the district with its annual audited financial statements and its quarterly income statements. Additionally, the district

must provide the corps with a report of the income received from billing and collecting monies monthly. The agreement also provides various other reports must be provided to the district. Therefore, based on our review of the contract, we find the district provides general support to the corps. Further, we find the specific services the corps provides pursuant to the contract comprise traditional governmental functions. See ORD 621 at 8 n.10. Thus, the corps is a governmental body pursuant to section 552.003. See Attorney General Opinion JM-821 at 5; see also Gov't Code § 552.003(1)(A)(xii); Open Records Decision No. 621 (1993) (although Arlington Economic Development Foundation receives private contributions, entire foundation is governmental body under section 552.003 because city's public funds provide general support for operation of foundation and all information in foundation's possession must be released unless Act's exceptions apply). Accordingly, the corps records are subject to the Act, and we will consider your arguments against disclosure.

Next, we must address the corps's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. See Gov't Code § 552.301(b). Further, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. See *id.* § 552.301(e). The corps received the request for information on April 23, 2012. Accordingly, you were required to provide the information required by subsection 552.301(b) by May 7, 2012. Moreover, you were required to provide the information required by subsection 552.301(e) by May 14, 2012. However, the envelope in which the corps provided the information required by subsections 552.301(b) and 552.301(e) was postmarked May 28, 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 conclude the corps failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. See *id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); see also Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by

another source of law or affects third party interests. *See* ORD 630. The corps claims the submitted information is excepted from disclosure under section 552.101 of the Government Code. Because section 552.101 can provide a compelling reason to overcome the presumption of openness, we will address the applicability of section 552.101 to the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You raise section 552.101 in conjunction with the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") for portions of the submitted information. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See* ORD 681 at 8; *see also* Gov't Code §§ 552.002, .003, .021. We therefore held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the corps may not withhold any portion of the information at issue on that basis.

Section 552.101 of the Government Code also encompasses information protected by section 773.091 of the Health and Safety Code, which provides in part:

- (b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical

supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

Health & Safety Code § 773.091(b). Although you contend section 773.091 is applicable to the submitted information, none of the submitted information consists of or was obtained from EMS records. Therefore, the corps may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 773.091(b) of the Health and Safety Code. As you raise no further objections to disclosure, the submitted information must be released.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/dls

Ref: ID# 495484

Enc. Submitted documents

c: Requestor
(w/o enclosures)

