



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 18, 2014

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Ms. Kimberly R. Jessett
Counsel for Cypress Creek Emergency Medical Services
Litchfield Cavo LLP
One Riverway, Suite 1000
Houston, Texas 77056

OR2014-20999

Dear Ms. Jessett:

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# 543578.

Cypress Creek Emergency Medical Services, Inc. (“CCEMS”), which you represent, received a request for the payroll information of all CCEMS employees since January 1, 2013, including names, positions, annual pay, benefits, and overtime, along with the insurance policy provided to directors of CCEMS. You claim CCEMS is not a governmental body, and thus, the requested information is not subject to the Act. In the alternative, you claim the submitted information is excepted from disclosure under sections 552.101 and 552.102 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 (permitting interested third party to submit to the attorney general reasons why requested information should or should not be released).

¹We 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.

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[.]” *Id.* § 552.003(1)(A)(xii). The term “public funds” means funds of the state or of a governmental subdivision of the state. *Id.* § 552.003(5).

Both the courts and this office have previously 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 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; see Open Records Decision No. 1 (1973). Rather, the *Kneeland* court noted 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. HM-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.”

Kneeland, 850 F.2d at 228. The *Kneeland* court ultimately concluded 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 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 229-231. The *Kneeland* court concluded, although the NCAA and SWC received public funds from some of their members, neither entity was a “governmental body” for purposes of the Act because

the NCAA and the 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 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 “[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 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 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 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 a purchaser.” *Id.* at 4. We found “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 the City of Dallas provided general support to the DMA facilities and operation, making the DMA a governmental body to the extent 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.* However, those areas for which the city had not provided support were not subject to the Act. *Id.*

We note 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.*

You state CCEMS is a private, non-profit corporation which provides emergency medical services to Harris County Emergency Services District Number 11 (the “district”). You have provided a copy of your agreement with the district. The agreement states CCEMS shall provide emergency services to residents, commercial interests, and others within the district on a twenty-four hours per day basis seven days a week. The agreement further provides the district shall make monthly payments of the operating expenses the district has identified to be paid based on the operating budget of CCEMS. You assert CCEMS maintains separate accounting for the funds received from the district, and the agreement states CCEMS and all of its personnel are independent contractors and have the right to control the details of the work in providing the emergency services. However, we note the district has the right to approve CCEMS’s capital and operating budgets on an annual basis and the district may inspect CCEMS’s financial records at all reasonable times. Additionally, the agreement states the Executive Director of CCEMS shall attend all regular

monthly meetings of the district or an alternative representative in his absence. Upon review, we conclude CCEMS is supported in part by public funds. Further, we find the specific services CCEMS provides pursuant to the contract comprise traditional governmental functions. See ORD 621 at 8 n.10. Accordingly, we conclude CCEMS falls within the definition of a "governmental body" under section 552.003(1)(A)(xii) of the Government Code to the extent it is supported by district funds.

However, an organization is not necessarily a "governmental body" in its entirety. "[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" is a governmental body. Gov't Code § 552.003(1)(A)(xii); see also ORD 602 (only records of those portions of DMA that were directly supported by public funds are subject to Act). Therefore, only those records relating to those parts of CCEMS's operations that are directly supported by public funds are subject to the disclosure requirements of the Act. As we are unable to determine from examination of the submitted documentation whether CCEMS employees and directors are paid from public funds, we must rule conditionally. Thus, to the extent the requested information pertains to CCEMS operations not supported by public funds, the information at issue is not subject to the Act. To the extent the requested information pertains to CCEMS operations supported by public funds, the requested information is public information subject to the Act and must be released unless it falls within the scope of an exception to disclosure. Accordingly, we will address your arguments against disclosure of this 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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. See Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find some of the submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, CCEMS must withhold the

information at issue, a representative sample of which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate any of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, CCEMS may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert*’s interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find you have failed to demonstrate section 552.102(a) is applicable to any of the submitted information. Accordingly, CCEMS may not withhold any of the submitted information under section 552.102(a) of the Government Code.

Section 552.136 of the Government Code provides in part that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”² Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device for purposes of section 552.136. We have marked insurance policy numbers that are subject to section 552.136 of the Government Code. Accordingly, CCEMS must withhold the information we have marked under section 552.136 of the Government Code.

In summary, to the extent the information at issue pertains to CCEMS operations not supported by public funds, the information at issue is not subject to the Act. To the extent the information at issue pertains to CCEMS operations supported by public funds, CCEMS must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. CCEMS must

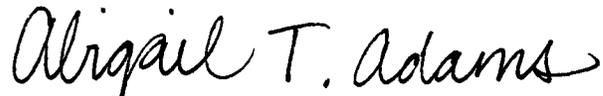
²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987).

release the remaining requested information pertaining to CCEMS operations supported by public funds.

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,

A handwritten signature in black ink that reads "Abigail T. Adams". The signature is written in a cursive, flowing style.

Abigail T. Adams
Assistant Attorney General
Open Records Division

ATA/ac

Ref: ID# 543578

Enc. Submitted documents

c: Requestor
(w/o enclosures)

COPY

Filed in The District Court
of Travis County, Texas

JA

MAR 04 2016

At 1:11 P.M.
Velva L. Price, District Clerk

CAUSE NO. D-1- GN-14-004998

CYPRESS CREEK EMS,
Plaintiff,

IN THE DISTRICT COURT

v.

KEN PAXTON, ATTORNEY GENERAL
OF TEXAS,
Defendant,

OF TRAVIS COUNTY, TEXAS

v.

WAYNE DOLCEFINO,
Intervenor.

53rd JUDICIAL DISTRICT

FINAL JUDGMENT

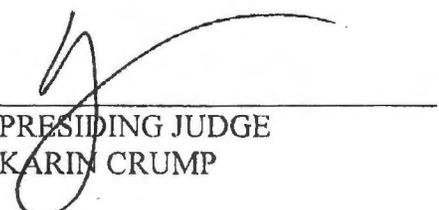
On February 29, 2016, the Court considered Plaintiff Cypress Creek EMS (CCEMS)'s request for declaratory relief and the summary judgment motions of Plaintiff and Intervenor Wayne Dolcefino. Cypress Creek EMS appeared through counsel of record, Andrew Todd McKinney, and announced ready for trial. Defendant Ken Paxton, Attorney General of Texas, appeared through counsel of record, Rosalind Leigh Hunt, and announced ready for trial. Intervenor Wayne Dolcefino appeared through counsel of record, Cristen David Feldman, and announced ready for trial. By agreement of the parties, the hearing constituted a final trial on all issues and claims for the parties' respective requests for declaratory relief.

This is a consolidated lawsuit under the Texas Public Information Act (PIA), by which CCEMS sought declaratory relief from three letter rulings of the Attorney General following the Texas Supreme Court's decision in *Greater Houston Partnership v. Paxton*, 468 S.W.3d 51 (Tex. 2015). Defendant Attorney General of Texas filed a response to the parties' summary judgment motions, concluded that CCEMS is not a "governmental body" within the meaning of *Greater Houston Partnership*, and requested that the Court grant Plaintiff CCEMS' Motion for

Summary Judgment. After reviewing the parties' respective motions and responses thereto, the summary judgment evidence and objections thereto, the pleadings on file, the arguments of counsel, and the applicable law, the Court enters the following declarations and orders:

1. IT IS ORDERED that Plaintiff CCEMS' objections to the Affidavit of Chris Feldman and Exhibit E attached thereto are OVERRULED. IT IS FURTHER ORDERED that Plaintiff CCEMS' Motion to Strike Intervenor's Summary Judgment Evidence is DENIED.
2. IT IS ORDERED that Plaintiff CCEMS' Motion for Summary Judgment is GRANTED. IT IS FURTHER ORDERED that Intervenor's Motion for Summary Judgment is DENIED.
3. IT IS ORDERED, ADJUDGED, AND DECLARED that Plaintiff CCEMS is not a governmental body under the Texas Government Code section 552.003(1)(A)(xii) and is not subject to the Texas PIA. Accordingly, CCEMS is not required to release the requested information to the requestor.
4. It is FURTHER ORDERED that all attorney's fees and costs incurred are to be borne by the parties incurring the same.
5. All relief not expressly granted herein is denied.
6. This Final Judgment disposes of all claims between the parties in each of the consolidated cases and is a final and appealable judgment.

SIGNED this 4th day of March, 2016.



PRESIDING JUDGE
KARIN CRUMP