



ATTORNEY GENERAL OF TEXAS  
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OR2014-22005

Dear Ms. Winland:

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# 545952.

The Austin DMO, Inc., d/b/a Downtown Austin Alliance (the "Alliance"), which you represent, received a request for (1) a check register, or comparable record, of the Alliance from a specified period of time; (2) any record of expenditure by the Alliance to the political action committee, "Let's Go Austin PAC," that shows the source of funds used for contributions to that political action committee; (3) any correspondence between any officer, employee, attorney, or agent of the Alliance and any officer, employee, or agent of Let's Go Austin PAC during a specified period of time; (4) and any correspondence between any officer, employee, attorney, or agent of the Alliance and the Mayor of the City of Austin (the "city"), any City Council member of the city, the City Manager of the city, the Assistant City Manager(s) of the city, or any attorney for the city about any matter involving official business of the city or of the Alliance during a specified period of time. The Alliance asserts it is not a "governmental body" subject to the Act. In the alternative, it claims the requested information is excepted from disclosure under sections 552.104 and 552.107 of the Government Code. We have considered the submitted arguments and information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

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). “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).

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 “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. Thus, the entity 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 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 (discussing 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. JM-821, *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.* 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 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 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. *See 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 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 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 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 “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.*

The Alliance argues the contract it entered into with the city expressly provides that all work and services will be performed as “an independent contractor and not as an officer, agent, servant or employee of the [c]ity.” However, an entity may not contract away its status as a governmental body under the Act. In addition, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”). Absent statutory authority, a party may not remove public information from the Act’s mandate of public disclosure. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) (without statutory authority, agency may not make information confidential by rule); Open Records Decision Nos. 541 at 3, 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to § 552.110). The relevant inquiry is whether the facts surrounding the Alliance and the nature of its relationships with the governmental bodies bring the Alliance within the definition of a governmental body under the Act. *See Greater Houston P’ship v. Abbott*, 407 S.W.3d 776, 783 (Tex. App.—Austin 2013, no pet. h.) (“[W]e will analyze [the Greater Houston Partnership’s] relationship with the City of Houston under the *Kneeland* framework as adopted by the Attorney General.”); Gov’t Code § 552.003(1)(A).

In this case, the Alliance informs us it is a Texas non-profit corporation whose members are a coalition of downtown property owners, individuals, and businesses. The Alliance asserts it has an arms-length contract with the city to provide certain improvements and services. After reviewing the submitted contract, we note although the contract imposes an obligation on the Alliance to provide certain services in exchange for a certain amount of money, the

agreement generally requires the Alliance to (1) develop Congress Avenue; (2) actively participate in transportation planning; (3) advocate for the transformation of the Northeast Quadrant into a safe, appealing, economically vital, and historically significant asset to downtown; (4) promote positive growth of downtown's retail, commercial, and residential markets; (5) provide leadership in the implementation of an initiative to cultivate a mix of local, regional, and national retailers downtown; (6) foster an environment that is supportive of cultural organizations, music, and events; (7) foster public-private partnerships to revitalize and activate downtown squares, plazas, and public spaces; (8) protect and enhance the natural environment; (9) provide leadership to facilitate appropriate aboveground and belowground infrastructure downtown; (10) provide leadership and direct services to create an appealing, welcoming, and clean downtown; (11) improve public safety and public order and reduce homelessness; (12) identify, collect, maintain, and distribute key data regarding the progress of downtown; (13) provide educational events and communications; (14) develop funding sources; (15) clearly articulate the need, advocate for, and participate in planning activities for downtown; (16) identify and develop effective relationships with key stakeholders; (17) develop and engage downtown leadership; (18) increase knowledge and interest in downtown; and (19) monitor and advocate for policy that enhances downtown's economic prosperity and competitive advantage. See Management and Improvement Services Agreement, Exh. A. Upon review of the submitted contract under the first prong of the *Kneeland* test, we find the Alliance's major contractual obligations are not specific, definite, or tied to a measurable amount of service for a certain amount of money. As in Open Records Decision No. 228, where we construed a similar contractual provision, we believe these provisions place the city in the position of "supporting" the operation of the Alliance with public funds within the meaning of section 552.003 of the Government Code. See ORD 228.

We also find the Alliance shares common purposes and objectives with the city. See *Greater Houston P'ship*, 407 S.W.3d at 785; Open Records Decision No. 621 at 9 (1993); see also Local Gov't Code § 380.001(a), (b) (providing 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). Further, we find many of the specific services the Alliance provides pursuant to the contract comprise traditional governmental functions. Accordingly, we conclude the Alliance falls within the definition of a "governmental body" under section 552.003(1)(A)(xii) of the Government Code with respect to the services it performs under the contract at issue.

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 the Alliance's operations that are directly supported by public funds are subject to the disclosure requirements of the Act. We note the requested information relates to those parts of the Alliance's operations that are directly supported by city funds. Accordingly, we will address the Alliance's arguments against disclosure of this information.

We note the Alliance has not submitted the requested check register, or comparable record. We assume, to the extent this information existed on the date the Alliance received the request, the Alliance has released it. If the Alliance has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.006, .301, .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 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. *See* ORD 541.

The Alliance states information in Attachment D relates to a draft request for proposals. The Alliance asserts the release of the information at issue could provide potential proposers with information they could use to their advantage, including information concerning the selection criteria and scope of services. The Alliance argues the potential proposers could use this information to gain an unfair competitive advantage, thereby compromising the integrity of the procurement process and potentially depriving the Alliance of the benefits of competition. Based on these representations and our review, we conclude the Alliance has demonstrated release of the information at issue could harm its interests with respect to this project. Thus, the Alliance may withhold the information in Attachment D under section 552.104 of the Government Code until such time as a contract has been executed. *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at expense of others and could be detrimental to public interest in contract under negotiation).

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client

privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Finally, the attorney-client privilege applies only to a confidential communication, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The Alliance states the information in Attachment C consists of communications involving Alliance attorneys and employees. The Alliance states the communications were made for the purpose of facilitating the rendition of professional legal services to the Alliance and these communications have remained confidential. Upon review, we find the Alliance has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the Alliance may withhold the information in Attachment C under section 552.107(1) of the Government Code.

In summary, the Alliance may withhold the information in Attachment D under section 552.104 of the Government Code and the information in Attachment C under section 552.107(1) of the Government Code.

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](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,



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Assistant Attorney General  
Open Records Division

DLW/bhf

Ref: ID# 545952

Enc. Submitted documents

c: Requestor  
(w/o enclosures)