



January 6, 2015

Mr. Rob L. Wiley
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2203 Timberloch Place, Suite 126
The Woodlands, Texas 77380

OR2015-00149

Dear Mr. Wiley:

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# 548875.

Houston Media Source ("HMS"), which you represent, received a request for the statements made by a named individual in support of the suspension of the requestor for a specified incident, video footage of the incident, and any related audio. You state HMS does not have information responsive to the portion of the request seeking video footage and any related audio.¹ You claim HMS is not a governmental body, and thus, the remaining requested information is not subject to the Act. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted arguments.

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

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).

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 contact 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 state HMS is a non-profit section 501(c)(3) corporation that operates a public access cable television channel pursuant to a contract with the City of Houston (the “city”). You assert HMS receives no funds from taxes. You explain HMS funds a portion of its operations through “equipment sales, production fees and services, and fees for teaching broadcast production classes.” However, you acknowledge HMS also receives funds from the city from a pass through of access subscriber fees paid by cable franchises to the city. Thus, we find HMS is supported in part with public funds.

You assert HMS provides its service “as an independent contractor and performs no other function for the [city].” 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 HMS and the nature of its relationships with the city bring HMS 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).

You have provided a copy of the agreement between HMS and the city. You contend HMS is not a governmental body under the Act because HMS’s contract with the city imposes specific and definite obligations on HMS to provide a measurable amount of services in exchange for specific sums of money. After reviewing the submitted contract with the city, we note HMS is required to, among other things, develop and implement strategies to (1) “ensure that top quality public access programming is available that reflects the activities, culture, concerns and interests of the citizens of the [c]ity and promotes a free exchange of ideas, information and understanding within the community;” (2) “involve the community in the development and production of public access programming including education institutions located within the service area;” and (3) “improve the viewership of public access programming by improving the quality of public access programming.” Upon

review of the submitted contract under the first prong of the *Kneeland* test, we find some of HMS's major contractual obligations are not specific, definite, or tied to a measurable amount of service for a certain amount of money. Accordingly, we find HMS and the city share a common purpose and objective such that an agency-type relationship is created. *See* Open Records Decision No. 621 at 9 (1993). The submitted contract also reveals the city has the power to audit the books and records of HMS. Further, we understand city council resolution number 85-76 provides the board of directors for HMS is to be appointed by the city's mayor and confirmed by the city council. Accordingly, we conclude HMS 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 city 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 HMS's operations that are directly supported by public funds are subject to the disclosure requirements of the Act. As we are unable to determine whether the requested information relates to HMS's operations supported by public funds, we must rule conditionally. Thus, to the extent the requested information pertains to HMS operations not supported by public funds, the requested information is not subject to the Act. To the extent the requested information pertains to HMS 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. In that event, we must address HMS's obligations under the Act.

Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is exempted from public disclosure. Pursuant to section 552.301(e), a governmental body that receives a request for information it wishes to withhold under the Act is required to submit to this office within fifteen business days of receiving the request (1) general 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* Gov't Code § 552.301(e). You state HMS received the request for information on October 6, 2014. As of the date of this letter, you have not submitted for our review a copy or representative sample of the information requested. Accordingly, we find HMS failed to comply with section 552.301 of the Government Code.

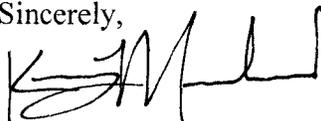
Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public

must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed to be public); *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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). We note that a compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). However, as you raise no exceptions to the disclosure of the requested information that is subject to the Act, it must be released to the requestor. If you believe the requested information that is subject to the Act is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 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, 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,



Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 548875

Enc. Submitted documents

c: Requestor
(w/o enclosures)