



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 3, 2015

Ms. Lori Fixley Winland  
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OR2015-04130

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# 555403.

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 for two specified time periods; (2) any record of expenditure by the Alliance to any political action committee that shows the source of funds used for contributions to that political action committee during a specified time period; (3) any correspondence between any officer, employee, attorney, or agent of the Alliance and any officer, employee, or agent of the political action committee "Let's Go Austin PAC" during a specified time period; and (4) 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 time period. We have considered the Alliance's assertion that it is not a "governmental body" subject to the Act.

Initially, we note the “check register, or comparable record” for one of the two time periods specified in the instant request was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-22005 (2014). In that ruling, this office determined that the Alliance was a governmental body subject to the Act with respect to the information at issue, and as the Alliance did not submit that information to this office for review, such information must be released to the requestor if it existed on the date the request was received. In response to that ruling, the Alliance filed a lawsuit against this office styled *Austin DMO, Inc. d/b/a Downtown Austin Alliance v. The Attorney Gen. of Tex.*, No. D-1-GN-14-005258 (53rd Dist. Ct., Travis County, Tex.). Accordingly, we will allow the trial court to resolve the issue of whether the information at issue in the pending lawsuit must be released to the public.

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[.]

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). “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 Partnership 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 Partnership*, 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 whether the requested information must be released under the Act.

Next, we must address the Alliance’s procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. 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* Gov’t Code § 552.301(e). In this instance, you state the Alliance received the request for information on December 10, 2014. As of the date of this letter, you have not submitted for our review a copy or representative sample of the information requested. Consequently, we find the Alliance 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 section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *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, 381-82 (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). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). We note you have not raised any exceptions to disclosure of the requested

information. Further, you have not submitted the requested information for our review. Therefore, we have no choice but to order the remaining requested information released pursuant to section 552.302 of the Government Code.

In summary, we will allow the trial court to resolve the issue of whether the information at issue in *Austin DMO* must be released to the public. The Alliance must release the remaining requested information.

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,



Lee Seidlits  
Assistant Attorney General  
Open Records Division

CLS/som

Ref: ID# 555403

c: Requestor