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ATTORNEY GENERAL OF TEXAS

March 27, 2015

Mr. Stephen M. Robinson
For the Greater Fort Bend Economic Development Council
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Houston, Texas 77027

OR2015-05916

Dear Mr. Robinson:

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# 556735.

The Fort Bend Economic Development Council (the "council"), which you represent, received a request for the council's check register for a specified time period. You first claim the council is not a governmental body, and thus, the requested information is not subject to the Act. In the alternative, you claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code and state the council will withhold bank account numbers under section 552.136 of the Government Code.¹ We have considered your comments and reviewed the submitted information. 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).

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

¹Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

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 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.*

The council informs us it is a nonprofit corporation that designs and implements programs that promote businesses in the Fort Bend County Area for the benefit of individual members and for the area as a whole. The council states approximately eleven percent of the council’s members are governmental bodies. The council asserts the contracts it enters into with governmental bodies are arms-length contracts that impose specific and finite obligations to provide a measurable amount of service in exchange for a certain amount of money and do not create an agency relationship between the council and governmental bodies. 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 council and the nature of its relationships with the governmental bodies bring the council 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, pet. granted) (“[W]e will analyze [the 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 response to this office’s request for additional information under section 552.303 of the Government Code, the council provided contracts between it and the following governmental bodies: Fort Bend County (the “county”), the Fort Bend Industrial Development Corporation, the Sugar Land 4B Corporation, the Sugar Land Development Corporation, the City of Missouri City (“Missouri City”), Stafford Economic Development Corporation, the City of Rosenberg (“Rosenberg”), and the Rosenberg Development Corporation. *See* Gov’t Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary

additional information to attorney general not later than seventh calendar day after date of receipt of notice). The council also submitted to this office its membership list for 2013-2014, which includes additional governmental bodies, as well as numerous non-governmental entities.

After reviewing the submitted contracts, we note although the contracts impose an obligation on the council to provide some certain services in exchange for a certain amount of money, the council's primary obligations are not specific or tied to a measurable amount of service. For example, the agreements variously require the council to (1) solicit industrial, business, and commercial prospects to locate in the county, Missouri City, and the City of Stafford ("Stafford");² (2) develop and implement a marketing plan to market and brand the county;³ (3) diversify the economy, increase the tax base, provide employment opportunities, and promote the general public welfare in Rosenberg;⁴ (4) recommend economic development goals, objectives, and a plan of implementation for Stafford;⁵ (5) promote and advertise the benefits of locating new business and commercial activities in the City of Sugar Land ("Sugar Land");⁶ (6) create new jobs and attract new businesses in Sugar Land;⁷ and (7) encourage the diversification of the local economy in Sugar Land to make it more impervious to state and national economic recession.⁸ We also note under two of the submitted contracts, the council will use the funds paid by the Sugar Land 4B Corporation and the Sugar Land Development Corporation for "day-to-day operations, supplies, salaries, office rentals, travel expenses, and other administrative costs[.]"⁹ Upon review of the submitted contracts under the first prong of the *Kneeland* test, we find the council's major contractual obligations are not specific, definite, or tied to a measurable amount of service for a certain amount of money. See *Greater Houston P'ship*, 407 S.W.3d at 785. As in Open Records Decision No. 228, where we construed a similar contractual provision, we believe these provisions place the contracting governmental entities in the position of "supporting" the

²See County Agreement, Art. II, sec. 2.10; Missouri City Agreement ¶C; Stafford Economic Development Corporation Agreement, sec. 2.

³See County Agreement, Art. II, sec. 2.10.

⁴See Rosenberg Agreement, sec. 2.

⁵See Stafford Economic Development Corporation Agreement, sec 2.

⁶See Sugar Land 4B Corporation Agreement, ¶D.2; Sugar Land Development Corporation Agreement, ¶D.2.

⁷*Id.*

⁸*Id.*

⁹See Sugar Land 4B Corporation Agreement, ¶C; Sugar Land Development Corporation Agreement, ¶C.

operation of the council with public funds within the meaning of section 552.003 of the Government Code. *See* ORD 228.

We also find the council shares common purposes and objectives with the county and the cities of Missouri City, Rosenberg, Stafford, and Sugar Land.¹⁰ *See Greater Houston P'ship*, 407 S.W.3d at 786-87; Open Records Decision No. 621 at 9 (1993). For example, two of the agreements require the council to (1) assist in the coordination of economic development activities and efforts among and between political subdivision, organizations, institutions, and companies in the area as directed by Sugar Land;¹¹ (2) undertake the contracted economic development activities as directed by and coordinated with Sugar Land;¹² and provide specified reports to Sugar Land.¹³ We also note five of the contracts give the contracting governmental bodies the right to appoint members to the council's Board of Directors.¹⁴ Further, we find many of the specific services the council provides pursuant to the contracts comprise traditional governmental functions. *See Greater Houston P'ship*, 407 S.W.3d at 786-87; ORD 621 at 7 n.10; *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), 381.004 (providing governing body of county 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 county, to promote state or local economic development and to stimulate business and commercial activity in the county). Accordingly, we conclude the council 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 contracts at issue.

¹⁰The council did not submit for our review other contracts it may have with any of the other governmental bodies on its membership list. Thus, we limit our conclusion to those governmental entities for which the council has submitted a contract.

¹¹*See* Sugar Land 4B Corporation Agreement, ¶D.2; Sugar Land Development Corporation Agreement, ¶D.2.

¹²*See* Sugar Land 4B Corporation Agreement, ¶D.2; Sugar Land Development Corporation Agreement, ¶D.2.

¹³*See* Sugar Land 4B Corporation Agreement, ¶E; Sugar Land Development Corporation Agreement, ¶E.

¹⁴*See* County Agreement, Art. V; Missouri City Agreement ¶D; Stafford Economic Development Corporation Agreement, sec. 5; Sugar Land 4B Corporation Agreement, ¶B; Sugar Land Development Corporation Agreement, ¶B.

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 council’s operations that are directly supported by public funds are subject to the disclosure requirements of the Act. Consequently, information relating to council operations supported by public funds is public information subject to the Act and must be released unless it falls within the scope of an exception to disclosure. Thus, we must address the council’s argument against disclosure of 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. 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 also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, protected under common-law privacy). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* ORDs. 600 at 9 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy).

Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the council must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information you marked does not identify an individual to whom the information pertains, and therefore, does not implicate any individual’s right to privacy. As you raise no further exceptions to disclosure, the remaining 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 556735

Enc. Submitted documents

c: Requestor
(w/o enclosures)