KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 26, 2015

Mr. Craig Holcomb
Executive Director
Friends of Fair Park
1121 First Avenue
Dallas, Texas 75120

OR2015-12752

Dear Mr. Holcomb:

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# 568912.

Friends of Fair Park ("Friends") received a request for information pertaining to Friends' operation of a bicycle sharing program (the "program"). You claim the requested information is not subject to the Act because Friends is not a governmental body for the purposes of the Act.[1] We have considered your arguments and reviewed the submitted information.

You assert Friends is not a governmental body, and therefore its records are not subject to the Act. 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). The determination of whether an entity is a governmental body for purposes of the Act requires an analysis of the facts

[1]Although in the alternative, Friends raises sections 552.101 and 552.110 of the Government Code, it makes no arguments to support these exceptions. Therefore, we assume Friends has withdrawn its claims these sections apply to the requested information. *See* Gov't Code §§ 552.301, .302.

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 that "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 society 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 that 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 that 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 (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 that 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. 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 that 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. 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.* 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 288 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 that "[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 [c]ommission 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 of Dallas and to maintain, operate, and manage an art museum. *See* ORD 602 at 1-2. The contract required the City of Dallas 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 that 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 that "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 that the City of Dallas provided general support to the DMA facilities and operation, making the DMA a governmental body to the extent that it received financial support from the City of Dallas. *Id.* Therefore, the DMA's records that related to programs supported by public funds were subject to the Act. *Id.*

In Attorney General Opinion MW-373 (1981), this office examined the University of Texas Law School Foundation (the "UT Law Foundation"), a nonprofit corporation that solicited donations and expended funds to benefit the University of Texas Law School (the "law school"). Pursuant to a Memorandum of Understanding, the law school provided the UT Law Foundation space in the law school building to carry out its obligations, utilities and telephone services, and reasonable use of law school equipment and personnel to coordinate the activities of the UT Law Foundation with the educational operations of the law school. This office found such services amounted to support for purposes of the Act and concluded "[s]ince the [UT Law] [F]oundation receives support from the [law school] that is financed by public funds, its records relating to the activities supported by public funds will be subject to public scrutiny." Attorney General Opinion MW-373 at 11 (citing ORD 228). The opinion noted that the purpose of the UT Law Foundation was to raise funds and provide resources for the benefit of the law school, and considered that the provision of office space and other assistance enhanced the cost effectiveness of operating the UT Law Foundation. Further, the opinion noted that the law school retained control over the relationship of the UT Law Foundation and the law school through the authority of the law school board of regents to control the use of law school property. *Id.* Thus, since the UT Law Foundation received general support from the law school, and the law school is financed by public funds, the UT Law Foundation was found to be a governmental body for purposes of the statutory predecessor of the Act. Therefore, the UT Law Foundation's records relating to the activities supported by public funds are subject to public disclosure. *Id.*

We additionally note that 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. Other aspects of a contract or relationship that involve 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.*

You inform us Friends is a non-profit citizens' group. You state Friends entered into an agreement with the City of Dallas (the "city") to operate and manage the program and have submitted a copy of the agreement. The agreement states the city will pay Friends no more than a $125,000 management fee to assist Friends in establishing the program at Fair Park and Friends is responsible for all services associated with the program that exceed $125,000, including all program expenses, taxes, maintenance, and improvements as well as collection of revenue from the operation of the program. The agreement further defines both Friends' and the city's duties and responsibilities as parties to the agreement. Thus, you argue Friends has contracted with the city to provide specific, measurable services in an arms-length transaction. Upon review, we conclude Friends receives public funds for specific measurable services and is not generally funded by the city. The agreement between Friends and the city

for operation of the program does not indicate a common purpose or objective that creates an agency-type relationship between Friends and the city. Based on your representations and our review of the submitted information, we agree the agreement is a typical arms-length contract for services. We conclude, therefore, Friends is not a governmental body subject to the Act, and it need not comply with the Act's disclosure provisions with regard to the instant request.

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,

Paige Lay

Paige Lay
Assistant Attorney General
Open Records Division

PL/bhf

Ref: ID# 568912

Enc. Submitted documents

c: Requestor