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OPINION COMMITTEE

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RQ-0229-GA

The Honorable Gregg Abbott
Attorney General of Texas
Attention: Opinion Committee Chairperson
P.O. Box 12548
Austin, Texas 78711-2548

Re: Border Health Institute, legal status and requirements

Dear Attorney General Abbott:

QUESTIONS PRESENTED

Whether the Border Health Institute ("the BHI") created under Texas Education Code Chapter 151 generally qualifies as a state agency, and whether it: (1) is entitled to sovereign immunity; (2) must comply with the Texas Open Meetings Act; (3) must comply with the Texas Public Information Act; (4) must follow state procurement and contracting rules; (5) must follow civil service rules; and (6) must obtain non-profit corporation status to be able to solicit funding.

DISCUSSION

General Status as a State Agency

To determine the status of an entity created by statute, the Texas Supreme Court has held that "[c]ommon sense dictates that important considerations...include, among other things, sources of funding, accountability, and supervision. Lohec v. Galveston County Commissioners Court, 841 S.W.2d 361, 363 (Tex. 1992). Other factors to be considered include the statutory framework in which an entity is created, its composition, and the scope of its concerns. Id. at 365. Where the proper classification of an entity is uncertain, courts must "favor more accountability

of government rather than less” since “[p]ublic policy strongly favors protecting taxpayers with strict oversight of governmental financial transactions.” *Id.*

All of the factors cited in *Lohec* support the conclusion that the BHI is an agency of the state. First, the BHI’s funding consists of appropriations by the Texas Legislature, in addition to any funding secured from other sources. Tex. Educ. Code Ann. § 151.005(a) (Vernon Supp. 2001). Second, the BHI is directly accountable to the legislature, since it must provide an annual audited financial statement and status report for each project it has undertaken to each member of the legislature whose district includes any portion of a county where the BHI is established or operating. *Id.* § 151.008. Third, although not directly supervised by the Texas Higher Education Coordinating Board (HECB), the body that oversees state agencies of higher education, *id.* § 61.051, the BHI and its activities are indirectly supervised by the HECB through the HECB’s supervision of several BHI members, *id.* § 151.009, and through the HECB’s filing of an impact statement regarding the initial implementation of the BHI legislation. *Cf.* Report of House Comm. on Higher Educ., Tex. H.B. 2025, 76th Leg., R.S. (1999) (containing an earlier version of the BHI legislation in which the BHI was to be directly supervised by the HECB). Fourth, the statutory framework in which the BHI was created is the Education Code, Title III, Higher Education, Subchapter H, Research in Higher Education. *Id.* § 151.002(a). Other entities created under Title III, such as state university systems, are considered state agencies. Op. Tex. Att’y Gen. No. JC-431, 2 (2001) (declaring that “[t]he term ‘state agency’ ...broadly defined to mean ‘a board, office, commission, department, institution, court or other agency in any branch of state government’ ...clearly includes the [Texas A & M University] System, an agency or institution in the state executive branch”); see also *Boyett v. Calvert*, 467 S.W.2d 205, 209 (Tex. Civ. App.—Austin 1971, writ ref’d n.r.e.) (holding that state university governing board members are officers of the state exercising state functions); *Rainey v. Malone*, 141 S.W.2d 713, 717 (Tex. Civ. App.—Austin 1940, no writ) (holding that state university governing board members “are public officers of the state, and (collectively as a board) constitute a department of the state government within the general meaning of that term”). By analogy, the BHI has the same status. Fifth, the composition of the BHI’s governing board is directly established by the legislature, although the board may alter its own membership over time. Tex. Educ. Code Ann. § 151.003 (Vernon Supp. 2001). Finally, although the BHI’s purpose is to provide education, research, and health care within and of relevance to the border region, the scope of its concerns is nevertheless statewide. See *Braun v. Trustees of Victoria Indep. Sch. Dist.*, 114 S.W.2d 947, 950 (Tex. Civ. App.—San Antonio 1938, no writ) (“Education is not of local interest, but is statewide. The state is as much interested in one [person’s] education as another’s, and it matters not in what locality [he or she] resides”); *Treadaway v. Whitney Indep. Sch. Dist.*, 205 S.W.2d 97, 99 (Tex. Civ. App.—Waco 1947, no writ) (holding that both education and public health services “are of interest and to the welfare of the entire public” and not “voluntarily assumed and just for the benefit of the people in some particular locality”).

Sovereign Immunity

Sovereign immunity, unless waived, protects the State of Texas, its agencies, and its officials from lawsuits for damages. *TRST Corpus, Inc. v. Financial Center, Inc.*, 9 S.W.3d 316,

322 (Tex. App.—Houston 1999, pet. denied). Linked to sovereign immunity is official immunity, which protects government employees, sued in their individual capacity for official acts. Alamo Workforce Development, Inc. v. Vann, 21 S.W.3d 428, 434 (Tex. App.—San Antonio 2000, no pet.).

To determine whether an entity is part of the government for immunity purposes, courts rely on the definition of “governmental unit” under Section 101.001(3) of the Texas Tort Claims Act, which provides as follows:

“Governmental unit” means:

(A) this state and all the several agencies of government that collectively constitute the government of this state, including other agencies bearing different designations, and all departments, bureaus, boards, commissions, offices, agencies, councils, and courts;

(B) a political subdivision of this state, including any city, county, school district, junior college district, levee improvement district, drainage district, irrigation district, water improvement district, water control and improvement district, water control and preservation district, freshwater supply district, navigation district, conservation and reclamation district, soil conservation district, communication district, public health district, and river authority;

(C) an emergency services organization; and

(D) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.

Tex. Civ. Prac. & Rem. Code Ann. § 101.001 (Vernon Supp. 2001).

Some entities are assumed to be governmental units without discussion or analysis. See, e.g., Texas Workers’ Compensation Comm’n v. City of Eagle Pass, 14 S.W.3d 801, 803 (Tex. App.—Austin 2000, pet. denied) (holding that a city, transportation authority, and joint self-insurance pool are “unquestionably” political subdivisions); Salcedo v. El Paso Hospital District, 659 S.W.2d 30, 31 (Tex. 1983) (holding that a hospital district is a political subdivision).

Other entities have been held to be governmental units because the statutes creating them expressly designate them as such. See, e.g., Gracia v. Brownsville Housing Authority, 1997 U.S. App. LEXIS 12981, 6 (5th Cir. 1997) (holding that a housing authority is a governmental unit because the Texas Local Government Code expressly provides that “for all purposes, including the application of the Texas Tort Claims Act..., a housing authority is a unit of government and the functions of a housing authority are essential governmental functions”); Rodriguez v. Texas Dep’t of Mental Health and Mental Retardation, 942 S.W.2d 53, 57 (Tex. App.—Corpus Christi 1997, no writ) (holding that a community center is a governmental unit because the Texas Mental Health Code expressly provides that such a center is “an agency of the state, a

governmental unit, and a unit of local government, as defined and specified by [the Texas Tort Claims Act]”).

Some entities have been held to be governmental units based on implied legislative intent. Such intent has been inferred from:

(1) an agency relationship with a governmental unit, Zacharie v. City of San Antonio, 952 S.W.2d 56, 59 (Tex. App.—San Antonio 1997, no pet.) (holding that the San Antonio Water System, although having “complete management and control over its [own] operation,” is an agent of the City of San Antonio and therefore entitled to governmental immunity);

(2) a statutorily-defined structure supported by government funds, Alamo Workforce Development, Inc. v. Vann, 21 S.W.3d 428, 433 (Tex. App.—San Antonio 2000, no pet.) (holding that workforce boards, formed as non-profit corporations, are entitled to sovereign immunity because they have a tier-like, statutorily-defined structure, are supported by government funds, and implement statutorily-established goals);

(3) a wholly-owned-subsiary relationship with a governmental unit, TRST Corpus, Inc. v. Financial Center, Inc., 9 S.W.3d 316, 321 (Tex. App. —Houston 1999, pet. denied) (holding that a wholly-owned subsidiary corporation formed by a governmental unit is entitled to sovereign immunity because “a lawsuit that may implicate [the subsidiary’s] assets necessarily implicates the [governmental unit’s] assets”); and

(4) the mere fact that an entity was created by the government, Gracia v. Brownsville Housing Authority, 1997 U.S. App. LEXIS 12981, 7-8 (5th Cir. 1997) (holding that, under former law, a housing authority was a governmental unit because it was “created” by the legislature and “activated” by a city); Huckabay v. Irving Hospital Authority, 879 S.W.2d 64, 66 (Tex. App.— Dallas 1993, no writ) (“Because the hospital was created by authority granted to the City of Irving by the legislature, [the hospital] is a unit of government as defined under [the Texas Tort Claims Act]”); Sharpe v. Memorial Hospital of Galveston County, 743 S.W.2d 717, 718 (Tex. App.—Houston [1st Dist.] 1987, no writ) (“[Certain statutes] provide for the creation and operation of county hospitals. Therefore, appellee, a county hospital, is a governmental unit.”).

Further, inclusion of private parties on an entity’s governing board does not bar it from being considered part of the government for purposes of sovereign immunity. For example, both community center boards of trustees and county bail bond boards include private members, Tex. Health & Safety Code Ann. §§ 534.002-004 (Vernon Supp. 2001); Tex. Occ. Code Ann. § 1704.002 (Vernon Supp. 2001), and both have been held to be governmental entities for liability purposes, Rodriguez v. Texas Dep’t of Mental Health and Mental Retardation, 942 S.W.2d 53, 57 (Tex. App.—Corpus Christi 1997, no writ); Burns v. Harris County Bail Bond Board, 139 F.3d 513, 520 (5th Cir. 1998).

Nor does engaging in activities commonly engaged in by private entities disqualify an entity from being considered part of the government for purposes of sovereign immunity. City of Corsicana v. Wren, 317 S.W.2d 516, 520 (Tex. 1958) (citing the following as examples of activities engaged in by both public and private entities: the operation of airports, railroad terminals, and ship wharves, and the providing of education, the collection of taxes, and military operations); Bennett v. Brown County Water Improvement Dist. No. One, 272 S.W.2d 498, 501 (Tex. 1954) (“[A water authority does not lose its governmental character by virtue of the fact that it generates power and sells the power to individuals, the same as a private utility”).

Taking into consideration all of the above, the BHI exhibits the characteristics of a governmental unit and is therefore entitled to sovereign immunity based on the following factors:

(1) the BHI is established by statute, Tex. Educ. Code Ann. § 151.002(a) (Vernon Supp. 2001);

(2) the BHI’s purpose is to provide education, research, and health care, id. § 151.002(b), which are governmental functions, see Rainey v. Malone, 141 S.W.2d 713, 716 (Tex. Civ. App.—Austin 1940, no writ) (“The importance of public education, not only as an appropriate, but as an essential governmental function, has always been recognized in Texas”); City of Trenton v. State of New Jersey, 262 U.S. 182, 191 (1923) (holding that governmental powers include protection against disease and care of the sick); Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a) (Vernon Supp. 2001) (providing that among a municipality’s governmental functions are health and hospital services);

(3) the BHI is supported by government funds, Tex. Educ. Code Ann. § 151.005(a) (Vernon Supp. 2001); and

(4) the BHI is accountable to the government, id. § 151.008.

Neither supporting nor refuting such a conclusion are the inclusion of private as well as public members on the BHI’s governing board, id. §151.003(a); and the overlap between its activities and the activities of private entities in the education, research, and health care arenas.

The Texas Open Meetings Act

Unless otherwise expressly permitted by law, meetings of governmental bodies in Texas must be open to the public. Tex. Gov’t Code Ann. § 551.002 (Vernon Supp. 2001). Under the Open Meetings Act, a “governmental body” is defined in relevant part as follows:

(A) a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members...[and]

(H) the governing board of a special district created by law.

Id. § 551.001(3) (“Section 551.001(3)(A)”; “Section 551.001(3)(H)”).

The Open Meetings Act is construed liberally and given a broad construction. Sierra Club v. Austin Transportation Study Policy Advisory Committee, 746 S.W.2d 298, 300 (Tex. App.—Austin 1988, writ denied); Op. Tex. Att’y Gen. No. DM-426, 4 (1996); Op. Tex. Att’y Gen. No. H-438, 2 (1974). Further, although the Act does not apply to “an ordinary non-profit corporation,” Op. Tex. Att’y Gen. No. DM-7 (1991), or a purely private organization, Tex. Att’y Gen. LO-98-061 (1998), an entity “need not be a traditional governmental entity, or be wholly devoid of private involvement, in order to be...subject to the Open Meetings Act.” Op. Tex. Att’y Gen. No. DM-284, 4 (1994).

For an entity to fall within Section 551.001(3) (A), it must: (1) be an entity within the executive or legislative department of the state; (2) be directed by one or more elected or appointed members; and (3) have supervision or control over public business or policy. Id. at 3.

Regarding the first requirement, the BHI was created under the Education Code, Title III, Higher Education, Subchapter H, Research in Higher Education. Tex. Educ. Code Ann. § 151.002(a) (Vernon Supp. 2001). Other entities created under this title, such as state university systems, are considered agencies within the executive branch of state government. Op. Tex. Att’y Gen. No. JC-431, 2 (2001) (declaring that “[t]he term ‘state agency’...clearly includes the [Texas A & M University] System, an agency or institution in the state executive branch”). By analogy the BHI has the same status.

Regarding the second requirement, “directed by one or more elected or appointed members” has been construed merely to distinguish meetings of an entity’s governing board from meetings of its employees or staff, and not to create any requirements regarding by whom or the manner in which a governing board must be elected or appointed. Op. Tex. Att’y Gen. No. H-772, 3 (1976). Thus the governing board of the BHI as designated by the legislature meets this requirement, even though its structure may be altered in the future by the board itself. See Tex. Educ. Code Ann. § 151.003 (Vernon Supp. 2001).

Regarding the third requirement, an entity has supervision or control over public business or policy if its role is more than merely advisory. Op. Tex. Att’y Gen. No. DM-284 (1994). Because the BHI’s governing board has full responsibility for its operation, Tex. Educ. Code Ann. § 151.004 (Vernon Supp. 2001), it is not merely an advisory body. Further, because it carries out governmental functions, that is, education, research, and health care, id. § 151.002(b), see Rainey v. Malone, 141 S.W.2d 713, 716 (Tex. Civ. App.—Austin 1940, no writ) (“The importance of public education, not only as an appropriate, but as an essential governmental function, has always been recognized in Texas”); City of Trenton v. State of New Jersey, 262 U.S. 182, 191 (1923) (holding that governmental powers include protection against disease and care of the sick); Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a) (Vernon Supp. 2001) (providing that among a municipality’s governmental functions are health and hospital services), the business the BHI supervises and controls is public business. Because it thus meets all the requirements of Section 551.001(3) (A), the BHI must comply with the Open Meetings Act.

Further, the BHI also meets the definition of a “special district” under Section 551.001(3)(H). A “special district” is defined as follows:

[A] limited governmental structure created to bypass normal borrowing limitations, to insulate certain activities from traditional political influence, to allocate functions to entities reflecting particular expertise, to provide services in otherwise unincorporated areas, or to accomplish a primarily local benefit or improvement, e.g., parks and planning, mosquito control, sewage removal.

Sierra Club v. Austin Transportation Study Policy Advisory Committee, 746 S.W.2d 298, 301 (Tex. App.—Austin 1988, writ denied) (holding that a four-county committee designated by the governor to bring federal highway funds into an urban area is a special district); see also Op. Tex. Att’y Gen. No. DM-426, 4-5 (1996) (declaring that a statutory regional housing authority serving several counties is a special district in part because it was created “to allocate the task of providing low-income housing to an entity with particular expertise and to accomplish a primarily local benefit or improvement”).

The BHI is created by law, Tex. Educ. Code Ann. § 151.002(a) (Vernon Supp. 2001), self-controlled and managed, id. § 151.004, and designed to allocate functions to an entity or entities with particular expertise, that is, expertise in public health care, education, and research relevant to the border region, id. § 151.002(b). Because it thus meets the requirements of a special district, as well as an entity within the legislative or executive branch, it must comply with the Open Meetings Act.

The Texas Public Information Act

Unless otherwise expressly permitted by law, information collected, assembled, or maintained by or for governmental bodies in Texas must be available to the public during normal business hours. Tex. Gov’t Code Ann. § 552.021 (Vernon Supp. 2001). Under the Public Information Act, a “governmental body” is defined in relevant part as follows:

- (i) a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members...
- (viii) the governing board of a special district; [and]
- (x) 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) (“Section 552.003(1)(A)(i)”; “Section 552.003(1)(A)(viii)”; “Section 552.003(1)(A)(x)”).

Because Sections 552.003(1)(A)(i) and (viii) of the Public Information Act are essentially the same as Sections 551.001(3)(A) and (H) of the Open Meetings Act, the same analysis applies, leading to the conclusion that the BHI must comply with the requirements of both Acts. In addition, since the BHI is supported by public funds, Tex. Educ. Code Ann. § 151.005(a) (Vernon Supp. 2001), it must also comply with the Public Information Act because it meets the definition of “governmental body” under Section 552.003(1)(A)(x).

Procurement

State procurement and contracting rules are contained in the State Purchasing and General Services Act, which applies to a “state agency,” defined as follows:

- (A) a department, commission, board, office, or other agency in the executive branch of state government created by the state constitution or a state statute...
- (C) a university system or an institution of higher education as defined by Section 61.003, Education Code, except a public junior college.

Tex. Gov’t Code Ann. § 2151.002(2) (Vernon 2000) (“Section 2151.002(2)(A)”; “Section 2151.002(2)(C)”).

The BHI was created under Title III of the Education Code. Tex. Educ. Code Ann. § 151.002(a) (Vernon Supp. 2001). Because other entities created under Title III, such as state university systems, are generally considered agencies within the executive branch of state government, Op. Tex. Att’y Gen. No. JC-431, 2 (2001) (declaring that “[t]he term ‘state agency’...clearly includes the [Texas A & M University] System, an agency or institution in the state executive branch”) by analogy, the BHI has the same status. Thus, although not defined as a university system or institution of higher education, and therefore not qualifying as a state agency under Section 2151.002(2)(C), the BHI falls within the more general category of an agency within the executive branch of state government under Section 2151.002(2)(A), thus requiring it to follow state procurement and contracting rules.

Civil Service

Although municipal and county civil service systems may be created under the Local Government Code, Tex. Loc. Gov’t Code Ann. Chapters 143 and 158 (Vernon 1999), no such system is provided by law for employees of state agencies or educational entities, and therefore the BHI need not follow civil service rules.

Non-Profit Status

Section 151.005(a) of the Texas Education Code provides as follows:

In addition to any amount appropriated by the legislature, the [BHI] may apply for and accept funds from the federal government or any other public or private entity. The

[BHI] or any member of the institute may also solicit and accept pledges, gifts, and endowments from private sources on the institute's behalf. A pledge, gift, or endowment solicited under this section must be consistent with the purposes of the institute.

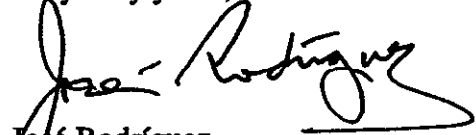
Tex. Educ. Code Ann. § 151.005(a) (Vernon Supp. 2001).

Because this section expressly authorizes the BHI to solicit funding from public and private sources, it need not obtain non-profit corporation status to be able to do so.

CONCLUSION

- (1.) The BHI appears to meet the general qualifications of a state agency.
- (2.) For liability purposes, the BHI is a governmental unit and therefore entitled to sovereign immunity.
- (3.) For purposes of the Open Meetings Act and Public Information Act, the BHI qualifies as a governmental body both as an agency within the executive branch of government and as a special district, and additionally as an entity supported by public funds under the latter Act, and thus must comply with the requirements of both Acts.
- (4.) For purposes of procurement, the BHI falls within the category of an agency within the executive branch of state government, thereby requiring it to follow state procurement and contracting rules.
- (5.) With respect to civil service rules, because there is no civil service system for employees of state agencies or education entities, the BHI need not follow such rules.
- (6.) Finally, because the BHI is expressly authorized to solicit funding from public and private sources, it need not obtain non-profit corporation status to be able to do so.

Very truly yours,


José Rodríguez
El Paso County Attorney