



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 30, 1995

Mr. Gary W. Smith  
City Attorney  
City of Greenville  
Legal Department  
P.O. Box 1049  
Greenville, Texas 75403-1049

OR95-1333

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 29266.

The Greenville Electric Utility System ("GEUS") received a written request for a "salary study the GEUS had completed during the budgeting process." The GEUS also received an oral request for another salary survey compiled by the Texas Public Power Association ("TPPA"). GEUS seeks to withhold the requested salary surveys based on sections 552.101, 552.104, 552.110, and 552.111 of the Government Code.

We first consider whether GEUS may ask for an open records decision when the request for information was not in writing. Section 552.301 of the Government Code states in part as follows:

A governmental body that receives a *written* request for information that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. [Emphasis added.]

This provision authorizes a governmental body to ask for an open records decision only when it receives a written request. Section 552.301 contains no such authorization when the request for information is not in writing. Moreover, section 552.301 does not require a governmental body to produce information in the absence of a written request. *See* Open Records Decision No. 304 (1982) at 2. Therefore, absent a written request, GEUS is not required to release the requested information. Nor may GEUS request an open records decision about the release of information that was requested orally. We, therefore, do not consider whether the exceptions you have raised apply to the TPPA salary survey.

Section 552.101 excepts from required public disclosure information that is considered confidential by law. This exception applies to information that is made confidential by judicial decisions that recognize the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). You are concerned about the release of the salaries of individuals who are not government employees. The disclosure of an individual's salary is generally intimate or embarrassing and of no legitimate concern to the public. *See* Open Records Decision Nos. 545 (1990), 373 (1983). However, the salaries in the survey are not those of individuals, but of certain employment positions. The information does not disclose an individual's salary. Therefore, we do not believe that the disclosure of any information in the survey will violate the common-law privacy of anyone, including that of the employees of the private companies surveyed.<sup>1</sup> Thus, GEUS may not withhold the requested information based on section 552.101 of the Government Code.

Nor may GEUS withhold the GEUS survey because the survey participants were told that their responses would be kept confidential. Under the Open Records Act, information is not excepted from required public disclosure merely because it is furnished with the expectation or promise that access to it would be restricted. *See* Open Records Decision Nos. 479 (1987) at 1, 180 (1977) at 2.

Section 552.104 of the Government Code applies to "information that, if released, would give advantage to a competitor or bidder." You state:

[t]he Utility is engaged in the business of wholesale power sales to entities outside the City limits of Greenville. Therefore the Utility is in competition with other public power agencies and investor owned electric utilities. Requiring the Utility to release a salary survey which would reveal staffing and assignment of individuals would put the Utility at a competitive disadvantage to other electric utilities who are not required to publicly disclose the information.

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<sup>1</sup>We recognize that a person who knows the name of an individual who occupies a certain employment position listed in the survey could ascertain that individual's salary by reviewing the survey. However, the information at issue does not by itself reveal private information about a named individual.

A governmental body may be afforded the right to claim the "competitive advantage" aspect of section 552.104 only where competition is authorized by law. Open Records Decision No. 604 (1992). We do not consider a public utility to be in competition with any other utility. No other utility provides utility service to the area served by that utility. It follows that public utilities are not authorized to compete. See V.T.C.S. art. 1446c, § 2 (containing legislative policy that public utilities are by definition monopolies in the areas they serve). Therefore, GEUS may not withhold the requested surveys based on section 552.104 of the Government Code.

You also raise section 552.110 of the Government Code, which excepts

[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

You do not assert that the surveys are trade secrets. Nor do you cite a statute or judicial decision that makes the surveys confidential. Consequently, GEUS may not withhold the surveys based on section 552.110 of the Government Code. See Open Records Decision No. 592 (1991).

Finally, you claim section 552.111 excepts from required public disclosure paragraphs 1, 4, 5, and 6 on page 1, and pages 2 through 6 of the GEUS survey. Section 552.111 excepts from required public disclosure

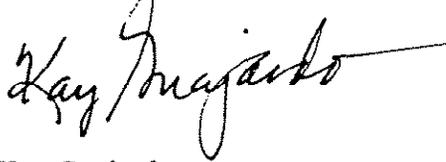
[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency . . . .

This exception applies to interagency or intragency communications that consist of advice, recommendation, and opinion that pertain to the policymaking functions of the governmental body at issue. Open Records Decision No. 615 (1993). An agency's policymaking processes do not encompass internal administrative and personnel matters. *Id.* In addition, purely factual information is not excepted from disclosure under this exception. See *id.* Information created for an agency by outside consultants acting on behalf of the agency in an official capacity may be within section 552.111. See Open Records Decision Nos. 563 (1990), 462 (1987).

We assume that GEUS employed the private company that conducted the survey in order to make recommendations for a new salary structure for 1994-95. We believe that the private company may be regarded as a consultant with a duty to advise GEUS. However, we do not consider information about the salary structure of GEUS to be information concerning its policymaking function. Such information pertains to internal administrative and personnel matters. We, therefore, conclude that GEUS may not withhold the requested information based on section 552.111 of the Government Code.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Kay Guajardo". The signature is written in a cursive style with a long horizontal stroke extending to the right.

Kay Guajardo  
Assistant Attorney General  
Open Records Division

KHG/KKO/rho

Ref.: ID# 29266

Enclosures: Submitted documents

cc: Mr. Matt Shrum  
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(w/o enclosures)