



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 26, 1996

Ms. Sheree L. Rabe
Assistant City Attorney
City of Georgetown
P.O. Box 409
Georgetown, Texas 78627-0409

OR96-1307

Dear Ms. Rabe:

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 RQ-743.

The City of Georgetown (the "city") has received two requests for information regarding business customers of the city's municipal utility. You believe that sections 552.101, 552.103, 552.104, and 552.110 of the Government Code authorize the city to withhold the requested information from required public disclosure. We agree that section 552.104 authorizes the city to withhold the requested information.

The first requestor seeks a copy of the "names, usage, rate, and sales tax, if any, of your Business Account Customers." The second requestor seeks a copy of the names and addresses of Georgetown Electric's commercial and industrial customers who are not "individuals," the amount of the customers' most recent utility bill, and the amount of sales tax paid on the most recent bill. You interpret the second request to refer to all of the utility's nonresidential customers. By "nonresidential," we understand you to refer to business customers.

We note the first requestor identifies itself as an "EXEMPT ENTITY for FULL DISCLOSURE under House Bill 859 Section 5(3)." The second requestor cites the same bill in support of its request for information. House Bill 859, Act of May 23, 1993, 73d Leg., R.S., ch. 473, 1993 Tex. Gen. Laws 1864, now codified at V.T.C.S. article 1446h, pertains to the confidentiality of certain information of a customer of a government-operated utility.¹ In general, article 1446h, section 2 deems confidential "personal

¹Article 1446h, section 1(1), V.T.C.S., defines "government-operated utility" as an entity that

information² in a customer's account records" (footnote added) if the customer has requested that the governmental body maintain the information as confidential. Article 1446h does not preclude a government-operated utility from disclosing such personal information to those persons listed in section 5 of the article. V.T.C.S. art. 1446h, § 5(6).

In Open Records Decision No. 625 (1994) this office determined that article 1446h, section 2 provides confidentiality only for information relating to natural persons; it does not protect the information of artificial entities such as corporations, partnerships, or other business associations. Open Records Decision No. 625 (1994) at 3-4. Consequently, the fact that article 1446h may prohibit a government-operated utility from releasing personal information about an individual to a particular requestor is irrelevant when the requested information concerns a business. On the other hand, we do not construe article 1446h to deem information about a nonresidential customer of a government-operated utility open for all purposes, without regard to the Open Records Act. Rather, we believe such information is subject to the Open Records Act.

Turning to the exceptions you raise, we will begin by discussing section 552.104 of the Government Code. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." In Open Records Decision No. 593 (1991), this office determined that certain situations may exist in which a governmental body properly may be deemed a "competitor" for purposes of section 552.104. In that decision, we concluded that "[w]here competition is authorized by law, we believe that a governmental body must be afforded the right to claim the 'competitive advantage' aspect" of section 552.104. *Id.* at 4. Furthermore, the decision concluded that a governmental body must demonstrate that release of requested information could cause specific harm to that body's legitimate marketplace interests. *Id.* at 9.

In regard to whether the city has statutorily authorized, legitimate marketplace interests, we note that municipalities are authorized by statute to own and operate utilities. Section 402.001(b) of the Local Government Code authorizes a municipality to "purchase, construct, or operate a utility system³ inside or outside the municipal

(Footnote continued)

(A) is a governmental body or is governed by a governmental body, as defined by . . . Article 6252-17a, [V.T.C.S.]; and

(B) provides water, wastewater, sewer, gas, garbage, electricity, or drainage services for compensation.

V.T.C.S. art. 1446h, § 1(1) (footnote omitted).

²Article 1446h, section 1(2) defines "personal information" as "an individual's address, telephone number, or social security number."

³Section 402.001(a) of the Local Government Code defines "utility system" to include an electricity system.

boundaries . . .” (Footnote added.) In addition, section 402.001(c) authorizes a municipality to extend the lines of its utility system outside the municipal boundaries and to sell electric services, among other services, to any person outside the municipal boundaries. Section 402.002 provides similarly for home-rule municipalities. *See also* V.T.C.S. art. 1111 (empowering “cities and towns including Home Rule Cities operating under this title . . . to build and purchase, to mortgage and encumber their light systems . . .”).

Chapter 402 of the Local Government Code does not explicitly authorize a municipality to compete to provide utility services, however. Nevertheless, in accordance with article I, section 26 of the Texas Constitution, Texas courts long have recognized that a municipal utility may compete with other utility companies to provide utility services within a certain area. *See City of Mason v. West Tex. Utils. Co.*, 237 S.W.2d 273, 279 (Tex. 1951). Furthermore, section 2.252(b) of the Public Utility Regulatory Act of 1995, expressly contemplates that more than one retail public utility⁴ may offer retail public utility service to any one geographic area.

We accordingly conclude that a municipal utility is specifically authorized by statute to engage in competition. Thus, a municipal utility has legitimate marketplace interests that it may seek to protect under section 552.104 of the Government Code. *See also* Open Records Decision No. 593 (1991) at 4.

We next consider whether the city has demonstrated that release of the requested information may cause specific harm to the city’s legitimate marketplace interests. You state, “Georgetown’s electric division is not a monopoly. We have dual certification in certain areas and customers may choose whether to use Georgetown’s electric service, [Texas Utilities,] or another electric company.” You also state, “Approximately 75% of Georgetown Electric’s service area is dually certificated with either Texas Utility Electric Company . . . or Pedernales Electric Co-Op. . . . This means that Georgetown Electric competes with [either an investor owned utility, such as Texas Utility Electric Company, or with an electric cooperative, such as Pedernales Electric Cooperative] for customers in approximately 75% of its service area.” In addition, the city has informed us that

Georgetown Electric has approximately 8,300 customers. Approximately 1,117 of those customers are small commercial and industrial customers. Although the commercial and industrial customers represent only 14% of the total number of customers, they represent approximately 40% of the total electric demand for Georgetown Electric.

⁴Section 2.251 of the Public Utility Regulatory Act of 1995, Act of March 29, 1995, 74th Leg., R.S., ch. 9, 1995 Tex. Sess. Law Serv. 31, 60, defines “retail public utility” for purposes of subtitle F of the Public Utility Regulatory Act of 1995 as “any person, corporation, municipality, political subdivision or agency, or cooperative corporation, now or hereafter operating, maintaining, or controlling in Texas facilities for providing retail public utility service.” *See id.* § 1.003(6), (7), (12), (defining “cooperative corporation,” “corporation,” and “person” for purposes of the Public Utility Regulatory Act of 1995.

Moreover, the city claims, because a utility company spreads the cost of services across all users, the cost of service increases as usage decreases. Thus, the loss of nonresidential customers may result in higher rates for those customers who continue to receive their utility services from the city.

Indeed, we understand that nonresidential customers form a lucrative portion of a utility company's business. For that reason, a utility's nonresidential customers are frequently sought by competing electric utility companies. See Richard J. Rudden & Robert Hornick, *Electric Utilities in the Future*, 132 FORTNIGHTLY 21, 22 (May 1, 1994). Additionally, a "city is entitled to make a reasonable profit from its own utility system." *San Antonio Indep. Sch. Dist. v. City of San Antonio*, 550 S.W.2d 262, 264 (Tex. 1976) (citing *South Tex. Public Serv. Co. v. Jahn*, 7 S.W.2d 942 (Tex. Civ. App. 1928, writ ref'd). Loss of its nonresidential customers may reduce the profit the city expects to receive from the municipal utility.

Release of the requested information would allow competitors of the city's utility to identify and solicit a municipal utility's most lucrative customers. We believe the city has demonstrated that release of the requested information may cause specific harm to the city's legitimate marketplace interests. In our opinion, however, the city has demonstrated that release of the information may specifically harm the city only to the extent the information involves customers in areas served by multiple utility companies. We find the city has shown no competitive interest in withholding information related to nonresidential customers who are located in areas served only by the city. We therefore conclude that section 552.104 of the Government Code authorizes the city to withhold from the requestors the requested information, to the extent it lists nonresidential customers located in areas not served exclusively by the city's utility company.

Given our conclusion, we need not consider whether any of the other exceptions you raise authorize the city to withhold the requested information. We are resolving this matter with an 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 should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

LRD/rho

Ref.: RQ-783

Enclosures: Submitted documents

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