



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 29, 1994

Mr. Craig Anthony Arnold
Matthews & Branscomb, P.C.
One Alamo Center
106 South Saint Mary's Street
San Antonio, Texas 78205-3692

Open Records Decision No. 625

Re: The construction of House Bill 859,
Acts 1993, 73d Leg., ch. 473 (now codified
at V.T.C.S. art. 1446h) (RQ-635)

Mr. Ruben R. Barrera
Davidson & Troilo, P.C.
613 N.W. Loop 410, Suite 1000
San Antonio, Texas 78216-5584

Ms. Beverly J. Landers
Senior Supervising Attorney
Department of Law-Claims Division
City of Austin
P.O. Box 96
Austin, Texas 78767-2910

Dear Mr. Arnold, Mr. Barrera, and Ms. Landers:

On behalf of the public utilities operated by the cities of San Antonio, Brownsville, and Austin, you have asked this office for open records rulings construing House Bill 859, Acts 1993, 73d Leg., ch. 473 (now codified at V.T.C.S. art. 1446h). The public utility for each of these cities has received a request for information regarding its customers, including the addresses and telephone numbers of some customers. You argue that some of this information is excepted from required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (formerly V.T.C.S. art. 6252-17a).¹ You seek to withhold some of the addresses and telephone numbers requested under section 552.101 of the Government Code (formerly V.T.C.S. art. 6252-17a, § 3(a)(1)) and House Bill 859.

¹The Seventy-third Legislature codified the Open Records Act as chapter 552 of the Government Code and repealed article 6252-17a, V.T.C.S. See Acts 1993, 73d Leg., ch. 268, §§ 1, 46. The codification of the Open Records Act in the Government Code is a nonsubstantive codification. *Id.* § 47.

The Open Records Act requires governmental bodies, including government-operated utilities, to disclose to the public all information that they collect, assemble, or maintain under a law or ordinance or in connection with the transaction of official business, unless the information falls within one of the exceptions listed in subchapter C. Gov't Code § 552.021. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section incorporates into the Open Records Act specific statutes that make information confidential, such as House Bill 859. See Open Records Decision No. 584 (1991) at 3.

Except as provided in section 5, House Bill 859 prohibits a "government-operated utility" from disclosing "personal information" in a customer's account records if the customer requests that this information be kept confidential. V.T.C.S. art. 1446h, § 2. "Personal information" is defined as "an individual's address, telephone number, or social security number." *Id.* § 1(2). Section 5 provides as follows:

This Act does not prohibit a government-operated utility from disclosing personal information in a customer's account records to:

- (1) an official or employee of the state or a political subdivision of the state, or the federal government acting in an official capacity;
- (2) an employee of a utility acting in connection with the employee's duties;
- (3) a consumer reporting agency;
- (4) a contractor or sub-contractor approved by and providing services to the utility or to the state, a political subdivision of the state, the federal government, or an agency of the state or federal government;
- (5) a person for whom the customer has contractually waived confidentiality for personal information; or
- (6) another entity that provides water, wastewater, sewer, gas, garbage, electricity, or drainage service for compensation.

House Bill 859 also requires that a government-operated utility "include with a bill sent to each of its customers" a notice of the customer's right to request the confidentiality of personal information under House Bill 859, including a statement of the fee applicable, and a form for the customer to use to request confidentiality. *Id.* § 4.

The requests received by the San Antonio, Brownsville, and Austin public utilities raise the following four questions regarding the interpretation of House Bill 859:²

1. Does House Bill 859 authorize a government-operated utility to withhold information about a customer that is a corporation, partnership, or other business association?
2. May a government-operated utility withhold personal information about its customers until after it has notified its customers of their rights under House Bill 859 and given the customers time to request confidentiality?
3. Is a government-operated utility required to disclose personal information about its customers who request confidentiality to persons and entities listed in section 5 of House Bill 859, or does this section merely permit a government-operated utility to disclose this information to the persons and entities listed?
4. How are the exceptions in section 5 to be applied?

Applicability to Business Associations

The documents submitted by Mr. Arnold and Ms. Landers include records regarding corporations and businesses, and thus, Mr. Arnold and Ms. Landers impliedly raise the question of whether House Bill 859 authorizes a government-operated utility to withhold information about a customer that is a corporation, partnership, or other business association. We conclude that it does not. Under House Bill 859, a government-operated utility may withhold "personal information" about its customers. "Personal information" is defined as "an *individual's* address, telephone number, or social security number." *Id.* § 1(2) (emphasis added). Although neither House Bill 859 nor the Code Construction Act, Gov't Code ch. 311, defines "individual," we believe that, at least in the context of House Bill 859, "individual" means only natural persons and does not include artificial entities such as corporations.

²Mr. Arnold and Mr. Barrera also raise additional questions in their requests for open records rulings. This office does not, however, have the authority to address these questions. None of these questions constitutes a request for "a decision . . . about whether the information is within [an] exception" under section 552.301(a) of the Government Code. Moreover, neither Mr. Arnold nor Mr. Barrera is authorized to request an opinion from the attorney general under section 402.042 of the Government Code. Therefore, section 402.045 of the Government Code prohibits us from giving legal advice or a written opinion on these questions to either Mr. Arnold or Mr. Barrera.

The purpose of House Bill 859 supports this conclusion. The purpose of the bill is to protect the personal safety and privacy of individual utility customers by permitting them to make some information about themselves confidential. House Comm. on State Affairs, Bill Analysis, H.B. 859, 73d Leg. (1993). In fact, the bill's sponsor in the House of Representatives noted that the bill is aimed solely at protecting public safety. Hearings on H.B. 859 Before the House Comm. on State Affairs, 73d Leg. (March 8, 1993) (statement of Representative Greenberg) (tape available from House Video/Audio Services Office). Permitting government-operated utilities to withhold the addresses and telephone numbers of corporations, partnerships, or other business associations would not serve this purpose.

Similarly, permitting government-operated utilities to withhold the addresses and telephone numbers of businesses would not further any recognized right to privacy. The right to privacy is designed to protect the feelings and sensibilities of human beings. Open Records Decision No. 192 (1978) at 4. The addresses and telephone numbers of businesses do not implicate anyone's feelings or sensibilities and, thus, releasing them would not infringe on anyone's right to privacy.

Furthermore, we believe that the legislature would have referred to something other than an "individual's" address, telephone number, and social security number if it had intended to make House Bill 859 applicable to corporations or other artificial entities. For example, it might have referred to a "person's" address, telephone number, and social security number. The Code Construction Act provides that "[p]erson" includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." Gov't Code § 311.005(2). Although the Code Construction Act does not define "individual," the definition of "person" implies that the word "individual" does not include corporations or other artificial entities.

Accordingly, the utilities operated by the City of San Antonio and the City of Austin must release the addresses and telephone numbers of customers that are corporations, partnerships, or other business associations. House Bill 859 does not permit them to withhold this information. Furthermore, neither Mr. Arnold nor Ms. Landers raised any other exceptions to required public disclosure regarding this information.

Disclosure Before Notification

On behalf of the City of Brownsville, Mr. Barrera asks whether a government-operated utility may withhold personal information about all its customers until after it has notified them of their rights under House Bill 859 and given them time to request confidentiality. We believe that this question should be moot by now. However, we also conclude that a government-operated utility must, in response to a request for the

information, release personal information about its customers even before it has notified them of their rights under section 4 of House Bill 859 and given them time to request confidentiality. Even after September 1, 1993,³ a government-operated utility must release personal information about a customer unless that customer asks that the information be kept confidential. Although House Bill 859 does require government-operated utilities to provide customers with notice of their rights to make information confidential, the confidentiality of the information is in no way tied to the notice. Furthermore, the legislative history of House Bill 859 indicates that it intended to place the burden on the customers to make information confidential.

Read together, the Open Records Act and House Bill 859 establish that the addresses and telephone numbers of public-utility customers are public information unless the customer requests that this information be kept confidential.⁴ V.T.C.S. art. 1446h, § 2; Gov't Code § 552.021; Open Records Decision No. 51 (1974) at 1. Section 4 of House Bill 859 does not change this reading. Section 4 merely requires each government-operated utility to give all its customers notice of their rights under House Bill 859 and a form to use to request confidentiality.⁵ Nothing in House Bill 859 ties the availability or confidentiality of information to the notice the government-operated utility must provide.

We also believe that if the legislature had intended to make personal information about customers of government-operated utilities confidential until the utility could notify the customers of their rights, then it would have done so explicitly. Section 552.024 of the Government Code (formerly V.T.C.S. art. 6252-17a, § 3A), in contrast to House Bill 859, creates a 14-day period during which a governmental body must withhold the home address and telephone number of a new employee to give the new employee time to

³House Bill 859 became effective on September 1, 1993. Acts 1993, 73d Leg., ch. 473, § 7.

⁴Theoretically, other exceptions to required public disclosure under the Open Records Act might also permit a government-operated utility to withhold this information. However, the other exceptions will apply only in rare circumstances and have not been raised in any of your requests.

⁵Section 4 reads as follows:

A government-operated utility shall include with a bill sent to each of its customers:

- (1) a notice of the customer's right to request confidentiality of personal information under this Act;
- (2) a statement of the amount of any fee applicable to the request; and
- (3) a form that the customer may use to request that confidentiality by marking an appropriate box on the form and returning it to the government-operated utility.

choose whether to allow public access to this information. The fact that the legislature did not take this approach in House Bill 859 strongly suggests that the legislature did not intend to create this sort of grace period. Furthermore, House Bill 859 does not establish a date by which the government-operated utility must provide the notice. Therefore, if we concluded that a government-operated utility could withhold personal information about its customers until after it notified its customers as required by section 4, a government-operated utility could withhold personal information about all its customers indefinitely merely by delaying the notice.

The legislative history of House Bill 859 also supports this conclusion. The bill analysis prepared by the House Research Organization indicates that the bill would not be a sweeping change in the Open Records Act or in the availability of information. Rather, the bill analysis noted that the scope of the bill is limited to government-operated utilities and that the bill "would require a person to request that information be confidential, similar to unlisted telephone numbers." House Research Organization, Bill Analysis, H.B. 859, 73d Leg. (1993).

In light of our conclusion regarding this question, the City of Brownsville must release a utility customer's address and telephone number unless, before the city receives a request for the information, the customer asks that the information be kept confidential. The character of requested information as public or not public must be determined at the time the request for information is made. Open Records Decision No. 530 (1989) at 5.⁶

Disclosure under Section 5

On behalf of the City of San Antonio, Mr. Arnold argues that section 5 of House Bill 859 does not require government-operated utilities to disclose any personal information about their customers to anyone. Rather, he argues that section 5 gives government-operated utilities the discretion to disclose personal information about customers who request confidentiality to the persons and entities listed in section 5. We disagree and conclude that the Open Records Act requires government-operated utilities to disclose information that it is not prohibited from disclosing under section 5 unless some other exception to required public disclosure applies to the information.

Before House Bill 859 was enacted, the address, telephone number, and social security number of a public-utility customer was generally available to the public. Under the Open Records Act, all information collected, assembled, or maintained by a

⁶House Bill 859 does, however, permit customers to change the designation of personal information by submitting a written request to the government-operated utility. See V.T.C.S. art. 1446h. Therefore, a government-operated utility may be required to disclose personal information about a customer to one requestor and prohibited from disclosing the same information to another requestor, when the customer asks that the information be kept confidential between the two requests.

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governmental body in the transaction of official business is public information that is available to the public unless it falls within one of the exceptions now listed in subchapter C of the act. Gov't Code § 552.021. A government-operated utility is a governmental body under the Open Records Act and collects information about its customers in the transaction of official business. Therefore, customer information is available to the public unless it falls within one of the exceptions now listed in subchapter C of the act. In the past, this office has concluded that addresses, telephone numbers, and social security numbers do not constitute information made confidential by law under the predecessor to section 552.101. Open Records Decision No. 51 (1974); *see also* Open Records Decision No. 443 (1986) at 1. *But see* Open Records Decision No. 622 (1994) (concluding that the Social Security Act makes social security numbers confidential under some circumstances). Thus, because other exceptions rarely applied to this type of information, it was generally available to the public.

House Bill 859 makes the addresses, telephone numbers, and social security numbers of certain customers confidential by law under section 552.101. In other words, it creates an exception to required public disclosure for certain information. This exception does not, however, encompass requests made by the persons or entities listed in section 5 of House Bill 859. Section 5 specifically states that "[the] Act does not prohibit a government-operated utility from disclosing personal information in a customer's account records to" certain persons or entities. Because House Bill 859 does not prohibit a government-operated utility from disclosing personal information to the persons and entities listed in section 5, the Open Records Act requires the government-operated utility to disclose the personal information to those persons and entities. *Cf.* Open Records Decision Nos. 151 (1977) at 3; 96 (1975) at 2 (concluding that the Open Records Act requires educational agencies to release information that they have the discretion to release under the federal Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g).

Mr. Arnold also objects to this reading of House Bill 859 on the grounds that it permits the persons and entities listed in section 5 to obtain information regardless of their reasons for requesting it. However, we believe that the legislative history of House Bill 859 indicates that the legislature intended this result. The bill analysis prepared by the House Research Organization indicates that the persons and entities listed in section 5 "would be excepted from the confidentiality requirement." House Research Organization, Bill Analysis, H.B. 859, 73d Leg. (1993). Furthermore, the bill analysis also states as follows:

The bill is narrowly constructed, would not affect legitimate uses of utility records and would make exceptions for all legitimate users of utility information including other governmental agencies, contractors and consumer reporting agencies. Consumer reporting

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agencies could need addresses and phone numbers to verify information on credit applications. These agencies give information to other businesses, not individuals, and generally are authorized to look into a person's credit.

Id. at 3. We believe this language indicates that the legislature determined the persons and entities listed in section 5 presumptively have legitimate uses for customers' addresses, telephone numbers, and social security numbers.

The plain language of both House Bill 859 and the Open Records Act also support this conclusion. Section 5 of House Bill 859 is cast in terms of the people or entities that might request information about customers, not in terms of the reasons they might request it. Furthermore, the Open Records Act prohibits a governmental body from asking why a particular requestor seeks information and from inquiring into the motives of the requestor. Gov't Code § 552.222; Open Records Decision Nos. 542 (1990) at 4; 508 (1988) at 2. Therefore, the reason a requestor wants information and other factors motivating the requestor are not relevant to the availability of the information under the Open Records Act. Open Records Decision Nos. 542 at 4; 508 at 2; Attorney General Opinion JM-757 (1987) at 2.

For these reasons, the City of San Antonio must release personal information about its customers to persons and entities listed in section 5 of House Bill 859. Mr. Arnold has not raised any exceptions to required public disclosure other than House Bill 859. Because we conclude that House Bill 859 does not permit a government-operated utility to withhold personal information about its customers from persons or entities listed in section 5, the City of San Antonio must release the information to these persons or entities.

Application of Section 5

The final questions raised by your requests concern how section 5 should be applied. On behalf of the City of San Antonio, Mr. Arnold asks whether the City Public Service Board ("CPS") may require the requestor, which claims to be a consumer reporting agency, to offer proof that it is a consumer reporting agency and what proof it may require. If the CPS is permitted to require proof, Mr. Arnold also asks whether the CPS must still ask for an attorney general opinion within ten days after receiving the request for information when the CPS wishes to withhold the information.

We conclude that the City of San Antonio may require the requestor to offer proof that it is a consumer reporting agency. Under the Open Records Act, a governmental body must ask for an opinion of the attorney general only if it wishes to withhold information from the requestor. Gov't Code § 552.301. Therefore, the governmental

body must, at least tentatively, determine whether the information is excepted from disclosure under the Open Records Act before asking for an attorney general opinion. Moreover, the Open Records Act presumes that governmental records are open to the public. *See* Open Records Decision No. 363 (1983). Consequently, when a governmental body tentatively determines that the information is excepted from disclosure and asks for an attorney general opinion, the burden is on the governmental body to establish how and why an exception applies to the requested information. Open Records Decision No. 532 (1989) at 1. The Open Records Act does not, however, prescribe a procedure that the governmental body must use to make its tentative determination and develop its arguments. The governmental body may use whatever process it deems appropriate, including requiring the requestor to provide proof.

We note, however, that the city must comply with the law when determining whether particular information is excepted from required public disclosure under the Open Records Act. For example, when determining whether the requestor is a consumer reporting agency under section 5 of House Bill 859, the city may not violate or require the requestor to violate the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.* The Fair Credit Reporting Act provides that consumer reporting agencies may furnish consumer reports only under certain circumstances. 15 U.S.C. § 1681b. The circumstances do not include proving that the consumer reporting agency is a consumer reporting agency. *See id.* Consumer reporting agencies and users of consumer information are liable to the consumer for any willful or negligent failure to comply with the Fair Credit Reporting Act. *Id.* §§ 1681n, 1681o. In addition, any person who knowingly and willfully obtains information on a consumer under false pretenses can be convicted of a crime. *Id.* § 1681q.

In response to the second question, we conclude that the city must comply with sections 552.301 and 552.302 of the Government Code (formerly V.T.C.S. art. 6252-17a, § 7(a)). These sections govern when a governmental body must ask for an attorney general's opinion and the consequences for failing to ask for an opinion during the prescribed time. Section 552.301 requires a governmental body to release requested information or to request a decision from the attorney general within 10 days of receiving a request for information that the governmental body wishes to withhold. When a governmental body fails to request a decision within 10 days of receiving a request for information, the information at issue is presumed public. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). This presumption may be overcome by a compelling demonstration that the information should not be released. *Hancock*, 797 S.W.2d at 381-82. A compelling demonstration can be made by showing that some other source of law makes the information confidential. Open Records Decision Nos. 552 (1990) at 1; 150 (1977) at 2.

From the evidence and arguments that we have been presented, however, we conclude that section 5 of House Bill 859 applies to the requestor seeking information from the CPS in this case. The requestor provided us with an affidavit, which at least makes a *prima facie* case that the requestor is a consumer reporting agency. We believe that the CPS may reasonably rely on this affidavit, at least in circumstances like this one when no other evidence apparently exists. Accordingly, the CPS cannot withhold the requested information under House Bill 859.

S U M M A R Y

House Bill 859, Acts 1993, 73d Leg., ch. 473 (now codified at V.T.C.S. art. 1446h), does not authorize a government-operated utility to withhold information about a customer that is a corporation, partnership, or other business association. House Bill 859 permits a government-operated utility to withhold an "individual's" address, telephone number, and social security number, and corporations, partnerships, and other business associations do not qualify as individuals in this context.

A government-operated utility must, in response to a request for information, release personal information about its customers even before it has notified them of their rights under section 4 of House Bill 859 and given them time to request confidentiality. House Bill 859 provides only that a government-operated utility may not disclose personal information about a customer if the customer requests that the information be kept confidential.

The Open Records Act does require a government-operated utility to release personal information about a customer to the persons and entities listed in section 5 of House Bill 859, even if the customer has requested confidentiality. Although section 5 of House Bill 859 appears to give government-operated utilities the discretion to release the information, the Open Records Act requires them to release information to the persons and entities listed in section 5.

The Open Records Act requires that a government-operated utility determine, at least tentatively, whether House Bill 859 permits it to withhold requested information before asking for an attorney general's opinion. The Open Records Act does not, however, prescribe the procedure that the government-operated utility must

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use to make this determination. The government-operated utility may use whatever process it deems appropriate provided that it does not violate or require anyone else to violate any provision of law.

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly slanted style.

DAN MORALES
Attorney General of Texas

JORGE VEGA

First Assistant Attorney General

DREW DURHAM

Deputy Attorney General for Criminal Justice

WILL PRYOR

Special Counsel

RENEA HICKS

State Solicitor

SARAH J. SHIRLEY

Chair, Opinion Committee

Prepared by Margaret A. Roll

Assistant Attorney General