



August 9, 2000

The Honorable Frank Madla
Chair, Committee on Intergovernmental
Relations
Texas Senate
P.O. Box 12068
Austin, TX 78711-2068

Open Records Decision No. 666

Re: Whether a municipality's disclosure to a municipally-appointed citizen advisory board of information pertaining to a municipally-owned power utility that is reasonably related to a competitive matter waives the municipality's claim to withhold such information under Section 552.131 of the Government Code.

Dear Senator Madla:

You ask whether a municipality's disclosure to a municipally-appointed citizen advisory board of information pertaining to a municipally-owned power utility that is reasonably related to a competitive matter waives the municipality's claim to withhold such information under section 552.131 of the Government Code. *See* Act of May 27, 1999, 76th Leg., R.S., ch. 405, § 46, 1999 Tex. Gen. Laws 2543, 2618 (codified at Gov't Code § 552.131). We understand the legal issue presented by your question to be whether the disclosure of information to a citizen advisory board constitutes a voluntary disclosure to the public under section 552.007(b) of the Government Code. We conclude that such disclosure constitutes an intra-governmental transfer of information and, therefore, would not prevent the governmental body from thereafter asserting an exception under the Public Information Act (the "Act") to public disclosure of the information.

Section 552.007 of the Government Code states:

(a) This chapter [Chapter 552, Government Code] does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.

(b) Public information made available under Subsection (a) must be made available to any person.

This provision prohibits a governmental body from selectively disclosing to the public information that is not confidential by law, but for which a governmental body may otherwise assert one or more of the Act's exceptions to required public disclosure. For example, in Open Records Decision No. 400 (1983), a governmental body disclosed information to a member of the public but subsequently wanted to withhold the same information under section 552.111 of the Government Code from another member of the public. This office declined to consider the section 552.111 assertion and found, pursuant to the statutory predecessor to section 552.007, that the governmental body had waived the section 552.111 assertion. *Id.* In considering what constitutes a release to the public that would implicate the Act's selective disclosure prohibition, this office has long held that the intra-agency transfer of information within a governmental body does not constitute such a release. *See* Attorney General Opinion JM-119 at 2 (1983) (finding that disclosure of information to a member of a board of trustees does not amount to a public disclosure); *see also* Open Records Decision Nos. 468 at 3 (1987) (allowing employee access to records does not constitute a disclosure to the public), 464 at 5 (1987) (distribution of evaluations by university faculty members among faculty members does not waive exceptions to disclosure with respect to general public) (overruled on other grounds by Open Records Decision No. 615 (1993)). For instance, a member of a governmental body who is acting in his or her official capacity is not a member of the public for purposes of access to information in the governmental body's possession. Thus, an authorized official may review records of the governmental body without implicating the Act's prohibition against selective disclosure. *See id.* In order to determine whether the disclosure of information to a citizen advisory board of a municipally-owned power utility would implicate the section 552.007(b) selective disclosure prohibition, we must look to the relationship between the governmental body and the citizen advisory board.

In your letter, you point out that some home rule municipalities operate their own municipal electric utilities. Section 552.131 of the Government Code excepts from disclosure information or records reasonably related to a competitive matter of the public power utility as determined by the public utility governing body. As a result of deregulation of the utility industry, private utility companies may compete with public power utilities. Because public power utilities are subject to the Act and private companies are not subject to the Act, section 552.131 was enacted to protect from public release the public power utilities' disclosure of competitive matters. In some of these cities, the city council designates an independent board to have authority over the municipal electric utility which constitutes the "public power utility governing body" as defined in section 552.131. However, in other cities, such as the City of Garland, the city council is the "public power utility governing body;" but the city council appoints a citizen advisory board to study and advise the city council on electric utility issues. You explain that members of the advisory boards are not city employees, but private citizens of the city who serve without compensation.

We have also received briefs from various cities concerning the formation and function of citizen advisory boards with regard to municipally-owned power utilities.

According to the City of Austin, citizen advisory boards are comprised of citizens appointed by the city council to evaluate issues and policies and to make recommendations. The brief states that “a citizen advisory board is merely performing tasks that the City Council is authorized to perform itself, and therefore it is acting on behalf of the City.” The Austin City Code provides for the creation of the Electrical Utility Commission to advise the city council on utility issues. The City of Austin found it necessary to create the Electrical Utility Commission because of the “complex issues, large costs, importance of electricity generation and impact of the utility on the community.” According to the City Code, the Electrical Utility Commission reviews and analyzes “all policies and procedures of the electric utility including, but not limited to, the following areas: the electric rate structure, fuel costs and charges, customer services, capital investments, new generation, facilities, selection of types of fuel, purchase of fuel, transportation of fuel, billing procedures, and the transfer of electric utility revenues from the utility fund to the general fund”

In the City of Denton, a Public Utilities Board was created by city charter to advise the city council on electric utility issues. The city council appoints the members of the Public Utilities Board, which is comprised of seven citizen members, with the City Manager and Assistant City Manager for Utilities serving as ex-officio members. The city explains that “the Public Utility Board is charged with the responsibility to review confidential information regarding competitive matters in order to make informed recommendations to the City Council in accordance with its duties specified in [the City Charter].” The City of Denton also states that the Public Utilities Board is supported by public funds.

In San Antonio, a board of trustees, the City Public Service Board, was created to act as the city’s public power utility governing body. A Citizen Advisory Committee was created by a city resolution to assist the City Public Service Board and act as a sounding board for the community and provide input into the business activities of the public power utility. According to the resolution, committee members will be selected to represent the various geographic, ethnic or racial, business and community groups served by the utility. According to the City of San Antonio, the citizen advisory board is “a volunteer board, advisory in nature, [which] will receive no compensation for [members’] participation. [San Antonio] will be financially responsible for administration of and operating costs associated with the [citizen advisory committee].” In the brief, the city states that “the governmental body creates these advisory boards so that board members can share community perspectives as to the utility’s programs and services and, upon being provided with information by the utility’s staff, provide feedback to be used in the formulation or refinement of plans or programs by the governing body.”

Having reviewed the submitted information, we see that, generally, the citizen advisory boards are created by city code or ordinance to assist and advise the city council or the public power utility governing body with or regarding matters related to the public power utility. Further, the city council or public power utility governing body provides competitive information to the citizen advisory boards in order for the citizen advisory boards to formulate recommendations on electric utility issues. Although the citizen advisory boards

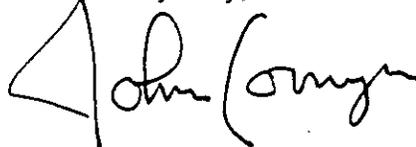
are typically merely advisory in nature and the members are not necessarily compensated, the boards are likely to be supported by public funds and to be provided with the administrative support of staff members of the governmental body. The citizen advisory boards have essentially been delegated the task of studying public power utility issues and making recommendations to the city council or the public power utility governing body. The members thus act in a similar capacity to that of an employee of the governmental body.

Based on the facts presented in the briefs concerning the function of the citizen advisory board and its relationship with the governmental body, we conclude that a citizen advisory board which studies electric utility issues and provides recommendations to the city on public utilities matters is, for purposes of the Act, a part of the governmental body that created it. As such, the governmental body's disclosure of information to the citizen advisory board is merely an intra-agency transfer of information. *See* Attorney General Opinion JM-119 at 2 (1983); *see also* Open Records Decision Nos. 468 at 3 (1987), 464 at 5 (1987). Because such a transfer of information does not amount to a public disclosure that triggers the section 552.007(b) selective disclosure prohibition, the governmental body that provides information to its citizen advisory board is not prevented from thereafter claiming an exception under the Act to the public disclosure of the information.

S U M M A R Y

A municipality's disclosure to a municipally-appointed citizen advisory board of information pertaining to a municipally-owned power utility does not constitute a release to the public as contemplated under section 552.007 of the Government Code, and therefore does not prevent the governmental body from thereafter asserting an exception under the Public Information Act to the public release of the information.

Yours very truly,

A handwritten signature in black ink, appearing to read "John Cornyn". The signature is written in a cursive style with a large, stylized initial "J".

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