



June 18, 2002

Ms. Leah Curtis Morris
Curtis, Alexander, McCampbell & Morris
P.O. Box 1256
Greenville, Texas 75403-1256

OR2002-3307

Dear Ms. Morris:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163859.

Greenville Electric Utility Systems (“GEUS”) received five requests for information related to its cable and Internet operation.¹ The requested information includes financial information, programming information, correspondence between GEUS and the National Engineering Company, Inc. (“NECI”), that relates to cable system channel offerings, the number of cable subscribers to adult entertainment channels, and communications between GEUS staff members and GEUS board members and/or members of the Greenville City Council regarding plans to offer pay per view or adult subscription programming on the GEUS cable system. You state that some of the requested information has been provided to the requestors. You claim, however, that portions of the requested information are excepted from disclosure under sections 551.086, 552.101, 552.104, 552.110, and 552.133 of the Government Code. You state that you have notified twenty-six third parties, whose proprietary interests have been implicated by the requests, of the request for information. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of

¹We note that by letter to this office dated June 13, 2002, GEUS withdraws its request for a decision concerning the adult channel subscribers’ names and addresses, based on a letter from the requestor withdrawing his request dated June 12, 2002.

exception in Public Information Act in certain circumstances). Eight of these third parties, Playboy Entertainment Group, Inc. ("Playboy"), Discovery Communications, Inc. ("Discovery"), Fox Cable Network Services L.L.C. ("Fox"), TVGateway L.L.C. ("TVGateway"), Home Box Office ("HBO"), National Cable Television Cooperative ("NCTC"), Tribune Television Company ("Tribune"), and National Engineering Consultants ("NECI"), have responded, variously arguing that portions of the information are excepted under sections 552.110, 552.131 and 552.133. We have considered the exceptions you claim and the arguments submitted by the interested third parties and the requestors, and have reviewed the submitted information.

You state that you have no information responsive to the request for a "summary of the marketing plan that GEUS has adopted regarding its cable services and how the financial obligations will be retired." The Public Information Act (the "Act") applies only to information in existence at the time the governmental body receives the request for information. *See* Open Records Decision Nos. 452 at 2-3 (1986) (document is not within the purview of the Act if, when a governmental body receives a request for it, it does not exist), 342 at 3 (1982) (Act applies only to information in existence, and does not require the governmental body to prepare new information). Furthermore, the Act does not require a governmental body to create information in response to a request. *See* ORD 452. Therefore, the Act does not apply to this information.

With regard to the request for the program guide for all adult program channels for the months of February and March of 2002, you state that GEUS has released to the requestor the program guide for March 27-31, 2002, but you indicate that GEUS does not possess the program guide for the other days. You state that it is possible that the program providers saved the information, but you state that GEUS does not have a contractual relationship with those providers. The Act applies to information that is maintained or collected in connection with the transaction of official business by a governmental body or for a governmental body and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002. As GEUS does not possess or have a right of access to the requested program guide information, the Act does not require its production.

We turn to the exceptions that have been raised. Both GEUS and NECI assert that portions of the requested information are made confidential under section 551.086 of the Government Code. This provision states in part that the Open Meetings Act, chapter 551 of the Government Code, does not require a public power utility governing body to conduct an open meeting to deliberate, vote, or take final action on any competitive matter, as that term is defined in subsection (b)(3). *See* Gov't Code § 551.086(c). A statute must explicitly require confidentiality; a confidentiality requirement will not be inferred. *See* Open Records Decision No. 465 at 4-5 (1987). Section 552.086 does not expressly make information confidential. Accordingly, you may not withhold the requested information based on section 552.101 in conjunction with section 551.086.

Section 552.104 states that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See* Open Records Decision No. 592 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from public disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision 541 (1990). After carefully reviewing the submitted information and arguments, we find that the applicability of this exception has not been demonstrated for any portion of the requested information.

Section 552.133 excepts from disclosure a public power utility's information related to a competitive matter. The exception defines "public power utility" as an "entity providing *electric or gas* utility services that is subject to the provisions of this chapter." Gov't Code § 552.133(a)(1) (emphasis added). In addition, a "competitive matter" is defined as "a utility-related matter that the public power utility governing body in good faith determines by a vote under this section is related to the public power utility's competitive activity[.]" Gov't Code § 552.133(a)(2). The provisions of section 552.133, read as a whole, apply only to electric or gas utility services. The legislative history of section 552.133 supports this conclusion. Section 552.133 was enacted as part of Senate Bill 7, which was the electric utility restructuring bill. Committee Chairman Senator David Sibley stated: "The intent of Senate Bill 7 is to open up the electric industry to competition allowing consumers to save money by shopping around for their electricity." Hearings on S.B. 7 Before the Special Senate Comm. On Electric Utility Restructuring, 76th Leg. (Feb. 22, 1999) (statement of Senator David Sibley). After carefully reviewing the information at issue, we conclude it is not "a utility-related matter" because it does not relate to "electric or gas utility services." Therefore, section 552.133 of the Government Code does not apply in this instance. Consequently, GEUS may not withhold the requested information under section 552.133 of the Government Code.

We turn to the third parties' information. Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the

business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). This office considers the applicability of six factors in assessing a trade secret claim.²

This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

²The secret trade secret factors are as follows:

- (1) the extent to which the information is known outside of [the company’s] business;
- (2) the extent to which it is known by employees and others involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979).

Playboy argues that sections six and nine of its license agreement and sections six and nine of Spice's licensing agreement are excepted from disclosure under 552.110. After reviewing Playboy's arguments and the information at issue, we conclude that Playboy has established the applicability of section 552.110(a) to the information. Accordingly, GEUS must withhold sections six and nine of the Playboy and Spice license agreements pursuant to section 552.110(a).

Next, Discovery asserts that the financial terms in the Discovery Agreement are excepted from disclosure under section 552.110(a) and (b). We have considered Discovery's arguments and reviewed the submitted Discovery Agreement. We conclude that Discovery has established that the financial terms of the Discovery Agreement are excepted from required public disclosure based on section 552.110(b) of the Government Code.

Fox argues that it does not possess portions of the requested information. The Act generally applies to information possessed by a governmental body. Gov't Code § 552.002. Thus, we only consider the required public disclosure of Fox's information that GEUS maintains, which is Fox's Affiliation Agreement. Fox argues that the information is excepted from disclosure based on a confidentiality agreement. An agreement with a governmental body to keep information confidential is not effective for purposes of the Act. A governmental body cannot agree to keep information confidential except where specifically authorized by statute to do so. *See Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1975), *cert. denied*, 430 U.S. 931 (1977).

Fox also argues that certain information is excepted from disclosure based on sections 552.110 and 552.131 of the Government Code. Section 552.131 excepts from public disclosure a business prospect's trade secret or commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the governmental body's territory. Gov't Code § 552.131(a). Fox has not argued or established that the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the governmental body's territory. Thus, section 552.131 is inapplicable to Fox's information. However, after review of the information and Fox's arguments under section 552.110, we conclude that Fox has established the applicability of section 552.110(b) to sections 4, 5, 6, 7, and 8 of its agreement.

TVGateway also objects to the public disclosure of requested information pertaining to its agreement with GEUS. TVGateway contends that its equipment sale prices, licensing fee, advertising revenue splits, intellectual property indemnification terms, marketing plans, and revenue generating opportunities and technologies are excepted from disclosure pursuant to

section 552.110(b). TVGateway argues that disclosure of this information would confer a competitive advantage on its competitors, exposing details about proprietary technology and allowing competitors to undercut TVGateway's prices. After considering TVGateway's arguments and reviewing the information, we conclude that TVGateway has established the applicability of section 552.110(b) to portions of its agreement. We have marked the portions of the agreement that are excepted from disclosure based on section 552.110(b).

HBO states that its agreements with GEUS "contain certain confidential commercial and financial information," which HBO does not wish disclosed. HBO has not, however, identified that information or provided arguments as to why it should be excepted from disclosure under the Act. Accordingly, you must release this information to the requestors. See Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

NCTC states that it objects to disclosure of its Member Agreement as disclosure would violate confidentiality provisions of certain agreements. As we have already stated, a governmental body cannot agree to keep information confidential except where specifically authorized by statute to do so. See *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In addition, although NCTC asserts that the Member Agreement contains proprietary trade secrets and confidential commercial or financial information, NCTC has not demonstrated the applicability of an exception to disclosure. Accordingly, we find that you must release information concerning NCTC to the requestors. See Gov't Code § 552.110(b); Open Records Decision No. 552 at 5 (1990).

Tribune raises section 552.110(b). Tribune argues that "disclosure of the terms of the agreement or of ancillary provisions negotiated between KDAF and GEUS could provide valuable information to another Dallas-Ft. Worth television station seeking a competitive advantage against KDAF" and that the information "could be used by a cable company in competition with GEUS to KDAF's disadvantage in future negotiations." We find that Tribune has not shown the applicability of section 552.110(b) to any portion of its agreement. See Gov't Code § 552.110(b); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

NECI raises sections 552.101 and 552.110(b), and also incorporates arguments made by GEUS in GEUS' brief to this office. NECI argues that information contained in its agreement with GEUS and reports it provided to GEUS would be of "significant value to the competitors of GEUS and the competitors of NECI" and would provide these competitors

with an unfair competitive advantage in future competitive matters. We find that NECI has not established the applicability of any exception to disclosure. *See* Gov't Code § 552.110(b); Open Records Decision No. 552 at 5 (1990).

We note that although you notified other third parties pursuant to section 552.305 of the Government Code, they have not provided this office with any arguments as to why the requested information should not be released. Therefore, we have no basis to conclude that their information is excepted from disclosure. Accordingly, we find that you must release the information of those third parties who did not submit arguments to this office. *See* Gov't Code § 552.110(b); Open Records Decision No. 552 at 5 (1990).

Finally, the submitted information contains e-mail addresses obtained from the public. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.³ Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. GEUS must, therefore, withhold e-mail addresses of members of the public under section 552.137.

In summary, based on section 552.110, GEUS must withhold the third party information relating to Playboy, Spice, Discovery, Fox, and TVGateway. Based on section 552.137, GEUS must withhold from disclosure the e-mail addresses we have marked. The following information must be released: the redacted portions of GEUS's "partial summary listing related to the construction of the Headend Building and the studio which will be used to create local programming;" copies of GEUS's contracts with programming providers; HBO's agreements with GEUS; NCTC's Member Agreements; the retransmission agreement between KDF (operated by Tribune) and GEUS; and NECI's agreement with GEUS and the reports provided by NECI to GEUS. Any remaining responsive information must also be released to the requestors

³House Bill 2589 also makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

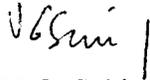
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 163859

Enc: Submitted documents

c: Mr. Denny Dunkel
6008 Trinity
Greenville, Texas 75402
(w/o enclosures)

Mr. Richard Goodrich
6243 HWY 34 South
Greenville, Texas 75474-3054
(w/o enclosures)

All 3rd Parties
(w/o enclosures)