



September 4, 2002

Mr. Harold F. Curtis, Jr.
Curtis, Alexander, McCampbell & Morris
P.O. Box 1256
Greenville, Texas 75403-1256

OR2002-4950

Dear Mr. Curtis:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168099.

The Greenville Electric Utility System (“GEUS”), which you represent, received a request for the following four items of information:

1. All information presented to the GEUS board by any GEUS staff person regarding the proposed “Adult Programming” survey. This includes company names, addresses, phone numbers, proposals, costs, proposed questions to be asked, and all other communication to the Board regarding the survey;
2. All communication from GEUS board members to GEUS staff regarding the above referenced survey;
3. All communication to and from GEUS and the companies being considered to do the above reference survey;
4. The names and addresses of all GEUS cable customers who have purchased “Adult” programming from GEUS since the inception of GEUS cable service through either pay-per-view or subscription. This includes Playboy Channel, Hot Choice, Spice Networks or any other “Adult” network made available by GEUS.

You state that much of the requested information is subject to production to the requestor. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.104, and 552.107(1) of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

With regard to the first requested item, you indicate that GEUS has released to the requestor the adult programming survey proposals except for the pricing and financial data in the proposals.¹ You assert that the portions of the proposals that relate to pricing of services are excepted from required public disclosure based on section 552.104 of the Government Code.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978).

You state that "no contract has been awarded and it is not certain when the contract will be awarded, if it is." We have reviewed the submitted information and GEUS's redaction of the proposals. We find that, based on section 552.104, GEUS may withhold the pricing and financial data in the proposals at this time. We have marked the documents accordingly.

Next, you assert that section 552.107(1) excepts from disclosure certain of the communications from GEUS Board members to GEUS staff. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990).

We have reviewed the submitted information, which you state is in original and partially redacted form. We understand you to raise section 552.107(1) for the information you redacted. We agree that a portion of the information is excepted from disclosure based on section 552.107(1). We have marked the documents accordingly.

For the small amount of information we find to be not covered by section 552.107(1), we consider your section 552.103 claim. Section 552.103 protects from required public

¹We understand that two companies, Image Analysis and Sterling Research Group, Inc., submitted proposals to the GEUS. You state that you have furnished notices of this request to these companies. Section 552.305(d) of the Government Code requires a governmental body to make a good faith effort to notify a person whose proprietary interest may be implicated by a request for information. We have received no arguments from either company for withholding the proposals. Accordingly, we do not address the question of whether those companies have a proprietary interest in the information.

disclosure information that relates to reasonably anticipated or pending litigation. You suggest that the information relates to reasonably anticipated litigation.

The governmental body that brings a section 552.103 claim has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). GEUS must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982).

You state that "[t]he possibility of litigation over this matter has been raised on several occasions and in public meetings by the Requestor or others associated with him[.]" We find that in this case, GUES has failed to establish the applicability of section 552.103. Consequently, GEUS may not withhold the information from the requestor based on section 552.103.

You claim that the names and addresses of cable subscribers are excepted from disclosure based on section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or judicial decision." Section 552.101 encompasses confidentiality provisions. You raise section 551 of title 47 of the United States Code. Section 551, which concerns the protection of subscriber privacy, reads in pertinent part, as follows:

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

(c) Disclosure of personally identifiable information

(1) Except as provided in paragraph (2), a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator.

(2) A cable operator may disclose such information if the disclosure is

(A) necessary to render, or conduct a legitimate business activity related to a cable service or other service provided by the cable operator to the subscriber;

(B) subject to subsection (h) of this section, made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed; or

(C) a disclosure of the names and addresses of subscribers to any cable service or other service, if

(i) the cable operator has provided the subscriber the opportunity to prohibit or limit such disclosure, and

(ii) the disclosure does not reveal, directly or indirectly, the

(I) extent of any viewing or other use by the subscriber of a cable service or other service provided by the cable operator, or

(II) the nature of any transaction made by the subscriber over the cable system of the cable operator; or

(D) to a governmental entity as authorized under chapter 119, 121, or 206 of Title 18, except that such disclosure shall not include records revealing cable subscriber selection of video programming from a cable operator.

Section 522(5) of title 47 of the United States Code defines a “cable operator” as “any person or group of persons”

(A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or

(B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

You have submitted a copy of Greenville’s charter amendment. You state that this amendment redefines GEUS’s role to build and operate a cable/Internet system as part of its duties as the municipally-owned electric utility. You also state that GEUS operates its cable/Internet system as “a seamless part of the electric utility.” We believe that GEUS is a “cable operator” for purposes of section 522(5). We also believe that GEUS subscriber names and addresses are “personally identifiable” information about those subscribers. You state that, in this instance, disclosure of the subscriber names and addresses would not be for any of the reasons specified in section 551. We understand that the subscribers concerned have not given their written or electronic consent to the release of their personally identifiable information. Therefore, we agree that section 551 makes this information confidential. Accordingly, based on section 552.101 of the Government Code, GEUS must not release to the requestor the requested names or addresses of cable subscribers.³

Finally, the submitted information also contains e-mail addresses obtained from the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential. 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. We have marked the e-mail addresses that are subject to section 552.137.

In summary, based on section 552.104, GEUS may withhold the pricing and financial data in the proposals at this time. Based on section 552.107(1), GEUS may withhold from

³In light of our conclusion under federal statutory law, we need not address your privacy claim for the subscriber information.

disclosure portions of the information we have marked. Based on section 552.101 of the Government Code, GEUS must not release to the requestor the requested names and addresses of cable subscribers. Based on section 552.137, GEUS must not release to the requestor the e-mail addresses we marked. GEUS must release to the requestor the remaining information.

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,

A handwritten signature in cursive script that reads "Kay Hastings".

Kay Hastings
Assistant Attorney General
Open Records Division

KH/seg

Ref: ID# 168099

Enc: Submitted documents

c: Mr. Ron Rogers
P.O. Box 883
Greenville, Texas 75403
(w/o enclosures)