



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 9, 2003

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

OR2003-2403

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# 179092.

Greenville Electric Utility Systems ("GEUS"), which you represent, received a request for (1) budgets detailing its operational expenses and electricity buying/selling costs for the past five years; (2) audit statements for the past five years; (3) reports and accompanying information regarding GEUS's debt; (4) all meeting minutes since January, 1997; (5) information, reports, studies, and memoranda regarding rate structure since January, 1997; (6) documentation regarding rate increases over the past year; (7) reports and related documents regarding a named individual's investigation of GEUS operations; (8) budgets, forecasts, profit/loss statements, audits, and other documents regarding GEUS's cable and Internet operations and comparing them to those of other cities; and (9) citizen newsletters published over the past five years. You inform us that GEUS has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.110, 552.111, and 552.133 of the Government Code. You also inform us that you have notified private parties whose proprietary interests are implicated by the present request for information.¹ We received correspondence from R.W. Beck, Inc. ("Beck"). We also received correspondence from

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

another interested third party.² We have considered all of the submitted arguments and have reviewed the submitted information.³

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Vectren Communications Services ("Vectren"). Thus, Vectren has not demonstrated that any submitted information that relates to Vectren is proprietary information for the purposes of section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990) (attorney general will grant exception to disclosure under statutory predecessor to Gov't Code § 552.110(a) if governmental body takes no position, third party makes *prima facie* case that information qualifies as trade secret under section 757 of Restatement of Torts, and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm).

Next, we address your statement that GEUS has withheld records of executive sessions of its board of directors. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that is made confidential by other statutes. Section 551.104 of the Government Code, a provision of the Open Meetings Act, makes the certified agenda or tape recording of a lawfully closed meeting confidential. A certified agenda or tape recording of a closed meeting is available for public inspection and copying only under a court order issued under section 551.104. *See* Gov't Code § 551.104(c); Open Records Decision No. 495 at 4 (1988).⁴ Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. Therefore, we agree that a certified agenda or tape recording of a properly closed executive session of GEUS's board of directors is confidential under section 552.101 of the Government Code in conjunction with section 551.104 of the Open Meetings Act and must not be released. *See* Open Records Decision No. 495 (1988).

²*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

³This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes GEUS to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

⁴We note that the Open Meetings Act does not make confidential records that were discussed or created in a closed meeting, other than a certified agenda or tape recording. *See* Open Records Decision No. 605 (1992).

You claim that other requested information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You raise section 552.107(1) with regard to a document that you describe as an opinion letter rendered by attorneys for GEUS. Based on this representation and our review of the document in question, we conclude that it is excepted from disclosure under section 552.107(1). We have marked that information accordingly.

Lastly, we address your representations with regard to Open Records Letter No. 2002-3307 (2002). You inform us that Open Records Letter No. 2002-3307 (2002) is the subject of a pending lawsuit filed by GEUS against this office over the release of information addressed in that decision. You also state that the submitted budgets, forecasts, profit/loss statements, audits, and other information regarding GEUS’s cable and Internet operations are at issue in the pending litigation. Likewise, the issues in the pending litigation clearly appear to

encompass the rest of the submitted information that is responsive to the present request. Therefore, except for the marked information that you may withhold under section 552.107(1), we do not address your claims or those of Beck with regard to the submitted information. We will allow the trial court to determine whether any of that information must be released.

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).

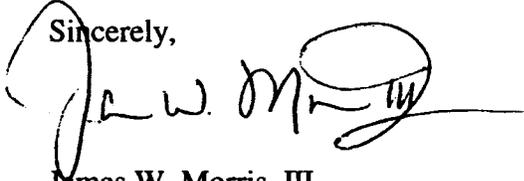
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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 black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 179092

Enc: Submitted documents

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