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AUG 30 1993

Opinion

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RQ-635

August 27, 1993

Opinion Committee

Honorable Dan Morales
Attorney General of the State of Texas
Office of the Attorney General
P. O. Box 12548, Capitol Station
Price Daniel, Sr. Building
Austin, Texas 78711-2548

GW

FILE # ML-22040-93

I.D.# 22040
PM 8/27/93

Re: Open Records Decision Request of City Public Service Board of San Antonio, Texas

Dear General Morales:

We are general counsel for City Public Service Board of San Antonio, Texas ("CPS"). CPS operates the municipally-owned gas and electric utility system of San Antonio and is an agency of the City of San Antonio.

CPS received the enclosed letters from Coe Information Publishers ("Coe") on August 20, 1993. One letter is a request for certain CPS customer and customer service records under the Texas Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a (Vernon Supp. 1993). The second letter seeks to establish Coe's right to receive confidential customer records as a consumer reporting agency under H.B. No. 859, Act of May 23, 1993, 73rd Leg., R.S., ch. 473, 1993 Tex. Sess. Law Serv. 1866 (Vernon), which takes effect September 1, 1993.

CPS believes that it is not required to provide confidential customer records to Coe under H.B. No. 859, and therefore respectfully requests an opinion with respect to the following questions:

1. Is CPS required by H.B. No. 859 to disclose to Coe personal information in a customer's account records that the customer has requested be kept confidential, or is CPS merely permitted to disclose this information?

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2. If CPS is required, or chooses, to disclose confidential customer information to consumer reporting agencies, what evidence may CPS require of Coe to establish whether it is a consumer reporting agency or what factors may CPS use in making this evaluation?

3. If CPS is allowed to seek evidence or proof of Coe's alleged status as a consumer reporting agency, is the period of time during which CPS must provide records that must be disclosed under the Texas Open Records Act (i.e., ten days) stayed pending provision of the evidence by Coe and evaluation (and perhaps investigation) of Coe's status by CPS?

CPS is a "government-operated utility" subject to H.B. No. 859. In its August 1993 customer bills, CPS included a notice of the customer's right to request confidentiality of personal information (i.e., the customer's address, telephone number, and social security number). Beginning with bills issued after September 1, the return portion of each bill will include a box marked "privacy requested", which customers may mark and return to request confidentiality.

Coe states that it is a consumer reporting agency as defined by § 1(3) of H.B. No. 859, because it "produces and sells updated consumer information reports to government agencies and private financial concerns," and therefore is excepted from the restrictions of H.B. No. 859.

CPS does not believe it is required to provide to all entities claiming to be consumer reporting agencies all personal information which customers request be kept confidential. First, § 5 of H.B. No. 859 states that the statute "does not prohibit a government-operated utility from disclosing personal information in a customer's account records to . . ." a variety of enumerated entities, including "a consumer reporting agency." The language is permissive, not mandatory, much like the language of § 14(a) of the Texas Open Records Act, which states that the "Act does not prohibit any governmental body from voluntarily making part or all of its records available to the public, unless expressly prohibited by law . . ." Tex. Rev. Civ. Stat. Ann. art. 6252-17a, § 14(c) (emphasis added). Section 2 of H.B. 859 expressly prohibits disclosure of confidential customer records, and Section 5 merely restores the option for a governmental body to disclose the information voluntarily in certain circumstances, such as to a consumer reporting agency.

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Second, Coe's reading of the statute would establish an automatic right of any of the enumerated entities to obtain all confidential customer information, regardless of reason for wanting the information, without any safeguards on the dissemination of that information to others. For example, under Coe's position, a contractor or sub-contractor for an unrelated federal housing project in Dallas could automatically obtain confidential customer information from every government-operated utility in Texas, either for its own purposes or for dissemination to others, simply because it was excepted from the restrictions of H.B. No. 859 as a contractor or subcontractor providing services to the federal government. Or all investor-owned utilities could automatically obtain all confidential consumer information from CPS, regardless of any relationship between their use of the information and the Texas Legislature's reasons for including other utilities among the enumerated entities of § 5. This clearly was not the Legislature's intent.

In addition, if CPS were required to disclose confidential customer information to consumer reporting agencies, or if CPS desired to do so, CPS believes that it may require any entity claiming that it is a consumer reporting agency to prove so. H.B. No. 859 defines "consumer reporting agency" as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." Id., § 1(3). This definition parallels the definition of consumer reporting agency in the federal Fair Credit Reporting Act, 15 U.S.C. § 1681a(f), except that H.B. No. 859 has no interstate commerce requirement. The definition is rather general and may be susceptible to abuse by persons or entities that desire confidential customer information and therefore assert that they are consumer reporting agencies without any evidence that they in fact are. CPS should be able to require the following information from any person or entity claiming to be a consumer reporting agency, including Coe:

1. copies of representative consumer reports that the entity provides to third parties;

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2. names, addresses, and phone numbers of third parties that purportedly have received these consumer reports, for purposes of verifying that such reports are indeed so provided;

3. evidence of the financial basis on which reports are provided, such as fee schedules, dues schedules, or details about the entity's cooperative nonprofit status;

4. information about the frequency and number of reports issued, and the regularity with which consumer credit information is gathered and evaluated;

5. representative examples of information gathered from other sources for evaluation and/or reporting; and/or

6. the legal name of the person or entity claiming to be a consumer reporting agency, any other names by which it is known, and the entity's address and telephone number.

Coe has voluntarily offered to provide some, although not all, of this information. CPS wishes to know whether it may require that Coe provide the information listed above, as necessary to evaluate whether Coe meets the statutory definition of a consumer reporting agency.

Finally, if CPS may require entities claiming to be consumer reporting agencies to prove their assertion, how does the process of obtaining and evaluating the evidence affect the requirement that requests for Attorney General Opinions must be made within ten days of the written request for the records if the governmental body wishes to withhold the information? Tex. Rev. Civ. Stat. Ann. art. 6252-17a § 7(a). For example, assume that an entity, such as Coe, claims that it is a consumer reporting agency and therefore may have access to confidential customer records. CPS may request that the entity provide the above-described evidence that it meets the statutory definition. If, however, the entity does not provide the requested evidence until the tenth day (or later) following its demand for the confidential records, CPS would have little or no time to evaluate the information and request an Attorney General Opinion if it believes the entity does not qualify. It would therefore seem necessary that the ten-day period be tolled while the entity responds to a reasonable request for proof that it meets the statutory definition of consumer reporting agency.

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Please do not hesitate to contact us if we can provide any further information about our Open Records opinion request.

Sincerely,

MATTHEWS & BRANSCOMB, P.C.

Craig Anthony Arnold
Craig Anthony (Tony) Arnold

Enclosures

cc: P. Stewart Schooler, Esq.
Director of Legal Services
City Public Service

Edward Clark, Esq.
Counsel for Coe Information Publishers

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Opinion Committee

September 30, 1993

FILE # ML-72546-93

I.D.# 72546-22580

Chairman, Opinions Committee
Office of the Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711

VIA CERTIFIED MAIL
NO. P 922 628 550
RETURN RECEIPT REQUESTED
AND VIA EXPRESS MAIL
NO. TB270357813

RE: Request for addresses, zip codes and telephone numbers
of municipally-owned utility customers.

Dear Chairman and Members of the Committee:

The Public Utilities Board of the City of Brownsville, Texas ("PUB") has instructed this firm to request an opinion pursuant to Section 552.301 of the Texas Government Code, formerly Tex. Rev. Civ. Stat. Ann. art. 6252-17a, § 7(a) ("Texas Open Records Act"), hereinafter referred to as the Act.

The undersigned are special legal counsel to the PUB. The PUB provides electric, water and wastewater service in its certificated service areas which include the City of Brownsville, Texas and surrounding areas.

Recently, and most importantly after September 1, 1993, the PUB has received three separate Open Records Act requests for lists of PUB customers, including names, addresses, zip codes and telephone numbers. The three open records act requests are attached to this letter as Exhibits A, B and C, and incorporated herein for all purposes.

On September 1, 1993 House Bill No. 859 became effective. This bill, which amends the Texas Open Records Act provides that a public utility such as the PUB shall notify its customers of their right to have their personal information (which includes an individual's address, telephone number and social security number) deemed confidential and not subject to disclosure. The PUB is in the process of notifying its customers of the change in the law

and their right to have their personal information be deemed confidential.

The PUB believes that the requested customer personal information is excepted from required disclosure by Section 552.022(3) of the Texas Government Code. Section 552.022(3) states that public information includes "information in an account . . . relating to the receipt or expenditure of public or other funds by a governmental body, if the information is not otherwise made confidential by law;" A customer's personal information can be deemed to be confidential pursuant to House Bill No. 859 if the customer, after notice by the utility, elects to designate his or her personal information confidential.

For the reasons stated above, the PUB submits that the exception contained in Section 552.022(3) and House Bill No. 859 apply to prevent disclosure of any customer personal information requested under the Open Records Act on or after September 1, 1993 until after the PUB has notified its customers of their right to designate their personal information confidential and allowed them sufficient time to respond and request that their personal information be deemed confidential. The PUB firmly believes that in view of House Bill 859, the most prudent course of action would be to allow the PUB to notify its customers of their right to designate their personal information confidential prior to responding to any Open Records Act requests seeking their addresses, telephone numbers or social security numbers. This course of action seems especially appropriate since the attached requests were received after September 1, 1993, the effective date of House Bill No. 859.

The PUB, therefore, respectfully requests a decision from the Attorney General on the following matters:

1. Can the PUB refuse to disclose any PUB customer personal information such as addresses, telephone numbers and social security numbers (requested under the Open Records Act on or after September 1, 1993) until after all its customers have had an opportunity to notify the PUB that their personal information be kept confidential pursuant to the provisions of House Bill No. 859?
2. The PUB employs a cyclical billing system based on 21 billing areas. In essence, the PUB sends out 21 sets of postcard bills per month over a period of 21 different days per month. Can the PUB conduct a special mass mailing to all PUB customers advising them of their right to designate their personal information confidential in lieu of sending out these notices at twenty-one (21) different times, or must the PUB's

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postcard bill to its customers be included in the notice to its customers according to the mandatory ("shall") language in Section 4 of House Bill No. 859?

If additional information is needed or if we can clarify any matter, please contact us.

Sincerely,


Ruben R. Barrera
L. Eric Friedland
For The Firm

LEF:daf
Att.
2/110



City of Austin

Founded by Congress, Republic of Texas, 1839
DEPARTMENT OF LAW-CLAIMS DIVISION
P. O. Box 96, Austin, Texas 78767-0096
Telephone (512) 499-2910

RQ-635



OCT 26 1993

October 25, 1993

COU

MARY KELLY

The Honorable Dan Morales
Texas Attorney General
Opinion Committee
209 West 14th Street
Austin, Texas 78701

FILE # ML-22932-93
L.D.# 22932

REC'D

OCT 26 93

RE: Opinion Request

Opinion Committee

Dear Attorney General Morales:

The City of Austin received, at its Utility Customer Service Office (UCSO), the attached Open Records Request (Exhibit A). The request is for certain specified information from UCSO's utility account data files. Two broad categories of information are requested: (A) all electric, water and wastewater accounts more than 90 days delinquent, and (B) all electric, water and wastewater accounts terminated since January 1, 1992, for non-payment. Additionally, the requester has asked that for each of the broad categories, certain specified sub-categories of information be provided (eg. customer names and addresses, length of time delinquent, service categories, status of collection action). Finally, the requester has asked that the information requested be provided on a computer tape or disc.

1. DATA IS NOT MAINTAINED AS REQUESTED.

UCSO maintains customer records and account histories in its LIS system. While most of the information requested is stored within the LIS system, there is no existing program to retrieve or duplicate the data in the form or format requested. Producing the information requested, in the form and format requested, requires much more than a simple computer search or mere compilation of data. Individual data fields that can be reflected in hard copy on separate screen printouts, contain differing pieces of the information requested. No one screen contains all of the information. A new program would have to be developed specifically for this request before UCSO could produce a tape or disc containing the specific information requested in this Open Records Request.

Because UCSO does not already maintain data in a format or produce a report that corresponds to this Open Records Request, if the City is required to produce the information requested, additional programming will be required. Development, testing

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an already overly burdened schedule. Programming priorities are established by the City Council and the existing schedule for new programs extends into 1995. Extensive testing must be done on any new program in order to avoid corrupting all of the City's systems that interface with the Utility account data files. At present, program modifications to the system are as much as six months to a year behind schedule.

2. SOME OF THE DATA IS CONFIDENTIAL UNDER HOUSE BILL 859.

Arguably, in order to respond to this Open Records Request, the City could run a duplicate program of all of its data files in whatever format the information is maintained; but, the file duplication would contain information subject to the nondisclosure protections of House Bill (H.B.) 859, passed by the State Legislature during the Seventy Third Legislative Session. H.B. 859 prohibits governmental utilities from disclosing personal information of their utility customers if the customers have requested nondisclosure. The legislation went into effect on September 1st. The City sent the required notices to its customers in the September bills. As responses are returned by Customers, the City is placing codes on each account that are visible when the account is accessed by computer terminal, no program has been written to exclude the confidential information (pursuant to H.B. 859) from a data file duplication. Developing, testing and implementing the confidentiality programming is a complex and major undertaking.

In consideration of the foregoing circumstances, the City of Austin, hereby requests an Open Records Opinion in response to the following questions:

1. Where the information requested is contained within the utility account data files but cannot be retrieved and duplicated in the form or format requested without the development of a new program specific to the request, is the City of Austin required under the Open Records Act ("the Act") to develop a new program for the specific purpose of producing the information as requested?
2. Where the Open Records request seeks some but not all of the information contained in the City's utility account data base but, the only way to produce all of the information requested is to provide the requester with a duplicate of all of the City's data file, is the City of Austin required to prepare a duplicate disc or tape of its entire utility account data files in response to an

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open records request for some of the information contained in those files?

- 3. Does compliance with the Open Records Act require the City of Austin provide a duplicate disc or tape of its utility account data files which include personal information where the customer has not had ample opportunity to invoke the nondisclosure protections provided by state law and where the system cannot mechanically exclude from a data file duplication of the protected information?

It should be mentioned that the LIS system is programmed to produce a monthly Aged Accounts Receivable Report which includes some but not all of the information sought in the request. A duplicate of this report could be provided to the requester without necessity for a new program being written. The requester has been advised of the availability of this report by separate letter (see Attachment B).

In submitting this opinion request, the City of Austin is aware that previous Attorney General Open Records Opinions, particularly Opinion No. 443 (1986), have hold that utility account records are subject to disclosure under the Open Records Act. We believe, however, that the circumstances described herein are more in line, though not squarely on point, with the circumstances or analysis presented in Open Records Opinion Numbers JM-672 (1983) and ORD-571 (1990).

Clarification was made in JM-672 that the Open Records Act does not impose an absolute requirement on the governmental entity to prepare an extensive new computer program to obtain particular sets of information. As in JM-672 the City of Austin should not be required to create the extensive new program necessary to respond to the subject in the form and format requested.

ORD-571 addressed the question of whether the Act included the right of direct access through computer searches which contain both public and protected information. It was determined that the act does not include such a right. Duplication of the LIS system files in order to provide the requester with all of the information sought would be tantamount to permitting an open computer search of public and protected information. Quoting from Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W. 688, 687 (Tex. 1976), cert. denied, 430 U.S. 931 (1977), ORD-571 includes the following statement about direct computer tie-ins:

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".....If a direct computer tie-in could not be effectuated without giving the Foundation access to information to which it is not entitled, then of course, the procedure would not be acceptable."

Duplication of all of the LIS files, which would include improper disclosure, is analogous to an indiscriminate tie-in access.

The City of Austin respectfully requests that the Attorney General issue an opinion in response to the questions it has raised in conjunction with this Open Records Request.

Sincerely,


Beverly J. Landers
Sr. Supervising Attorney
City of Austin

BJL:sma