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Opinion Committee



CITY OF GEORGETOWN

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Opinion Committee

June 24, 1994

BY FACSIMILE TRANSMISSION TO
FAX NUMBER (512) 463-2092:

Office of the Attorney General
Attn: Becky Payne, Director
Open Records Division
300 W. 15th Street, 12th Floor
P.O. Box 12458
Austin, Texas 78711

Re: Open Records Request from Texas Utility Auditing

Dear Ms. Payne:

The City of Georgetown has received a request from Texas Utility Auditing for a copy of the names, usage, rate and sales tax of Georgetown Electric's business customers. (See attachments.) The Finance Director for the city informs me that someone in the office contacted the company to clarify whether they were requesting all utility information or just electric customer information. They were told that Texas Utility Auditing only wants the electric information on the city's business customers. The city operates its own electric utility in competition with other electric providers in the area. As Assistant City Attorney, I have refused to release the requested information for the reasons outlined below.

Confidentiality

Sec. 552.101 of the Government Code exempts information that is deemed confidential by law. The information requested includes information that is confidential both to the individual customers and to Georgetown's electric operation. Many of our business customers do not want the information requested released, because it may compromise their competitive position. Trade secret and financial information is confidential by law. See, *Rimes v. Club Corporation of America*, 542 S.W.2d 909, 913 (Tex. Civ. App.-Dallas 1976, writ ref'd n.r.e.). Trade secrets may consist of any formula, pattern, device or combination of information used in one's business which gives one an opportunity to obtain an advantage over competitors who do not know or use it. *Id.*

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V.T.C.A. art. 1446h exempts personal information in a customer's account from the Open Records requirement if the customer requests that the utility keep the information confidential. I do not believe that this provision applies to business customers. Business customers are not usually as concerned with the release of any personal information as they are with the release of competitive trade secret information.

Releasing this information will compromise the competitive position of some of Georgetown's customers. One of Georgetown's competitors, Texas Utilities Electric, would never consider releasing such information because it would be unfair to the customer and to the Electric Company. Texas Utilities does not have to face this issue because they are not a governmental entity. It is not fair for Georgetown Electric to have to release information that would violate the confidentiality of customers as well as Georgetown's own competitive position merely because the company is owned by the city instead of shareholders.

Litigation Exception

Section 552.103 of Government Code exempts information that relates to litigation or settlement negotiations to which a political subdivision is a party. Texas Utilities (TU) is one of our competitors and has filed a tariff for a rate change with the Public Utility Commission. Our interests in that case are opposed to TU's. We are in the process of deciding whether we are going to intervene in that case. Releasing this type of information, with the possibility of litigation pending, would jeopardize our position in this case. Rates and customers are the very issues at stake in the tariff filing. Open Records Decision 511 (1988) exempts information that relates to litigation if releasing the information would impair the governmental bodies' litigation interests. Our interests would be directly impaired should we be required to release the requested information. The city opposes the release of the requested information because of the very real possibility of litigation pending at this time with an electric company competitor.

Competitive Advantage

Section 552.104 of the Government Code exempts information that, if released would give advantage to a competitor or bidder. We believe that releasing the information requested would allow competitors to gain an advantage over our customers as well as over Georgetown's electric operation. Georgetown's electric division is not a monopoly. We have dual certification in certain areas and customers may choose whether to use Georgetown's electric service, TU or another electric company. We are in competition with other electric companies. We oppose the release of the requested information because it would jeopardize the competitive position of the city as an electric service provider. We also oppose the release of the requested information because it would jeopardize the competitive position of our individual business customers. This concern is more fully discussed elsewhere in this letter.

Trade Secret

Section 552.110 of the Government Code excepts trade secret, commercial or financial information obtained from a person as privileged or confidential. Georgetown objects to the release of this information because it contains trade secret, commercial and financial information that is confidential for Georgetown's utility operations, as well as for the individual business customers. Releasing this information would seriously affect Georgetown's ability to retain and attract business customers to our utility company.

Additionally, Georgetown's business customers would be forced to reveal confidential information. Since the competing utility companies are not subject to the Open Records requirement, their business customers would be able to obtain confidential information on our customers but our customers would not be able to obtain the same information. This would put Georgetown's business customers at an unfair disadvantage and would release sensitive data that may jeopardize their operation.

Open Records Decision 496 (1988) states that confidential information may not be released if it will impair the Government's ability to obtain necessary information in the future or will cause substantial harm to the competitive position of the person from whom the information was obtained. Both of these prongs are present in our situation. Therefore, none of the requested information should be released.

Privacy

Section 552.305 of the Government Code excepts information which may affect a third party's privacy or property interest. As already stated, the information requested affects the privacy interest of third parties, the business customers of the City of Georgetown's electric division. Many of our customers may be motivated to switch to a utility company that is not subject to the open records act, such as one of our competitors Texas Utilities, if we are required to release information that they do not want released. Texas Utilities Auditing is free to contact businesses in Georgetown to see if they wish to provide the requested information. The businesses that wish to provide the information are free to do so and the businesses that do not wish to release the information may do so. There is not reason that the information has to come from the City of Georgetown. Requiring us to release the requested information would likely result in a loss of customers for our utility company and provide an unfair advantage to our competitors.

Releasing the information would also result in allowing the competitors of our business customers to gain information that would give them an unfair advantage. Energy costs are a part of the cost to manufacture, produce and sell many items. Profit and pricing information are confidential in most companies. Releasing the requested information would seriously affect the ability to compete fairly for many of our customers. This especially unfair to our business customers since our competitors' customers are not subject to the same disclosure rules. This means that any competitor who is with another utility company may obtain this sensitive information, but our customers would not be able to obtain the same information about the competitor. Georgetown strongly urges against a ruling that would

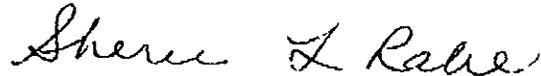
place our customers at an unfair disadvantage merely because the service is being provided by the city rather than a private company.

Creation of Information

Finally, the information requested is not kept in the format requested. We would have to enter a query in the computer to try to arrange the information as requested. Our staff estimates that this additional step would involve an additional two hours of time, at a minimum. Open Records Decision 467 (1987) states that the statute does not require a governmental body to create or prepare the new information or to prepare information in the form requested. The City of Georgetown objects to the request because it would require the city to create information in a form that does not currently exist.

For all of the reasons discussed above, Georgetown objects to releasing the information requested by Texas Utilities Auditing. Please feel free to call me at (512) 930-3653 if you have any questions or need additional information. Thank you for your attention to this matter.

Sincerely yours,



Sheree L. Rabe
Assistant City Attorney

SLR:mlr
Attachments