



KEN PAXTON  
ATTORNEY GENERAL *of* TEXAS

# Requests Involving Third Party Interests

Considerations When the Records Aren't Your Own

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# Initial Considerations

- Start with the practical
  - Notify the 3<sup>rd</sup> parties as soon as possible
  - Make sure the 3<sup>rd</sup> party knows deadlines and to send to the AG
- First pass through the records you should note who else has an interest
  - 3<sup>rd</sup> parties
  - Other GBs
  - Victims
- Where does this fall with deadlines?

# Proprietary Information

- Section 552.104
- Section 552.110
- Section 552.1101
- Other relevant sections
- Related issues

# Section 552.104

- Proprietary interests of a governmental body:
  - “Information is excepted from [disclosure] if a governmental body demonstrates that release of the information would harm its interests by providing **an advantage to a competitor or bidder** in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.”
- Only applicable to governmental bodies, not third parties.

# The *Boeing* Decision

- *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015) is no longer applicable to section 552.104.
- The legislature amended section 552.104 after the Boeing decision to clarify section 552.104 cannot be raised by a third party.

# What Section 552.104(a) Protects

- Section 552.104(a) applies in two distinct situations:
  - Ongoing competitive bidding situation
  - Reoccurring competitive situation

# Section 552.104(a): Ongoing Competitive Situation

- Exempts from release information “providing an advantage to a competitor or bidder in a particular ongoing competitive situation”

# Particular Competitive Situation Examples (Slide 1 of 4)

The City of Bluebonnet requests bids to construct a new park pavilion. The city receives bids from the following: Gazebos R Us; Decks Unlimited; and Park Improvement Company. During the bidding process, Decks Unlimited asks to see all the submitted bids.



# Particular Competitive Situation Examples (Slide 2 of 4)

- Can the city raise section 552.104(a)?

Yes. Section 552.104(a) explicitly provides a governmental body may raise section 552.104(a).

# Particular Competitive Situation Examples (Slide 3 of 4)

- The city informs the OAG that no contract has been signed and the bidding process is ongoing. Can the city withhold the information at issue?

Yes. Release of the proposals while the bidding process is ongoing would necessarily result in an advantage to the requesting bidder at the expense of others. This would undercut the city's ability to get the best terms under the contract, and ultimately harm the city's interest.

# Particular Competitive Situation Examples (Slide 4 of 4)

- Can Gazebos R Us, the interested third party, assert section 552.104(a)?

No. Section 552.104(a) specifies only governmental bodies are permitted to raise that section.

# Section 552.104(a): Reoccurring Competitive Situation

- Excludes information from release if “the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future”
- A general statement that a GB plans to seek goods or services at some unspecified time in the future is not adequate to demonstrate section 552.104.

# Reoccurring Competitive Situation Example (Slide 1 of 2)

- The City of Oak requests bids for vehicle fuel for the next two months. Northside Auto and Southside Auto each submit bids. The city ultimately enters into a contract with Northside Auto. Southside Auto subsequently requests Northside Auto's proposal.

# Reoccurring Competitive Situation Example (Slide 2 of 2)

- The city states, although a contract was awarded, it will continue to seek bids for vehicle fuel on a bi-monthly basis. The city also establishes that it has awarded fuel contracts on a bi-monthly basis for the last 2 years. Will the city be able withhold the information under section 552.104(a)?
  - Yes. If the city establishes (1) it will seek the goods or services on a recurring basis and (2) releasing the proposals would harm its interest in negotiating a future contract, then the city will be able to withhold the information under section 552.104(a).

# Previous Determinations

- Be prepared for requests for third-party information that the OAG previously determined could be withheld under section 552.104.

# Section 552.110: Proprietary Interests of Third Parties

- Section 552.110(b): “Except as provided by Section 552.0222, information is excepted from the requirements of Section 552.021 if it is demonstrated based on specific factual evidence that the information is a trade secret.”
- Section 552.110(c): “Except as provided by Section 552.0222, commercial 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 is excepted from the requirements of Section 552.021.”



# Section 552.110

Only applicable to third parties, not governmental bodies

# What Section 552.110 Protects

- Trade secrets
- Commercial or financial information, the release of which would result in substantial competitive harm

# Section 552.110(a)

## Definition of trade secret

- 1)The owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- 2)The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information

# Trade Secrets

“... based on specific factual evidence that the information is a trade secret.”

# Substantial Competitive Harm

“. . . disclosure would cause substantial competitive harm to the person from whom the information was obtained.”

# Section 552.1101

Excepts certain information submitted in response to a request for a bid, proposal, or qualification if disclosure would give advantage to a competitor

# Section 552.305

- Interested third parties must be notified.
- Language requirements are in section 552.305 notice.
- Form letter is on our website and will be in the back of the handbook.

# No Representative Samples

A governmental body may not submit representative samples for third-party proprietary information.



# Additional Considerations for Sections 552.104(a), 552.110, and 552.1101

- Section 552.301
- Section 552.022
- Section 552.0222

# Section 552.301

- Section 552.104(a) is discretionary.
- Sections 552.110 and 552.1101 are mandatory.

# Section 552.022

- Section 552.022(a) is not applicable to section 552.104(a)
- EXCEPT pursuant to section 552.104(c)

# Subsections 552.104(b) and (c)

- Section 552.104(b): “Section 552.022 . . . does not apply to information that is excepted from required disclosure under [552.104(a)].
- Section 552.104(c): “Subsection (b) does not apply to information described by Section 552.022(a) relating to the receipt or expenditure of public or other funds by a governmental body for a parade, concert, or other entertainment event paid for in whole or part with public funds. . . .”

# Section 552.022(a)(3)

- “Information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body”

# Section 552.104(c) Examples

## (Slide 1 of 2)

- The City of Townsville plans to throw a celebration for its bicentennial. As part of this event, they hire musician Stevie Ray Vaughan to play. The city receives a request for the contract between the city and Vaughan. Can the city withhold the contract with Vaughan under section 552.104(a)?
  - No. The contract is subject to section 552.022(a)(3). Thus, pursuant to section 552.104(c), section 552.104(b) does not apply.

# Section 552.0222 (Slide 1 of 2)

- Contracts described by section 2261.253(a) of the Government Code
- Contracts described by section 322.020(c) of the Government Code
- Overall price and certain contract terms

# Section 552.0222 (Slide 2 of 2)

- “(b) The exceptions to disclosure provided by Sections 552.110 and 552.1101 do not apply to the following types of contracting information:
  - (1) a contract described by Section 2261.253(a), excluding any information that was properly redacted under Subsection (e) of that section;
  - (2) a contract described by Section 322.020(c), excluding any information that was properly redacted under Subsection (d) of that section;”



# Section 2261.253(a) of the Government Code

- Contracts between **state agencies** and a private vendor for the purchase of goods or services
- Sections 552.110 and 552.1101 do not apply.

# Section 322.020 of the Government Code

- Contracts posted by the Legislative Budget Board
- Sections 552.110 and 552.1101 do not apply.

# Section 552.0222(b)(3)

- “(A) any term describing the overall or total price the governmental body will or could potentially pay, including overall or total value, maximum liability, and final price;
- (B) a description of the items or services to be delivered with the total price for each if a total price is identified for the item or service in the contract. . . .”