



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 26, 2016

Mr. Brandon Dyson  
Assistant City Attorney  
Office of the City Attorney  
City of San Angelo  
72 West College Avenue  
San Angelo, Texas 76903

OR2016-21710

Dear Mr. Dyson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 627716 (City File No. 16-529).

The City of San Angelo (the "city") received a request for all responses to a specified request for proposals and a specified contract. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the interests of Cavallo Energy Texas ("Cavallo"); the Texas General Land Office (the "GLO"); MP2 Energy, LLC ("MP2"); MidAmerican Energy Services, LLC ("MidAmerican"); Gexa Energy ("Gexa"); and Constellation NewEnergy, Inc. ("Constellation"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code §§ 552.304 (interested party may submit comments stating why information should or should not be released), .305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from the GLO, Gexa, and MP2. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from MidAmerican, Constellation, or Cavallo explaining why their information should not be released to the requestor. Therefore, we have no basis to conclude these third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating business enterprise claiming exception for commercial or financial information under section 552.110(b) must show by specific factual evidence release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the city may not withhold any portion of the submitted information on the basis of a proprietary interest these third parties may have in the information.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The GLO advises us it has created the State Power Program, with Cavallo as one of its representatives, through which it bids on contracts for the right to sell electrical energy to public retail customers. The GLO states it competes with private companies for the awards of these contracts. Additionally, the GLO contends the release of its information at issue would put the GLO at a disadvantage in future bids because this information details services and the GLO's business strategies, business methodologies, pricing formulas, and pricing structures. The GLO further asserts release of this information would allow competitors to gain insight into the GLO's business and marketing strategies, and this would put the GLO at a disadvantage in the marketplace. Thus, the GLO argues allowing competitors access to the information at issue will undermine its ability to compete in this marketplace. Based on the GLO's representations and arguments, we conclude the GLO has shown that release of the information at issue would give advantage to a competitor or bidder. Therefore, we conclude the city may withhold the GLO's information under section 552.104 of the Government Code.

Additionally, a private party may also invoke section 552.104(a) of the Government Code. *Boeing*, 466 S.W.3d at 831. As previously noted, the "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Id.* at 841. Gexa states it has competitors. In addition, Gexa states release of its bid proposal and contract would reveal proprietary information to competitors and cause Gexa substantial competitive harm in future bids. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records

Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 832. After review of the information at issue and consideration of the arguments, we find Gexa has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold Gexa's information under section 552.104(a) of the Government Code.

Next, MP2 argues portions of the remaining information are excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) of the Government Code protects "[c]ommercial 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[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

MP2 contends portions of the remaining information are commercial or financial information, release of which would cause substantial competitive harm to MP2. Upon review, we find MP2 has demonstrated its customer information constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, to the extent MP2's customer information is not publicly available on the company's website, the city must withhold MP2's customer information at issue, which we have marked, under section 552.110(b) of the Government Code. Further, we find MP2 has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, with the exception of the information we marked for release, the city must withhold MP2's marked information under section 552.110(b) of the Government Code. However, we find MP2 has failed to demonstrate the release of any of the remaining information would cause the company substantial competitive harm. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Thus, the city may

not withhold any of the remaining information under section 552.110(b) of the Government Code.

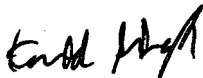
We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the city may withhold the GLO and Gexa's information under section 552.104 of the Government Code. The city must withhold MP2's customer information, to the extent the information is not publicly available on the company's website, which we have marked, under section 552.110(b) of the Government Code. With the exception of the information we marked for release, the city must withhold MP2's marked information under section 552.110(b) of the Government Code. The city must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kavid Singh  
Assistant Attorney General  
Open Records Division

KVS/bhf

Ref: ID# 627716

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Parties  
(w/o enclosures)