



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 24, 2017

Ms. Hadassah Schloss
Open Government Director
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2017-01596

Dear Ms. Schloss:

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# 642738.

The Texas General Land Office (the "GLO") received a request for two specified wind leases. You state the GLO has released one of the leases to the requestor. The GLO claims some of the submitted information is excepted from disclosure under section 552.104 Government Code. Additionally, the GLO states release of the submitted information may implicate the proprietary interests of a third party. Accordingly, the GLO states, and provides documentation showing, it notified Duke Energy Renewables Wind, LLC ("Duke") of the GLO's receipt of the request for information and of its right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 Duke. We have considered the submitted arguments and reviewed the submitted 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 informs us the information it marked pertains to a competitive bidding situation. The GLO additionally states release of this information could cause it to lose potential leases to its competitors. Upon review, we find the GLO has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the GLO may withhold the portions of the submitted information it marked under section 552.104(a).¹

Additionally, a private third party may invoke section 552.104(a). *See id.* Duke raises section 552.104 for some of the remaining information. Duke states it has competitors. In addition, Duke states release of the remaining information it has marked under section 552.104 would allow a competitor to have “an unfair window into Duke’s commercial terms, and be able to alter its commercial terms in order to outbid Duke in future lease negotiations.” 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 the *Boeing* decision, 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 831, 839. After review of the information at issue and consideration of the arguments, we find Duke has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the GLO may withhold the information we marked under section 552.104(a).

In summary, the GLO may withhold the portions of the submitted information it marked under section 552.104(a) of the Government Code. The GLO may also withhold the information we marked under section 552.104(a). The GLO must release the remaining information.

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.

¹As our ruling is dispositive for this information, we need not address Duke’s argument against its disclosure.

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, 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,

A handwritten signature in black ink that reads "Kael A Henze". The signature is written in a cursive style with a large initial "K" and a stylized "A".

Kaelan A. Henze
Assistant Attorney General
Open Records Division

KAH/eb

Ref: ID# 642738

Enc. Submitted documents

c: Requestor
(w/o enclosures)