



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 18, 2019

Mr. Joseph J. Gorfida, Jr.
Counsel for the City of Midlothian
Nichols, Jackson, Dillard, Hager & Smith, LLP
500 North Akard Street, suite 1800
Dallas, Texas 75201

OR2019-07401

Dear Mr. Gorfida:

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# 761283 (Ref. No. 106113).

The City of Midlothian (the "city"), which you represent, received a request for monthly copies of electricity bills from a stated time period. Although the city takes no position regarding whether the submitted information is excepted from disclosure, you state its release may implicate the proprietary interests of Gexa Energy, LP ("Gexa"). Accordingly, you state, and provide documentation showing, you notified Gexa of the request for information and of its right to submit arguments to this office. *See* Gov't Code § 552.305(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 Gexa. We have considered the submitted arguments and reviewed the submitted information.

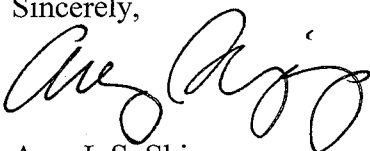
Gexa asserts the submitted responsive information is protected under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). 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, which includes the requestor's company. In addition, Gexa states the information at issue, if released, would give

competitors an advantage in submitting competitive bids on “future city opportunities, as well as . . . other public entity opportunities Gexa may choose to bid on in the future.” We note Gexa seeks to withhold some of the terms of a contract. 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 831, 839. 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. Accordingly, we conclude the city may withhold the submitted information under section 552.104(a) of the Government Code.¹

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, 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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

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¹As our ruling is dispositive, we need not address Gexa’s remaining arguments against disclosure.

Ref: ID# 761283

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)