



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

April 16, 2020

Ms. Tracie Wallace  
General Clerk  
City of Smithville  
P.O. Box 449  
Smithville, Texas 78957

OR2020-11099

Dear Ms. Wallace:

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# 822697.

The City of Smithville (the "city") received a request for certain contracts and franchise agreements. The city claims the submitted information is excepted from disclosure under sections 552.101 and 552.133 of the Government Code. Additionally, the city indicates it notified Bluebonnet Electric Cooperative, Inc. ("Bluebonnet") of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *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 Bluebonnet. We have considered the submitted arguments and reviewed the submitted information.

Initially, we understand the city and Bluebonnet to argue the submitted information is confidential because it is subject to a confidentiality agreement. We note information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere

expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, the city must release it, notwithstanding any expectations or agreement specifying otherwise.

Bluebonnet raises section 552.104 of the Government Code for the submitted information. Section 552.104 excepts from disclosure information “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.” Gov’t Code § 552.104(a) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3*. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov’t Code 552.104(a). Therefore, we do not address Bluebonnet’s arguments under section 552.104 of the Government Code.

Bluebonnet also raises section 552.110 of the Government Code for the submitted information. Section 552.110(b) of the Government Code states “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See id.* § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (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.

*Id.* § 552.110(a). Section 552.110(c) of the Government Code states:

- (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 required disclosure].

*Id.* § 552.110(c). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). Bluebonnet argues the submitted information consists of trade secrets subject to section 552.110(b). Upon review, however, we find some of the information at issue is subject to

section 552.0222(b) and may not be withheld on the basis of section 552.110(b). *See id.* Additionally, we find Bluebonnet has failed to provide specific factual evidence demonstrating any portion of the information at issue is a trade secret. Therefore, the city may not withhold the submitted information under section 552.110(b) of the Government Code.

Bluebonnet also argues some of its information consists of commercial or financial information subject to section 552.110(c). However, as noted above, we find some of the information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(c). *See id.* Additionally, we find Bluebonnet has failed to provide specific factual evidence demonstrating any portion the information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the city may not withhold the submitted information under section 552.110(c) of the Government Code.

Section 552.133 of the Government Code excepts from disclosure a public power utility's information that is "reasonably related to a competitive matter."<sup>1</sup> *Id.* § 552.133(b). Section 552.133(a) provides the following:

(a) In this section, "public power utility" means an entity providing electric or gas utility services that is subject to the provisions of this chapter.

*Id.* § 552.133(a). Section 552.133 only protects the competitive interest of a public power utility. *See* Open Records Decision No. 666 at 2 (2000) (statutory predecessor to section 552.133 enacted to protect municipally owned utilities from public disclosure of competitive matters). The submitted information reveals the city contracts with Bluebonnet for its electric services. However, the city does not inform us it owns or operates a public power utility. Additionally, although Bluebonnet raises section 552.133, this exception does not protect the interests of third parties. *See id.* Further, Bluebonnet is not a public power utility. *See* Gov't Code § 552.133(a) (defining "public power utility"). Thus, we find the city and Bluebonnet have failed to demonstrate the applicability of section 552.133 to the submitted information, and the city may not withhold it on that basis. As no further arguments against disclosure are made, the city must release the submitted 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.

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<sup>1</sup> We note the submitted information falls within the scope of section 552.022(a)(3) of the Government Code, which requires disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]" unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(3). Section 552.133(c) provides, however, that "[t]he requirement of Section 552.022 that a category of information listed under section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under law does not apply to information that is excepted from required disclosure under [section 552.133]." *Id.* § 552.133(c).

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

James M. Graham  
Assistant Attorney General  
Open Records Division

JMG/gw

Ref: ID# 822697

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: Third Party  
(w/o enclosures)