



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 19, 2022

Ms. Patricia M. Borschow  
Assistant General Counsel  
El Paso Water Utilities - Public Service Board  
P.O. Box 511  
El Paso, Texas 79961-0511

OR2022-32172

Dear Ms. Borschow:

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# 979232 (ORR EPW07-31).

The El Paso Water Utilities - Public Service Board (the "board") received a request for proposals submitted in response to a specified request for proposals. You claim the submitted information is excepted from disclosure under sections 552.110 and 552.1101 of the Government Code. You also state release of this information may implicate the proprietary interests of third parties. Accordingly, you state 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* § 552.305(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 PCL/Sundt a Joint Venture ("PCL/Sundt"). We have considered the submitted arguments and reviewed the submitted information.

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 information relating to that party should be withheld from public disclosure. *See Gov't Code* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any remaining third parties at issue explaining why their information should not be released. Therefore, we have no basis to conclude any remaining third parties have a protected proprietary interest in the submitted information. *See, e.g., id.* §

552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the board may not withhold any of the information at issue on the basis of any proprietary interest any remaining third parties at issue may have in it.

We note PCL/Sundt asserts exceptions to the required public disclosure of information the board has not submitted for our review. This ruling does not address information beyond what the board has submitted to us for review. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the board submitted as responsive to the request for information.<sup>1</sup> *See id.*

PCL/Sundt raises section 552.104 of the Government Code for some of its 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 PCL/Sundt’s arguments under section 552.104.

We note you raise section 552.110 of the Government Code. Section 552.110 of the Government Code protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See id.* § 552.110(b)-(c). Although you assert the submitted information is excepted under section 552.110, that exception is designed to protect the interests of third parties, not the interests of a governmental body. In addition, although you raise section 552.1101 of the Government Code for the information at issue, this section protects only the interests of a vendor, contractor, potential vendor, or potential contractor that has provided information to a governmental body, not those of the governmental body itself. *See id.* § 552.1101(c). Thus, we do not address your arguments under sections 552.110 or 552.1101 of the Government Code.

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<sup>1</sup> As we are able to make this determination, we need not address PCL/Sundt’s arguments against disclosure of this information.

Section 552.110(b) of the Government Code states, “[e]xcept as provided by [s]ection 552.0222, 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). PCL/Sundt argues some of its information consists of trade secrets subject to section 552.110(b) and commercial or financial information subject to section 552.110(c). Upon review, we find PCL/Sundt has demonstrated its customer information constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the board must withhold PCL/Sundt’s customer information under section 552.110(c) of the Government Code; however, to the extent the customer information at issue is made available to the public by PCL/Sundt, including but not limited to on its website or social media accounts, it may not be withheld under section 552.110(c).<sup>2</sup> Further, we find PCL/Sundt has failed to provide specific factual evidence demonstrating the remaining information at issue is a trade secret or constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the board may not withhold any of the remaining information at issue under section 552.110(b) or 552.110(c) of the Government Code.

In summary, the board must withhold PCL/Sundt’s customer information under section 552.110(c) of the Government Code; however, to the extent the customer information at issue is made available to the public by PCL/Sundt, including but not limited to on its website or social media accounts, it may not be withheld under section 552.110(c). The board must release the remaining information.

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<sup>2</sup> As our ruling on this information is dispositive, we need not address the remaining argument against disclosure of this 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.

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,

Jennifer Copeland  
Assistant Attorney General  
Open Records Division

JC/jxd

Ref: ID# 979232

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)