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Lawmakers may review effects of court ruling on public information law

A 2015 ruling by the Texas Supreme Court shielding certain government information from public disclosure inspired several bills that did not make it to the governor's desk during the 85th regular session of the Texas Legislature. Policymakers could revisit the issues affecting public information about government contracting during the 86th regular session in 2019.

Boeing Co. v. Paxton addressed a provision of the Texas Public Information Act (PIA) that allows records to be withheld from public disclosure if it would provide an advantage to a competitor or bidder. This exception traditionally has been raised by governmental entities to protect their purchasing interests during the ongoing bidding period for a contract. The Supreme Court's decision in *Boeing* allows not only governmental entities but private companies contracting with the government to assert the exception to protect competitively sensitive information and for it to be withheld from public disclosure if it would provide an advantage to another bidder or competitor, including after a contract has been awarded.

More than 2,000 open records letter rulings from the Office of the Attorney General have cited *Boeing* since the decision (see *Decisions citing* Boeing, p. 2). This prompted several legislative proposals in 2017 that would have amended the statutory exception to public disclosure that was the basis for the *Boeing* decision. The Legislature also considered, but did not enact, proposals related to a second Texas Supreme Court ruling, *Greater Houston Partnership v. Paxton,* that determined when a private entity that receives public funds for economic development is subject to the PIA (see *Does the PIA apply*, p. 4).

Some say the interpretation of the PIA under *Boeing* improperly limits the public's access to information on government spending and contracting**,** while others say it appropriately protects certain types of proprietary business information from being released to competitors.

SCR 56 by Watson, approved by the Legislature in 2017, requested the creation of a joint interim committee to examine all state open government laws. The joint committee has not been established, but an interim charge tasks the House Committee on Government Transparency and Operation with evaluating "whether, in light of recent Texas Supreme Court rulings, the provisions of the Public Information Act are adequate to support transparency and accountability in government, particularly as it relates to government contracting and procurement." A hearing to consider this charge has been set for March 27.

Background and current law

The Public Information Act, under Government Code, ch. 552, establishes the types of government records that are public and that must be released to those who request the information. It defines "public information" as "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by and, in certain cases, for a governmental body. Examples in the law include information in a contract "relating to the receipt or expenditure of public or other funds by a governmental body." Enacted in 1973 by the 63rd Legislature, the law states that it is to be "liberally construed in favor of granting a request for information."

Provisions of the Public Information Act. The PIA contains requirements for preserving and maintaining public information, training requirements for certain elected and appointed officials, procedures for accessing public information, and timelines for governmental bodies to produce requested information. It also addresses repetitious or redundant requests for information, fees that governmental entities may charge to produce certain information, and actions that may be taken against

violators of the law, including unauthorized destruction or removal of public records.

The law makes certain categories of information subject to disclosure and contains numerous exceptions. The exception scrutinized in *Boeing,* under sec. 552.104, states that information is excepted from disclosure to the public "if it is information that, if released, would give advantage to a competitor or bidder." Another provision, under sec. 552.110, excepts trade secrets and certain commercial or financial information from disclosure.

Subchapter G of the PIA directs governmental bodies to ask the attorney general for a decision about whether information they seek to withhold falls within an exception. Third parties whose privacy or property interests may be involved in a request, including a case under the competitive disadvantage or trade secret exceptions, may submit in writing to the attorney general the reasons the information should be withheld or released.

Open records decisions and letter rulings. Requests to the attorney general from governmental bodies may result in either an open records decision or an open records letter ruling on the question. Open records decisions are formal opinions that usually address novel or problematic legal questions and are signed by the attorney general. These decisions may be cited as precedent in subsequent requests to the attorney general. More commonly, informal open records letter rulings will be issued based on established law and practice and signed by assistant attorneys general in the Open Records Division. Letter rulings are applicable only to the specific documents and circumstances presented in the request, and the attorney general advises that they not be cited as precedent on open records questions.

Boeing Co. v. Paxton

The dispute leading to the *Boeing* decision began in 2005 when a requestor sought a copy of the lease agreement between Boeing and the Greater Kelly Development Authority relating to Boeing's facility for repairing and refurbishing aircraft. The authority, later renamed Port San Antonio, was created by the city of San

Decisions citing *Boeing*

More than 2,000 open records letter rulings from the Office of the Attorney General have cited *Boeing* since the 2015 decision, resulting in either release or withholding of information requested under the PIA (*See Open records decisions and letter rulings, this page*). Several have received attention from the media, the public, and lawmakers.

The city of McAllen, in a request to the attorney general's Open Records Division, sought to withhold information about a concert contract with a pop artist who performed before a holiday parade in 2015. The city said releasing the information would put it at a competitive disadvantage for similar contracts in the future and might implicate the proprietary interests of a talent agency. The division said the test under *Boeing* was whether knowing a competitor's information "would be an advantage, not whether it would be a decisive advantage" and said the city could withhold the information.

In a 2017 case, the Office of the Governor took no position on a request for information about an event that had received funding from the state's Major Events Trust Fund, but said the information might implicate proprietary interests of two private entities involved in the event. One of the entities sought to withhold information, citing damage to future negotiations. Citing *Boeing*, the division said the entity need only show the information "would give an advantage to a competitor even after a contract is executed" and that the information could be withheld.

In another case, the city of Austin sought to withhold information about candidates being recruited for city manager. The city said releasing the information would harm its ability to compete in a limited marketplace for qualified individuals and would undermine salary negotiations. The division in a 2018 ruling said it was not persuaded that competition among job applicants was a competitive situation to which sec. 552.104 was applicable and that a private entity involved in the search had failed to show a competitive disadvantage under *Boeing*.

Antonio under provisions in Local Government Code, ch. 379B to repurpose Kelly Air Force Base.

Port San Antonio notified Boeing of the request and the company provided a redacted version of the lease to the requestor. Boeing submitted to the attorney general the reasons it believed the redacted parts should be withheld, saying the information fell under sec. 552.110, the exception for trade secrets and certain commercial or financial information. Boeing said it contained sensitive information on their costs that would allow a competitor to underbid Boeing on government contracts. This information included maintenance costs, insurance limits, certain penalties for early lease termination, dollar caps on potential incentives, and calculation of future rent. An open records letter ruling (OR2005-11107) concluded that none of the withheld information was exempt from disclosure under sec. 552.110.

Boeing sought declaratory and injunctive relief in state district court. The parties agreed to a temporary injunction and the case was tried in Travis County. The trial court ordered Port San Antonio to provide the redacted information, determining that it was not exempt under sec. 552.110 and that Boeing did not have standing under sec. 552.104 to assert that the requested information would give advantage to a competitor or bidder. Boeing appealed and the Third Court of Appeals in Austin affirmed the trial court ruling in 2012. One member of the three-judge panel wrote a concurring opinion, saying he agreed with the majority decision but found nothing in the law's text to support the court's conclusion that the exception for information related to competition or bidding was only for the government's benefit.

At the Texas Supreme Court, Boeing argued that the appeals court should have granted the company standing to assert sec. 552.104, which excepts from disclosure information that would give advantage to a competitor or bidder. Port San Antonio argued that the court of appeals decision imposed obligations on government bodies to assert exceptions on behalf of third parties.

The attorney general argued that the exception does not apply to third parties like Boeing and should be considered in the context of the PIA as a whole, which seeks to balance governmental transparency with third-party privacy and confidentiality concerns. The attorney general also argued that the exception applies only to ongoing competitive bidding.

The Supreme Court in 2015 reversed the decision of the appeals court, allowing Boeing to assert the exception and allowing the information in question to be withheld. One justice dissented from the ruling and another did not participate. The court came to three main conclusions about sec. 552.104. First, the court ruled that either the government or a private party may assert the exception to protect its competitively sensitive information. Second, the court said that when evaluating whether sec. 552.104 permits an exception to disclosure, the attorney general must determine whether knowing information about another bidder's offer would be an advantage, not whether it would be a decisive advantage. Third, the court said nothing in the exception's text says it applies only to ongoing competitive bidding.

The majority opinion said that certain financial aspects of Boeing's lease with Port San Antonio concerned the company's overhead costs and contained competitive information that, if disclosed, would enable other military-service contractors to reverse engineer Boeing's bid and undercut it. The court reversed the court of appeals judgment and sustained Boeing's objection to the mandatory release of the information.

The dissent agreed that non-governmental bodies may claim the exception under sec. 552.104 but said that Boeing's evidence was too hypothetical and speculative to establish that the release of the information would give advantage to a competitor or bidder. The dissenting justice said he would conclude that a party relying on the exception must establish the existence of a specific competitor in a particular competition and show how the information would benefit that competitor.

Proposals in response to *Boeing*

Several bills filed during the 85th regular legislative session in 2017 would have amended Government Code, sec. 552.104 to address the effects of the *Boeing* decision. While none of these bills became law, similar proposals or proposals on government contracting transparency could emerge during the 86th regular session in 2019.

HB 349 by Canales would have established that sec. 552.104 did not apply to information about receipt or expenditure of funds by a governmental body for a parade, concert, or other entertainment event that was open to the general public and paid for in whole or part with public

funds. The bill also would have prohibited provisions in contracts that prevented the disclosure of such information. HB 349 was approved by the House but died after being removed from the Senate's Local and Uncontested Calendar.

HB 792 by Capriglione and a companion bill, SB 407 by Watson, would have modified sec. 552.104 to assert that the exception applied only if a governmental body demonstrated that the release of the information in question would harm its interests by providing an advantage to a competitor or bidder in a particular competitive situation. The legislation would have established that the exception did not apply to a bid or proposal after the applicable contract had been executed. SB 407 was passed by the Senate but died, along with HB 792, in the House Government Transparency and Operation Committee.

Does the PIA apply to economic development entities receiving public funds?

Another 2015 decision on public information by the Texas Supreme Court led to proposed legislation in 2017. In *Greater Houston Partnership v. Paxton,* the court said a private entity must be "sustained" by public funds to fall under the definition of a governmental body and be subject to the Public Information Act. Government Code, sec. 552.003(1)(A)(xii) defines a governmental body, in part, as the portion of a private entity "that spends or that is supported in whole or in part by public funds."

In a 6-3 decision, the court said GHP, a nonprofit corporation that provides economic development services to area cities, does not qualify as a governmental body because it does not rely on government contracts to sustain itself. The dissent said GHP should be considered a governmental body if it receives public funds provided to subsidize or underwrite its activities and those activities promote a purpose, interest, or mission that the entities share and would each pursue even in the absence of a contractual relationship.

Under SB 408 by Watson, which was approved by the Senate in 2017 but died in the House Government Transparency and Operation Committee, entities that received or spent public funds would have been included in the definition of a governmental body if:

- the receipt or expenditure of public funds did not impose a specific obligation on the entity to provide a measurable amount of goods or services in exchange for the funds;
- the public funds were received or spent under an agreement to provide a traditional governmental service, which did not include a utility service, that the state or political subdivision would not provide under the agreement; or
- the private entity used real or personal property owned or leased by the state or a political subdivision that was not generally available to the public under an agreement that provided for no or nominal consideration in return for the use.

Under SB 408, such information would have been public only to the extent that it related to the part, section, or portion of the entity that received public funding or used property owned or maintained by the state.

Supporters of the bill said it would ensure that private entities receiving taxpayer funds as part of their mission to perform economic development and other services typically performed by government were accountable to taxpayers for the public funds they receive. They said that without such disclosure, government entities could funnel public dollars to a private nonprofit without adequate public oversight. Critics of the bill said that such entities often deal with confidential information, including names of businesses being recruited to Texas, and disclosing such information could allow other states to gain a competitive advantage. Critics said including elected officials on the nonprofits' boards and requiring such entities to disclose information in federal tax filings was sufficient protection for the use of public funds.

Under HB 839 by Ortega and a companion bill, SB 425 by Rodríguez, the exception under sec. 552.104 would not have applied to information contained in a bid or proposal after the governmental body awarded the applicable contract. Neither bill received a public hearing.

Debate on changes to the law. The most recent proposals in response to *Boeing* have focused on returning the statute to the way many people interpreted it before the court ruling. This has included limiting those who have standing to assert the "competitive disadvantage" exception to governmental bodies and applying the exception only to particular competitive situations before a contract is awarded. Supporters of these proposals say the combined effect of the ruling has broadened the information on government spending that can be withheld under the PIA. Critics of these proposals say the Legislature should let the statute stand as interpreted under *Boeing* as an appropriate protection for commercially sensitive information that allows businesses to compete fairly and equally for government contracts.

Asserting exception. Supporters of amending the law to apply the exception only to the competitive purchasing interests of governmental bodies say the court's ruling made it too easy for government contractors to claim that any request for information puts them at a competitive disadvantage. They say the PIA should be amended to make more information publicly available and reduce the growing number of requests by third parties to the attorney general to keep government purchasing information private.

Critics of narrowing the exception in this way say private entities should not have to rely on a governmental body to protect their sensitive competitive information such as project designs, staffing, and overhead costs. Before the *Boeing* decision, critics say, business competitors and corporate recruiters were increasingly using the PIA inappropriately to obtain information about competing private entities, such as staff rosters and salaries. They say if private entities do not have the right to protect their confidential information from public disclosure, they could be reluctant to enter business relationships with governmental entities.

Final contracts. Supporters of allowing the exception to disclosure to apply only before a contract is awarded say *Boeing* has allowed basic information about how much the government is paying for services to be shielded from disclosure, making it difficult for the public to monitor government spending for waste and fraud at a time when public-private partnerships are becoming more common. They say the type of proprietary information businesses are most concerned about disclosing is more likely to be included in a bid proposal than in a finalized contract and that, in any event, the Legislature has an interest in disclosing information that could help the government receive a reduced price for services. If requested information rose to the level of a trade secret, it would be excepted from disclosure under a separate provision of the PIA, they say.

Critics of applying the exception only before a contract is awarded say a private entity's competitively sensitive information could give an advantage to a competitor even after a contract is executed by informing a competitor on how to undercut the current contractor when contracts are re-bid. In addition, critics say, proprietary information such as a project design could be taken from an entity's bid proposal and included in the contract.

— by Janet Elliott and Mary Beth Schaefer

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John H. Reagan Building
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P.O. Box 2910
Austin, Texas 78768-2910
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www.hro.house.state.tx.us

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