

# Texas High Court Boosts Corporate Confidentiality Protection

Law360, New York (July 14, 2015, 10:20 AM ET) -- The Texas Supreme Court issued two recent opinions that may provide private companies with a greater ability to protect their confidential information in Texas even when dealing with public entities. The court held that Section 552.104 of the Texas Public Information Act ("PIA"), which exempts from public disclosure information "that, if released, would give advantage to a competitor or bidder," applies not only to governmental bodies conducting competitive bidding but to private parties as well. *Boeing Co. v. Paxton*, No. 12-1007, 2015 Tex. LEXIS 583 (Tex. June 19, 2015).



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The Texas attorney general and state courts historically concluded that private parties lacked standing to assert this exception in connection with a PIA request. In *Boeing*, however, the court reversed this trend, finding that the statutory provision on its face does not limit the exemption to the government, and also clarified that a private party has standing to directly assert this exception, as opposed to relying on a governmental body to assert it.

To further this point, one week later, in *Greater Houston Partnership v. Paxton*, No. 13-0745, 2015 Tex. LEXIS 614 (Tex. June 26, 2015), the Court held that the Greater Houston Partnership, a private entity operating like a chamber of commerce, was not a "governmental body" subject to public disclosure of its private business affairs under the PIA. Similar to the *Boeing* opinion, the Court based its decision on the PIA's "plain and unambiguous language."

Both *Boeing* and *Greater Houston* show that even in light of the PIA's liberal construction mandate and overarching goal of increasing governmental transparency, Texas courts may now be willing to protect the confidentiality interests of private parties and curb the sweeping reach of the PIA by focusing on the text of the statute. This article focuses on the *Boeing* case and how it may offer private companies a new tool to protect their confidential information.

## Background

In 1995, Boeing began a nationwide search for a suitable facility to conduct its business of maintaining and overhauling older aircraft for the military. Three years later, Boeing selected the Kelly Air Force Base in San Antonio, Texas, and signed a 25-year lease with the Greater Kelly Development Authority, later renamed the Port Authority of San Antonio.

The Port is a tax-exempt enterprise incorporated by the city as a separate political jurisdiction. For two years, Boeing devoted a team of 12 employees and outside consultants to evaluate and negotiate a competitive agreement with the Port.

Several years after signing the lease with the Port, a former Boeing employee, Robert Silvas, submitted a PIA request for information about the lease. Pursuant to its statutory obligations, the Port notified Boeing about this request. Boeing provided a redacted version of the lease to Silvas and filed objections with the Texas attorney general as to the redacted portions. Boeing argued that the redacted information was competitively sensitive information regarding its overhead costs at Kelly Air Force Base. According to Boeing, a competitor could use this information to underbid Boeing on government contracts. Boeing further argued that it took steps to safeguard and restrict the internal distribution of certain information in the lease, including rental rates, share of common maintenance costs, insurance coverage, liquidated damages provisions and lease incentives.

The attorney general concluded in an open-records letter ruling that the information withheld by Boeing was not exempt from disclosure under the PIA. Boeing sought declaratory and injunctive relief in Travis County district court and joined the attorney general and the Port as parties. The trial court ordered Boeing to release the information, holding that (1) the information was not exempt under Section 552.110 of the PIA because it was not Boeing's proprietary information, a trade secret, or otherwise exempt under the exception; and (2) Boeing did not have standing to assert the Section 552.104 exception protecting certain information related to competition or bidding. Boeing, 2015 Tex. LEXIS 583 at \*8-9. Boeing appealed, and the Austin Court of Appeals affirmed the trial court's judgment.

Before the Texas Supreme Court, Boeing argued that the court of appeals erred in holding that Section 552.104 did not apply to Boeing. The attorney general, however, argued that this exception applies only to governmental bodies and not third parties like Boeing. Rejecting Boeing's argument that Section 552.104 on its face does not limit the exemption to governmental bodies, the attorney general argued that the exemption must be read in the context of the PIA as a whole. The PIA, according to the attorney general, seeks to balance governmental transparency with third-party privacy and confidentiality interests, and the PIA must be read in light of this balance. According to the attorney general, if Section 552.104 were read in isolation and not in light of the PIA's overarching purpose, Section 552.104 would "create a super exception" so lenient that it would override the other exceptions. Boeing, 2015 Tex. LEXIS 583 at \*12.

Boeing, on the other hand, argued that its position is supported by the text of the PIA and that the attorney general was attempting to rewrite the PIA's provisions. As a general matter, according to Boeing, nothing in the PIA bars private standing to prevent public disclosure, and nothing in Section 552.104 restricts the provision to the government. Rather, the PIA as a whole grants standing to any "person who claims to be the victim of a violation." Boeing, 2015 Tex. LEXIS 583 at \*12. Finally, Boeing argued that if Section 552.104 is too broad, then it is for the Legislature — not the attorney general — to rewrite the statute.

## **The Texas Supreme Court's Analysis**

The court first took issue with the court of appeals' conclusion that Section 552.104 was a "purely discretionary exception" that the Port was free to waive. The court of appeals reached this conclusion by looking to Section 552.007, which permits a governmental body to voluntarily disclose "part or all of its information ... to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law." Boeing, 2015 Tex. LEXIS 583 at \*14. The court rejected this interpretation of the PIA and concluded that the real issue is whether Boeing has the right under the act to assert its own interests in protecting the information. The court acknowledged that the PIA requires a governmental

body to raise and argue any applicable disclosure as a prerequisite to judicial review but concluded that this rule does not apply when another person's privacy or property interests are implicated. In this case, the court noted, the Port simply deferred to Boeing to protect its own interests, and the fact that the Port did not raise the Section 552.104 exception did not waive Boeing's right to raise the exception itself.

The court then addressed the central question of Boeing's standing or right to raise the exception. According to the court, no language in the PIA limits Section 552.104 to the government. Rather, Section 552.104 is positioned and referenced throughout the PIA similarly to the other provisions that potentially implicate "a person's privacy or property interests." In support of this conclusion, the court emphasized that the PIA provision titled "Information Involving Privacy and Property Interests of Third Party" cites to Section 552.104 as one of several examples that might involve third-party privacy or property concerns. In light of these conclusions, the court held that Section 552.104's exception applies to both the government and private parties and may be invoked by either to protect the privacy and property interests of a private party in accordance with its terms.

Finally, the court considered whether the information withheld by Boeing would, in fact, give advantage to Boeing's competitors. The court examined the record and noted that intense competition exists in the aerospace industry for large government contracts. Referencing testimony from a Boeing manager, the court emphasized that the primary difference between competitors' bids was the overhead included in the final bid price. The court also noted that Boeing protects certain financial aspects of its lease with the Port in order to prevent competitors from reverse-engineering Boeing's bid and that Boeing had lost bids to competitors over as little as a 1 percent difference in bids. The court concluded that the undisputed evidence established that the withheld information "if released would give advantage to a competitor or bidder." Boeing, 2015 Tex. LEXIS 583 at \*27-28.

## **Implications**

The Boeing opinion creates a potent argument for companies seeking to protect sensitive business information from public disclosure in connection with a PIA request that, previously, was not thought to be viable. The Section 552.104 exception will likely be particularly helpful to companies that may not be able to prove that the information at issue is a trade secret or otherwise "confidential under law" but will be able to show that the information would give advantage to a competitor or bidder.

Companies should be mindful, however, that while this exception appears to be broad, the attorney general and Texas courts are likely to scrutinize the evidence presented by the company to determine — as emphasized in the dissenting opinion — if the information merely could give advantage to a competitor as opposed to the requisite showing that the information would give advantage. For example, the attorney general and Texas courts will likely examine the extent to which companies safeguarded the information at issue and the level of competition in the particular industry. In other words, the testimony and evidence will be key.

Based on recent events, there may be a new tool set for companies to protect confidential information when bidding public jobs in Texas and dealing with public entities that were previously foreclosed, but this protection is going to depend heavily on the actual evidence presented and the facts and circumstances of that case. Nevertheless, protection under these new cases may still require the expense of fully litigating the matter.

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