

**DON'T MESS WITH THE TEXAS PUBLIC  
INFORMATION ACT: THE THREAT TO  
GOVERNMENT TRANSPARENCY POSED BY  
*BOEING V. PAXTON* AND HOW TO FIX IT**

Comment

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*“The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”<sup>1</sup>*

## I. INTRODUCTION

The Texas Public Information Act (TPIA) states that “it is the policy of this state that each person is entitled . . . at all times to complete information about the affairs of government” and that this policy “shall be liberally construed” in favor of transparency.<sup>2</sup> The Office of the Attorney General of Texas recently denied open records requests made by taxpayers in McAllen, Texas seeking to discover how much their city paid singer Enrique Iglesias.<sup>3</sup> Mr. Iglesias headlined at the city’s holiday concert in December 2015, raising questions among the taxpayers about exactly how much public money the city spent on the concert.<sup>4</sup> In another occurrence, the attorney general’s office likewise denied an open records request asking the City of Houston to release how many driver permits it issued to the ride-sharing company Uber.<sup>5</sup> The outcomes in these disputes, and others like them, are the direct result of a recent Texas Supreme Court opinion interpreting a specific provision of the TPIA in a way that broadens the ability of government entities and private parties to resist and avoid disclosure upon open records requests.<sup>6</sup>

1. TEX. GOV’T CODE ANN. § 552.001 (West 2012) (describing how the policy of TPIA favoring open government comes from “the American constitutional form of representative government”). The “need for an informed citizenry” is essential to ensuring government accountability, according to the Texas Public Information Act. OFFICE OF THE ATTORNEY GEN. OF TEX., PUBLIC INFORMATION HANDBOOK 2016 (last revised Oct. 2015), [https://www.texasattorneygeneral.gov/files/og/publicinfo\\_hb.pdf](https://www.texasattorneygeneral.gov/files/og/publicinfo_hb.pdf).

2. § 552.001. The Open Records Act was recodified as the Texas Public Information Act in 1993. See Act of May 19, 1973, 63d Leg., R.S., ch. 424, §§ 1–16, 1973 Tex. Gen. Laws 1112, 1112–18 (codified at TEX. REV. CIV. STAT. art. 6252–17a (West 2017)); see also *Mutscher v. State*, 514 S.W.2d 905, 910–11 (Tex. Crim. App. 1974) (summarizing the events of Sharpstown Scandal as an example of reasoning for the TPIA).

3. See TEX. ATT’Y GEN. OR2016-05179, at 1 (“Thus, we conclude the city may withhold the submitted information under section 552.104(a) of the Government Code.”).

4. See *id.*; *Enrique Iglesias to Headline McAllen Holiday Parade*, CITY OF MCALLEN NEWS (Nov. 19, 2015), <http://www.mcallen.net/publicstuff-widgets/news/2015/11/19/enrique-iglesias-to-headline-mcallen-holiday-parade>; Jim Malewitz, *Texas High Court Carves “Monstrous Loophole” for Government Secrets*, TEX. TRIB. (Aug. 5, 2016), <https://www.texastribune.org/2016/08/05/lawmakers-eye-monstrous-loophole-keeps-contract-de/>.

5. See TEX. ATT’Y GEN. OR2016-01651, at 1; Malewitz, *supra* note 4.

6. See § 552.104(a); *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015); see generally also TEX. ATT’Y GEN. OR2016-05179 (citing *Boeing v. Paxton* as a foundation for its decision).

This Comment will address the recent Texas Supreme Court case, *Boeing v. Paxton*, and analyze its ramifications for Texas practitioners, citizens, government entities, and corporations. Part II explores how open records legislation originated in Texas and gives a brief overview of the TPIA.<sup>7</sup> Additionally, Part II puts the TPIA in context by outlining how Texas courts have interpreted the TPIA before *Boeing*.<sup>8</sup> Part III fully explores *Boeing v. Paxton*, the recent Texas Supreme Court case that threatens to cause serious harm to government transparency in Texas.<sup>9</sup> Also, Part III concludes with an investigation into why the Texas Legislature should address the Supreme Court's holding in *Boeing*.<sup>10</sup> Part IV delves into the ramifications of *Boeing* in subsequent open records disputes, attorney general rulings, and the rise of private party willingness to contest disclosure in open records requests.<sup>11</sup> This Comment endeavors to shine a light on what *Boeing* means for Texas moving forward.<sup>12</sup> Part V explores possible solutions to the threat to government transparency and the survival of the TPIA's broad policy favoring disclosure.<sup>13</sup>

The facts of *Boeing* are simple: a citizen made an open records request for the information in a government lease between the Port Authority of San Antonio (Port Authority) and The Boeing Company (Boeing), a private entity.<sup>14</sup> Boeing used the Port Authority, a former Air Force base, to repair military aircrafts under a government contract.<sup>15</sup> Boeing was unhappy with the idea of handing over the lease—which contained information relevant to its business operations.<sup>16</sup> Boeing claimed that the lease information was exempt from disclosure under a specific provision in the TPIA, § 552.104(a), which provides an exception to disclosure for certain information that would give competitors and bidders an advantage if released.<sup>17</sup> The Supreme Court of Texas, interpreting § 552.104, held that the information in the government contract was not subject to disclosure under the Act.<sup>18</sup> The outcome, analysis, and reasoning of the Court in *Boeing* all strongly indicate that open records policy in Texas has changed direction by increasingly placing private

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7. See *infra* Part II.

8. See *infra* Part II.

9. See *infra* Part III.

10. See *infra* Part III.

11. See *infra* Part IV.

12. See *infra* Section IV.C.

13. See *infra* Part V.

14. *Boeing Co. v. Paxton*, 466 S.W.3d 831, 834 (Tex. 2015).

15. *Id.*; see *About Boeing Defense, Space & Security*, BOEING, <http://www.boeing.com/company/about-bds> (last visited Sept. 12, 2017); *Boeing: Historic Legacy, Big Future in the Alamo City*, PORT SAN ANTONIO, <http://www.portsanantonio.us/Webpages.asp?wpid=477> (last visited Sept. 12, 2017).

16. See *Boeing*, 466 S.W.3d at 834.

17. See *id.*; TEX. GOV'T CODE ANN. § 552.104(a) (West 2012).

18. See *Boeing*, 466 S.W.3d at 831.

interests over the public's right to know.<sup>19</sup> Thus, the Texas Supreme Court's holding in *Boeing* poses a serious threat to the integrity of the TPIA's policy favoring disclosure and government transparency.<sup>20</sup>

Before *Boeing*, both the Texas Attorney General and Texas courts consistently interpreted the § 552.104 exception to disclosure in the TPIA as being unavailable to private parties, meaning that it was a *discretionary* exception for the government.<sup>21</sup> Despite the fact that San Antonio used a large amount of public funds to incentivize Boeing to come to the city, the Texas Supreme Court held that the information Boeing wished to keep secret was exempt from disclosure and that third parties, such as Boeing, have standing to raise the particular exception under the TPIA.<sup>22</sup>

The Texas Supreme Court turned against the approximately thirty-year long position of the attorney general's office by holding that private third parties have standing to raise the § 552.104 exception to disclosure under the TPIA.<sup>23</sup> The *Boeing* case raises eyebrows because the government's ability to exercise sole discretion in disclosing government contract information is now limited when a private entity intervenes and asserts that the information falls under the exception of the TPIA.<sup>24</sup> "Typically, a request for public information involves two parties, the governmental body holding the information and the citizen requesting it; . . ." this dynamic will no longer be true for many open records disputes in the future.<sup>25</sup> The Court's interpretation of this TPIA exception to disclosure broadens its scope significantly, giving private third parties a powerful tool to escape disclosing information in their contracts with the government and enjoining the government from fulfilling its guarantee of transparency with the people.<sup>26</sup>

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19. *Texas Supreme Court Boosts Corporate Confidentiality Protections*, JONES DAY (July 2015), <http://www.jonesday.com/texas-supreme-court-boosts-corporate-confidentiality-protections-07-10-2015/> (explaining that "even in light of the PIA's liberal construction mandate and overarching goal of increasing governmental transparency, Texas courts [after *Boeing*] may now be willing to protect the confidentiality interests of private parties and curb the sweeping reach of the PIA").

20. *See id.*; *see also* Malewitz, *supra* note 4; Kelley Shannon, *Court Rulings Taking a Toll on Texas Public Records Access*, FT. WORTH STAR-TELEGRAM (Aug. 2, 2016, 5:07 PM), <http://www.star-telegram.com/opinion/opn-columns-blogs/other-voices/article93333662.html>.

21. *See Boeing*, 466 S.W.3d at 831 ("The court [of appeals] reasoned that section 552.104 was 'a purely discretionary exception' that the Port was free to waive because the protected information was neither 'confidential under law' nor 'prohibited by law' from disclosure."); *see also* § 552.007 (permitting a governmental body to voluntarily disclose "part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law").

22. *See Boeing*, 466 S.W.3d at 831 (Tex. 2015).

23. *See id.* *See generally* OFFICE OF ATTORNEY GEN. OF TEX., *supra* note 1 ("The supreme court's decision overrules a long line of attorney general decisions limiting the application of section 552.104 to governmental bodies and discussing the burden a governmental body must meet in order to withhold information under section 552.104.")

24. *See Boeing*, 466 S.W.3d at 831.

25. *See id.* at 833.

26. *See Boeing Co. v. Abbott*, 412 S.W.3d 1, 12 (Tex. App.—Austin 2012, pet. granted), *rev'd sub nom.* *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015) ("The standing issue presented in this case is whether the PIA affords a private party, like Boeing, the right to *enjoin* a governmental body from

## II. THE EYES OF TEXANS ARE UPON YOU: OPEN RECORDS LEGISLATION IN TEXAS

The TPIA's predecessor, the Texas Open Records Act, was passed in 1973 by the "reform-minded Sixty-[T]hird Legislature" as a result of public uproar over scandals involving widespread government corruption and lack of transparency.<sup>27</sup> The early 1970s were tumultuous times in Texas politics; times that not only inspired the codification of open records laws in Texas, but a time that also caused Texans across the state to send their government a strong message.<sup>28</sup> The message was simple: The people of Texas will not tolerate corruption and secrecy in government dealings.<sup>29</sup>

### A. *The Sharpstown Scandal: The Events that Spurred the Passage of Open Records Laws in Texas*

In 1971, the Securities and Exchange Commission (SEC) filed civil and criminal charges against Houston banker Frank Sharp due to an extensive stock manipulation scheme he and his companies orchestrated.<sup>30</sup> Not long into its investigation, the SEC discovered that various members of the Texas government were deeply involved in the stock manipulation scheme.<sup>31</sup> Because many of Sharp's investors were high-ranking members of the Texas government, Sharp was able to push through favorable legislation that allowed his bank to escape federal oversight.<sup>32</sup> By passing legislation benefitting Sharp's personal businesses, his investors reaped the rewards.<sup>33</sup> Allegations of corruption in the government were widespread, including House Speaker Gus Mutscher, Jr., State Democratic Chairman Elmer Baum, Governor Preston Smith, Lieutenant Governor Ben Barnes, and many more.<sup>34</sup> As a result of the investigation, Governor Smith was named an "un-indicted conspirator for accepting a loan from Sharp" but was never criminally

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disclosing public information on grounds that it is excepted from disclosure under section 552.104." (emphasis added)); see also §§ 552.001(a)–.353.

27. See Act of May 19, 1973, 63d Leg., R.S., ch. 424, 1973 Tex. Gen. Laws 1112 (codified at TEX. REV. CIV. STAT. art. 6252–17a (West 2017)); see also *Mutscher v. State*, 514 S.W.2d 905, 910–11 (Tex. Crim. App. 1974) (summarizing events of Sharpstown scandal); OFFICE OF THE ATTORNEY GEN. OF TEX., *supra* note 1.

28. See CHARLES DEATON, *THE YEAR THEY THREW THE RASCALS OUT Part One, Three* (1973); HARVEY KATZ, *SHADOW ON THE ALAMO: NEW HEROES FIGHT OLD CORRUPTION IN TEXAS POLITICS* 5–7 (1972).

29. See generally DEATON, *supra* note 28; KATZ, *supra* note 28.

30. See DEATON, *supra* note 28; KATZ, *supra* note 28.

31. See DEATON, *supra* note 28; KATZ, *supra* note 28; Phillip K. Maxwell & Joe K. Longley, *History of Article 21.21 and Deceptive Trade Practices Act*, 9 J. TEX. INS. L. 20, 21–25 (2008).

32. Maxwell & Longley, *supra* note 31.

33. *Id.*

34. See DEATON, *supra* note 28; KATZ, *supra* note 28.

charged.<sup>35</sup> The SEC tried State Representative Tommy Shannon, along with House Speaker Mutscher and one of his aides, and found them guilty of conspiracy to accept a bribe from Sharp.<sup>36</sup>

Once word got out among Texas voters that “moneyed interests may have greased public palms for private gain,” the political outlook for the Texas legislators was not good.<sup>37</sup> In 1972, an election year following the Sharpstown Scandal in 1971, Texas voters swiftly cleaned house by filling the legislature with reform candidates.<sup>38</sup> By bringing in a sweep of new leaders and new laws in Texas, voters sent a clear message that they would not tolerate corruption and secrecy.<sup>39</sup> Texas elected a new governor, lieutenant governor, attorney general, and new leadership in the senate and house.<sup>40</sup>

The newly elected representatives “championed ‘open government’ free of the secret influence of special interests and the lobbyists who serve them” and endeavored to pass the first open records legislation in Texas.<sup>41</sup> In 1973, they succeeded in passing the Texas Open Records Act, which was later recodified as the Texas Public Information Act in 1993.<sup>42</sup> After these events, it was only fitting that the preamble of the TPIA recognizes that the people “insist on remaining informed so that they may retain control over the instruments they have created.”<sup>43</sup>

### B. *The Texas Public Information Act: An Accountability Tool*

The TPIA “guarantees access to public information, subject to certain exceptions.”<sup>44</sup> Similar to the federal Freedom of Information Act (FOIA), the TPIA was written with the goal of making information the rule and secrecy the exception.<sup>45</sup> However, this broad policy favoring disclosure is

35. James Pinkerton, *Sharpstown Scandal Sparked Revolution at the Polls*, HOUS. CHRON. (Sept. 24, 2016, 9:37 PM), <http://www.chron.com/local/history/major-stories-events/article/Sharpstown-scandal-sparked-a-revolution-at-the-9279816.php>. Governor Smith “convened a special legislative session” for the purpose of pushing through Sharp’s favorable legislation. *Id.* Unsurprisingly, Governor Smith later vetoed that same legislation. *Id.*

36. See DEATON, *supra* note 28, at 30–40; KATZ, *supra* note 28, at 61–79, 280–81.

37. Maxwell & Longley, *supra* note 31, at 25.

38. See DEATON, *supra* note 28, Part Two; Pinkerton, *supra* note 35.

39. See DEATON, *supra* note 28, Part Two.

40. Maxwell & Longley, *supra* note 31.

41. *Id.*; see also DEATON, *supra* note 28; KATZ, *supra* note 28.

42. See OFFICE OF THE ATTORNEY GEN. OF TEX., *supra* note 1, at 16; see also Act of May 19, 1973, 63d Leg., R.S., ch. 424, 1973 Tex. Gen. Laws 1112 (codified at TEX. REV. CIV. STAT. art. 6252–17a (West 2017)); Mutscher v. State, 514 S.W.2d 905, 910–11 (Tex. Crim. App. 1974).

43. TEX. GOV’T CODE ANN. § 552.001 (West 2012).

44. Boeing Co. v. Paxton, 466 S.W.3d 831, 833 (Tex. 2015) (quoting Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P., 343 S.W.3d 112, 114 (Tex. 2011)).

45. § 552.001(a) (deriving the fundamental policy of the TPIA from “the American constitutional form of representative government”); see also 5 U.S.C.A. § 552 (West 2016); Wellford v. Hardin, 315 F. Supp. 768 (D. D.C. 1970); 111 CONG. REC. 26821 (1965), [http://nsarchive.gwu.edu/nsa/foialeghistory/111%20Cong.%20Rec.%2026820%20\(Oct.%2013,%201965\).pdf](http://nsarchive.gwu.edu/nsa/foialeghistory/111%20Cong.%20Rec.%2026820%20(Oct.%2013,%201965).pdf) (“Knowledge will forever govern

not unlimited.<sup>46</sup> The Act outlines approximately sixty exceptions, all requiring narrow construction.<sup>47</sup>

*1. Prior to Boeing v. Paxton: How Texas Courts Have Viewed the Policy and Purpose of the Texas Public Information Act*

Generally, Texas courts have liberally interpreted the TPIA in support of open government, as required by the TPIA.<sup>48</sup> However, the courts have also recognized that the TPIA's exceptions to disclosure counterbalance "the public's right to know" and that the interests of private parties are often involved in open records requests.<sup>49</sup> Whether information falls within the scope of the TPIA and any of its exceptions are "questions of law involving statutory construction," and courts should not interpret individual provisions in ways that lead to absurd results.<sup>50</sup> In addition to the liberal construction of TPIA provisions in favor of disclosure, courts have generally obeyed the mandate that they should narrowly construe exceptions to disclosure.<sup>51</sup> Texas courts have recognized that "[l]iberal construction of the [Texas Public Information Act] may require disclosure even in instances where inconvenience or embarrassment may result."<sup>52</sup>

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ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both."). FOIA was passed to fix the problems of its predecessor, the Administrative Procedure Act (APA), which promoted secrecy with loopholes like "such phrases in section 3 of the [APA] as—'requiring secrecy in the public interest,' or 'required for good cause to be held confidential.'" 111 CONG. REC. 26821. In addition to loopholes, the APA was believed to have been used to cover up government blunders and inefficiencies. *Id.* ("Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities . . .").

46. See §§ 552.101–.154 (displaying the exceptions to disclosure under the TPIA).

47. See *id.*

48. OFFICE OF THE ATTORNEY GEN. OF TEX., *supra* note 1. "The Act requires the attorney general to construe the Act liberally in favor of open government." *Id.* (describing § 552.001(b)); see, e.g., A & T Consultants v. Sharp, 904 S.W.2d 668, 675 (Tex. 1995); Abbott v. City of Corpus Christi, 109 S.W.3d 113, 118 (Tex. App.—Austin 2003, no pet.); Thomas v. Cornyn, 71 S.W.3d 473, 480 (Tex. App.—Austin 2002, no pet.).

49. See Waste Mgmt. of Tex., Inc. v. Abbott, 406 S.W.3d 626, 630 (Tex. App.—Eastland 2013, pet. denied); see also *Tex. Dep't of Pub. Safety*, 343 S.W.3d at 114.

50. See *City of Fort Worth v. Abbott*, 258 S.W.3d 320, 327 (Tex. App.—Austin 2008, no pet.); see also *Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser*, 140 S.W.3d 351, 356 (Tex. 2004).

51. § 552.001; see also *Harris Cty. Appraisal Dist. v. Integrity Title Co.*, 483 S.W.3d 62 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 329 (Tex. App.—Austin 2002, no pet.) ("Texas courts have consistently adhered to these requirements by narrowly construing the type of information that may be withheld under the statute's exceptions.").

52. See *Arlington Indep. Sch. Dist. v. Tex. Atty. Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.); *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 552 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

## 2. *The Section 552.104 Exception to Disclosure*

Deep in the heart of the dispute in *Boeing* was a particular exception to disclosure under the TPIA § 552.104.<sup>53</sup> The § 552.104 exception states that:

- (a) Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.
- (b) The 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 this section.<sup>54</sup>

This particular exception to disclosure addresses concerns in giving “competitor[s] or bidder[s] on a government contract” an “unfair advantage over other competitors or bidders” through the disclosure of information under the TPIA.<sup>55</sup> In the past, the office of the attorney general consistently interpreted § 552.104 as designed to protect the government’s purchasing interests in competitive bidding.<sup>56</sup> The attorney general construed it as a waivable or discretionary exception meant only for the government.<sup>57</sup> Thus, prior to *Boeing*, private party attempts to raise this exception were consistently denied.<sup>58</sup>

### III. *BOEING V. PAXTON*: THE END OF TRANSPARENCY

The issue placed before the Texas Supreme Court to decide in *Boeing* was whether a private entity such as Boeing has standing to raise the § 552.104 exception to disclosure under the TPIA.<sup>59</sup> Boeing is the largest aerospace company in the world, and a significant part of its business is in

53. § 552.104(a); *Boeing Co. v. Abbott*, 412 S.W.3d 1, 12–18 (Tex. App.—Austin 2012, pet. granted), *rev’d sub nom.* *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015).

54. § 552.104(a).

55. TEX. ATT’Y GEN. OR1988-509, at 4.

56. *See* TEX. ATT’Y GEN. OR1994-023, at 1 (“Section 552.104, however, is designed to protect only a governmental body’s interests.”) (citing TEX. ATT’Y GEN. OR1990-541, at 4–5); TEX. ATT’Y GEN. OR1988-514, at 2 (describing how the predecessor to § 552.104 “protects the government’s purchasing interests by preventing competitors or bidders from gaining unfair advantage over other competitors or bidders”).

57. *See* TEX. ATT’Y GEN. OR1991-592, at 8.

58. *See generally* TEX. ATT’Y GEN. OR1994-035, at 3. An argument made by Motorola in the 1990s that § 552.104 “protects its proposals from public disclosure” was denied because the purpose of the exception “was to protect the government’s interests when it is involved in commercial transactions . . . and not to protect the interests of business entities that compete in the private sector.” *Id.* Additionally, the attorney general held that “Motorola lack[ed] standing to assert the protection of this section on behalf of Collin County.” *Id.*; *see also* TEX. ATT’Y GEN. OR1990-541, at 5.

59. *See generally* *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015).



the competition for contracts in maintaining and overhauling older aircraft for the military.<sup>60</sup> In 1995, Boeing needed a new facility to conduct its work on planes, and it zeroed in on the Kelly Air Force Base in San Antonio, which the Department of Defense had scheduled for closure under the Base Realignment and Closure Program.<sup>61</sup> This space at Kelly Air Force Base, was large enough and well equipped to house Boeing's military aircraft.<sup>62</sup> In response to the effort to make Kelly Air Force Base a better fit for commercial operations, the City of San Antonio created the Port Authority, which was a tax-exempt enterprise that the city incorporated as a separate political jurisdiction.<sup>63</sup> Boeing signed a lease with the Port Authority in 1998, granting it 1.3 million square feet at Kelly Air Force Base for a twenty-year term and has re-signed the lease since then for a term of fifteen years effective on December 23, 2014.<sup>64</sup> Once established at Kelly Air Force Base, Boeing's goal was to "compete for government aircraft contracts," and it was successful—Boeing is the Port Authority's largest tenant.<sup>65</sup>

The dispute in *Boeing* began with a former Boeing employee named Robert Silvas who made a TPIA request to the Port Authority for "various Boeing corporate information, including the lease."<sup>66</sup> Boeing responded with a redacted version of the lease and subsequently sought relief from the attorney general, asserting that the redacted parts of the lease were sensitive information regarding overhead costs that, if disclosed, would give advantage to its competitors.<sup>67</sup> Boeing's main concern was that a competitor could take the lease's redacted information and reverse engineer it to use for the purpose of underbidding Boeing in future contests for government contracts.<sup>68</sup>

The information that Boeing claimed to qualify for exemption included "rental rates, share of common maintenance costs, insurance coverage required by the Port [Authority], liquidated damages provisions, and lease incentives."<sup>69</sup> Only about a dozen of Boeing's total employees knew this information, and Boeing feared that disclosure to the public would

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60. *Id.* at 834; see also *About Boeing Defense, Space & Security*, *supra* note 15; *Boeing: Historic Legacy, Big Future in the Alamo City*, *supra* note 15.

61. *Boeing*, 466 S.W.3d at 834.

62. *Id.*

63. *Id.*

64. *Id.* at 831 n.1.

65. *Id.* at 834.

66. *Id.* At oral argument, the attorney for Boeing described the request as coming from "a disgruntled employee" who "handwrote on a scrap of paper his name, address, and I want the Boeing lease." Transcript of Oral Argument at 13, *Boeing v. Paxton*, 466 S.W.3d 831 (Tex. 2015) (No. 12-1007).

67. *Boeing*, 466 S.W.3d at 834; see also *infra* text accompanying notes 78–87 (discussing the procedural disposition and history of *Boeing*).

68. *Boeing*, 466 S.W.3d at 834.

69. *Id.* at 834–35. Boeing also sought to withhold "the percentage used to calculate Boeing's share of the common maintenance costs, the actual dollar figure for the insurance limits . . . the percentage used to calculate Boeing's penalty for early termination, the actual dollar caps on incentives Boeing might achieve for meeting goals, . . . and the actual numbers used to calculate Boeing's future rent." *Id.* at 834 n.2.

significantly harm its business interests.<sup>70</sup> This fear was reasonable, because the market for refitting military aircraft is so competitive that even a one percent difference in bid price could cost Boeing millions of dollars.<sup>71</sup> Admittedly, Boeing's argument in preserving its business interests by keeping the redacted lease information exempt is strong. In fact, the exact thing that Boeing was worried might happen at Kelly Air Force Base had previously occurred in Lake Charles, Louisiana, where Northrop Grumman Corporation underbid Boeing "by about one percent and now has the contract for one heavy-lift aircraft that Boeing formerly serviced at Kelly [Air Force Base]."<sup>72</sup>

The § 552.104(a) exception to disclosure, which allows information that "if released, would give advantage to a competitor or bidder," was central to the legal issues in *Boeing*.<sup>73</sup> The primary issues placed before Texas courts was whether a private entity, such as Boeing, has standing to raise the § 552.104 exception and whether the particular information in the case qualified for the exception.<sup>74</sup> The Supreme Court of Texas held, for the first time, that a private entity, like Boeing, has standing to raise the § 552.104 exception to disclosure, effectively enjoining the government from retaining any of its prior sole discretion over whether to disclose the information in the contract to Silvas.<sup>75</sup>

Allowing the government to evade disclosure of information—and lose its discretionary exception—in government contracts does not promote laudable policy ideals, nor does it further the purpose of the TPIA.<sup>76</sup> *Boeing* represents an unprecedented shift in TPIA interpretation, giving private parties across Texas the tools to shield their information and prevent the government from its discretionary choice to disclose government information.<sup>77</sup> By holding for the first time that private parties have standing

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70. *Id.* at 835.

71. *See id.*; *see also* TEX. GOV'T CODE ANN. § 552.104(a) (West 2012) ("Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.").

72. *Boeing*, 466 S.W.3d at 840.

73. § 552.104(a).

74. *See Boeing*, 466 S.W.3d at 831.

75. *See id.*

76. *See* § 552.001 ("[G]overnment is the servant and not the master of the people."); *see also* *Boeing Co. v. Abbott*, 412 S.W.3d 1 (Tex. App.—Austin 2012, pet. granted), *rev'd sub nom.* *Boeing Co v. Paxton*, 466 S.W.3d 831 (Tex. 2015).

77. *Texas Supreme Court Boosts Corporate Confidentiality Protections*, *supra* note 19. The § 552.104 exception gives private parties the power to interfere with effective communication between citizens and government. *Id.*

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.

*Id.*

to raise the § 552.104 exception, the Court in *Boeing* changed the course of Texas open records policy, and not for the better.<sup>78</sup>

### A. Procedural History

The dispute that eventually made its way to the Supreme Court of Texas began in the Office of the Attorney General of Texas, like all open records disputes in Texas.<sup>79</sup> The attorney general is called to “prepare, distribute, and publish any materials, including detailed and comprehensive written decisions and opinions” based on disputes under the TPIA.<sup>80</sup> The attorney general issued a decision denying any application of the § 552.104 exception to the information Boeing was seeking to keep private,<sup>81</sup> concluding that the § 552.104 exception was meant for the government’s benefit in protecting the integrity of the bidding process.<sup>82</sup>

#### 1. The District Court

In response to the attorney general’s open records letter ruling that none of the redacted information in the lease is exempt from disclosure under TPIA, Boeing sought declaratory and injunctive relief before the district court of Texas in Travis County.<sup>83</sup> Greg Abbott, in his capacity as attorney general, sought declaratory relief against Boeing.<sup>84</sup> The district court affirmed the attorney general’s original ruling, holding that none of the information Boeing sought to keep confidential was exempt from disclosure under § 552.104(a).<sup>85</sup> The court held that even if the information redacted from the lease qualified for the § 552.104(a) exemption, Boeing did not have standing to raise the exception.<sup>86</sup> Because the information was not found to be confidential under other law—such as trade secret law—the court ordered

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78. See *Boeing*, 466 S.W.3d at 831; see also *infra* Part IV.

79. *Boeing*, 466 S.W.3d at 831. The attorney general is “responsible for maintaining uniformity in the Act’s application, operation, and interpretation.” *Id.* at 833.

80. § 552.011.

81. See *Boeing Co. v. Abbott*, No. D-1-GN-05-004594, 2010 WL 9035561, at \*1 (345th Dist. Ct. Travis County, Tex. July 14, 2010).

82. *Boeing Co. v. Abbott*, 412 S.W.3d 1, 16 (Tex. App.—Austin 2012, pet. granted), *rev’d sub nom.* *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015).

While it may be true, at least to some degree, that the government is not a competitor or a bidder, it does not follow that the government has no interest in protecting competitive bidding on government contracts. While a disclosed bid might certainly give a bidder unfair advantage, i.e., the opportunity to underbid, the government has an interest in maintaining the integrity of the bidding process, which is furthered by section 152.104.

*Id.*

83. *Abbott*, 2010 WL 9035561, at \*1; see also *Boeing*, 466 S.W.3d at 835.

84. *Abbott*, 2010 WL 9035561, at \*1.

85. *Id.*; see also § 552.104(a).

86. See generally *Boeing Co. v. Abbott*, No. D-1-GN-05-004504, 2010 WL 10922570, at\* 1 (345th Dist. Ct. Travis County, Tex. July 28, 2010).

Boeing to make the information in the lease available within fifteen days of the final judgment.<sup>87</sup>

## 2. The Court of Appeals

The Texas Third Court of Appeals affirmed both the attorney general's ruling and the district court's holding.<sup>88</sup> The court stated initially that "determin[ing] the legislature's intent" is the court's main objective when construing the TPIA.<sup>89</sup> The court of appeals interpreted the TPIA with the backdrop of the Act's expressly stated purpose of "ensur[ing] public access" to information relating to "the affairs of government."<sup>90</sup> Before the court of appeals, Boeing first argued that the lease's redacted information was a common law trade secret, making it confidential and exempt from disclosure under § 552.022(a).<sup>91</sup> The court of appeals dismissed this argument, holding that the district court did not err "in concluding that trade-secret law does not protect the lease information from mandatory disclosure under section 552.022."<sup>92</sup> Although common law trade secrets have been recognized as exempt from disclosure under the TPIA,<sup>93</sup> the court of appeals held that Boeing simply did not meet its burden at trial of establishing that the lease information was a common law trade secret.<sup>94</sup>

Boeing's main argument was that the lease's redacted information was exempt from disclosure under the § 552.104 exception, which applies to any information that "if disclosed would give advantage to a competitor or bidder."<sup>95</sup> Boeing's argument that the district court erred was twofold.<sup>96</sup> First, Boeing argued that the district court erred in holding that it lacked standing to assert the § 552.104 exception to disclosure.<sup>97</sup> Addressing this threshold argument, the court sided with the attorney general, affirming that Boeing did not have standing to assert the § 552.104 exception because TPIA

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87. *Abbott*, 2010 WL 9035561.

88. *Boeing Co. v. Abbott*, 412 S.W.3d 1 (Tex. App.—Austin 2012, pet. granted), *rev'd sub nom.* *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015).

89. *Id.* (citing *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003)).

90. *Id.* at 8 (citing § 552.001(a)) ("The express purpose of the PIA is to ensure public access to complete information about the affairs of government and its public officials and employees.").

91. *Id.* This particular section of the TPIA describes what is considered to be public information, which is therefore subject to disclosure requests. § 552.022(a). Boeing did not argue that the lease information was not public information under § 552.022. *Abbott*, 412 S.W.3d at 8. Instead, Boeing argued that the lease information was "confidential under other law," therefore not subject to disclosure upon TPIA requests. *Id.* at 12.

92. *Abbott*, 412 S.W.3d at 9.

93. § 552.110 ("A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of Section 552.021.").

94. *See Abbott*, 412 S.W.3d at 9; *see also infra* Section V.A (describing why the court of appeals held that the lease information is not exempt from disclosure as a trade secret).

95. *Abbott*, 412 S.W.3d at 8; *see also* § 552.104.

96. *Abbott*, 412 S.W.3d at 12.

97. *Id.*

exceptions to disclosure are intended to protect the interests of government bodies, not those of private entities.<sup>98</sup> Second, Boeing argued that a plain reading of § 552.104 showed that third parties are the intended beneficiaries of the exception by pointing out that only private parties can have “competitors,” indicating that the legislature clearly intended third parties to have standing.<sup>99</sup>

The court of appeals rejected Boeing’s arguments as unpersuasive and held that the legislature’s clear intention was for § 552.104 to be a discretionary exception meant solely for government bodies.<sup>100</sup> Under the court of appeals’ reading of § 552.104, no private party can prevent a governmental body from disclosing requested information because it does not have the standing to raise the exception to disclosure.<sup>101</sup> In support for its holding, the court of appeals relied heavily on legislative intent, past attorney general rulings interpreting the applicability of TPIA exceptions, and a reading of the TPIA as a whole.<sup>102</sup> Because it held against Boeing on the threshold issue of standing, the court of appeals did not address Boeing’s second point—that the district court erred in holding that the lease information in question does not qualify for exception under § 552.104.<sup>103</sup> In short, the court of appeals supported a reading of the TPIA that viewed exceptions to disclosure as a *discretionary* option available only to the government.<sup>104</sup>

### B. The Supreme Court of Texas

Boeing appealed the judgment of the court of appeals, claiming that the lower courts failed to apply § 552.104 properly.<sup>105</sup> The Supreme Court of Texas subsequently reversed the court of appeals, holding not only that the information Boeing sought to keep confidential qualifies for the § 552.104(a) exception to disclosure, but also that the exception itself may be raised by both government *and* private entities.<sup>106</sup> This resulted in Boeing being able to maintain the secrecy of its competitive information in the government

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98. *Id.* (“The attorney general argues that the exception does not protect the legal interests of third parties like Boeing. Rather, the attorney general contends, section 552.104 is meant to protect the government’s purchasing interests and can be waived by the governmental body if not properly raised.”).

99. *Id.* at 21.

100. *Id.*

101. *Id.*

102. *Id.* at 13–14.

103. *Id.* at 12.

104. *See id.* (“However, even assuming that section 552.104 protects the interest of private parties, as Boeing argues, it does not follow that the legislature intended for a private party to have the right to prohibit a governmental body from disclosing information on this basis. . . . [W]e find that a plain reading of the PIA shows that section 552.104 is a purely discretionary exception.”).

105. TEX. GOV’T CODE ANN. § 552.104(a) (West 2012); *Boeing Co. v. Paxton*, 466 S.W.3d 831, 835 (Tex. 2015).

106. § 522.104(a); *Boeing*, 466 S.W.3d at 835.

lease and prevented Silvas from receiving the lease information he requested.<sup>107</sup> Importantly, the Court’s holding extinguishes the ability of the government to maintain sole discretion over whether to raise the exception to disclosure under the TPIA because interested third parties are now able to raise the exceptions themselves.<sup>108</sup> This interpretation of the TPIA overturns the long-held interpretation of Texas courts and attorneys general by allowing for private entities to enjoin the government from disclosing information to its citizens.<sup>109</sup>

The Texas Supreme Court began its analysis by noting that the TPIA “guarantees access to public information, subject to certain exceptions.”<sup>110</sup> Leading with this statement—a statement that places emphasis on the exceptions to disclosure—is a clear shift in tone from the court of appeals’ analysis, which instead emphasized the broad policy of the TPIA towards transparency and presumptive disclosure.<sup>111</sup> The Court first addressed the threshold issues of whether Boeing had standing to raise the § 552.104(a) exception and whether the court of appeals erred in holding that § 552.104(a) was meant as a discretionary exception intended only for the government.<sup>112</sup>

Boeing argued that the absence of express language in the TPIA or in § 552.104(a) stating that the government is the *sole* party that may raise exceptions indicated that Boeing had standing.<sup>113</sup> Boeing also pointed to that the fact that § 552.104(a) is expressly mentioned in other parts of the TPIA that recognize the involvement of third-party concerns.<sup>114</sup> Boeing used this to argue that there was no reason for the legislature to recognize the existence of third-party interests “if a third party like itself has no right to assert the exception.”<sup>115</sup> The attorney general argued that the court of appeals was correct in holding that the legislature intended § 552.104(a) to exist “exclusively for the government’s benefit,” and was therefore not available

107. *Boeing*, 466 S.W.3d at 835.

108. *Id.* at 840.

109. *Id.* at 842; *see also* TEX. ATT’Y GEN. OR1991-592, at 1–10.

110. *Boeing*, 466 S.W.3d at 833 (quoting *Tex. Dep’t of Pub. Safety v. Cox Tex. Newspapers, L.P.*, 343 S.W.3d 112, 114 (Tex. 2011)).

111. *Boeing Co. v. Abbott*, 412 S.W.3d 1, 8 (Tex. App.—Austin 2012, pet. granted), *rev’d sub nom. Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The court of appeals began its analysis by emphasizing the overall policy toward disclosure and transparency, with little mention of exceptions to disclosure. *Id.*

The express purpose of the PIA is to ensure public access to complete information about the affairs of government and its public officials and employees . . . . Through this access to information, the public “may retain control over the instruments they have created.” Consistent with this policy, the legislature has mandated that the PIA is to be liberally construed in favor of granting requests for information.

*Id.* (citation omitted).

112. *Boeing*, 466 S.W.3d at 835–39.

113. *Id.* at 838.

114. *Id.*; TEX. GOV’T CODE ANN. § 552.305(a) (“In a case in which information is requested under this chapter and a person’s privacy or property interests may be involved, including a case under Section 552.101, 552.104, 552.110, or 552.114 . . .”).

115. *Boeing*, 466 S.W.3d at 838.

to third parties.<sup>116</sup> Additionally, the attorney general argued that reading the exception as Boeing suggested would create a “super exception” that is too lenient, threatening to swallow the general rule favoring disclosure.<sup>117</sup> Boeing responded by arguing that a simple reading of § 552.104(a) did not show any clear language indicating that the exception was meant only to protect government interests.<sup>118</sup> Lastly, Boeing pointed out that if its reading of § 552.104(a) created a “super exception,” as the attorney general argued, then the remedy lies with the legislature, not the Court.<sup>119</sup>

The Court sided with Boeing on the threshold issue of standing, favoring Boeing’s argument that a close reading of § 552.104(a) shows no express language limiting the ability to raise the exception only to the government.<sup>120</sup> The Court also agreed with Boeing’s argument that the recognition of private third-party interests in other parts of the Act showed the legislature’s intent to allow third parties to raise exceptions to disclosure.<sup>121</sup> The Court concluded that the court of appeals erred in its holding that Boeing lacked standing to raise the § 552.104(a) exception, and that the court of appeals’ reading of the Act was incorrect.<sup>122</sup> Agreeing with Boeing, the Court reasoned that there was no point in including language referring to third parties in other areas of the Act if the legislature did not intend for third parties to have standing to raise exceptions.<sup>123</sup>

Next, the Court addressed the second question as to whether the redacted information in the lease qualified for the § 552.104(a) exception.<sup>124</sup> Boeing argued that the lease’s redacted information would undoubtedly give advantage to its competitors. Boeing proved this at trial through evidence presented about the “intense competition that exists in the aerospace industry for large government contracts.”<sup>125</sup> The attorney general argued that Boeing

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116. *Id.* at 835. The attorney general supported its arguments by using past attorney general open record letter rulings as persuasive evidence, arguing before the Court that it should uphold the longstanding interpretation of attorney generals that the government alone has standing to raise the § 552.104(a) exception. *Id.* at 835–36, 838 (citing TEX. ATT’Y GEN. OR1991-592, at 8–9) (determining that § 552.104’s exception applies only to governmental entities); *see also* TEX. ATT’Y GEN. OR1990-541, at 4–7.

117. *Boeing*, 466 S.W.3d at 836.

118. *Id.*

119. *See id.*

120. *Id.* at 838.

121. *See id.* In particular, the Court mentioned § 552.305(a), a provision in which the § 552.104(a) exception is expressly mentioned as an example of disclosure that may implicate third party interests. *Id.*; *see also* TEX. GOV’T CODE § 552.305(a) (West 2012). The Court agreed that the legislature would not have expressly recognized third-party interests in other areas of the Act if it had not intended third parties to have standing to raise exceptions. *Boeing*, 466 S.W.3d at 839.

122. *Id.*

123. *Id.*

124. *Id.* (“Accordingly, we hold that section 5[5]2.104’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.”)

125. *Id.* Evidence at trial came from “a Boeing manager with long experience in bidding for military projects,” who described the bidding process as one in which a price difference of as little as one percent

did not meet the requirements of § 552.104(a) because Boeing’s argument was based on hypotheticals and speculations and that no “specific competitive harm in particular ongoing competitive bidding” was shown.<sup>126</sup> The Court held that the § 552.104(a) exception applied to the redacted lease information due to the highly competitive and unique nature of the aerospace industry.<sup>127</sup> The Court concluded that “the test under [§] 5[5]2.104 is whether knowing another bidder’s overhead costs would be an advantage, not whether it would be a decisive advantage”—a test that Boeing easily met with evidence of the highly competitive aerospace market.<sup>128</sup> Thus, the Supreme Court of Texas interpreted the TPIA for the first time to provide private third parties with standing to raise the § 552.104(a) exception to disclosure.<sup>129</sup>

### C. Flaws in the Texas Supreme Court’s Analysis

*“This chapter shall be liberally construed in favor of granting a request for information.”*<sup>130</sup>

The Texas Supreme Court’s analysis is flawed in one major way: it does not give proper consideration for the overarching purpose of the TPIA, and therefore it fails to adequately read § 552.104(a) in the backdrop of the Act as a whole.<sup>131</sup> Boeing seems to have successfully convinced the Court to view § 552.104(a) in an isolated way, making an argument based on the plain language of the provision more persuasive.<sup>132</sup> However, if the policy that the TPIA “shall be liberally construed in favor of granting a request for information” has any true meaning, then courts should avoid any reading of the TPIA that is harmful to that purpose, especially when another reasonable construction can be made.<sup>133</sup> Where the underlying purpose of the statute is clear and unambiguous, courts should be diligent to construe the statute’s provisions in such a way that produces outcomes consistent with that

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can decide who wins a contract. *Id.*

126. *Id.* at 840. The statute itself does not demand specific evidence of harm in an ongoing competitive bidding process, but two past attorney general decisions have required a showing of specific harm. *Id.*; see also TEX. ATT’Y GEN. OR1990–541, at 4; TEX. ATT’Y GEN. OR1988–514, at 1.

127. *Boeing*, 466 S.W.3d at 839–41.

128. *Id.* at 841.

129. See *id.* at 841–42.

130. TEX. GOV’T CODE ANN. §552.001(a) (West 2012) (emphasis added).

131. See *Greater Hous. P’ship v. Paxton*, 468 S.W.3d 51, 59 (Tex. 2015) (“We must therefore analyze the reasonableness of each definition in light of the statutory context.”); see also *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014) (plurality opinion); *R.R. Comm’n v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 628 (Tex. 2011) (“We generally avoid construing individual provisions of a statute in isolation from the statute as a whole.”); *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011) (“It is a fundamental principle of statutory construction and indeed of language itself that words’ meanings cannot be determined in isolation but must be drawn from the context in which they are used.”).

132. *Boeing*, 466 S.W.3d at 838.

133. § 552.001(a) (emphasis added).



purpose.<sup>134</sup> It is clear that granting private third parties standing to raise § 552.104(a)—a provision with a qualification bar that is relatively easy to pass—will result in a higher likelihood that more open records requests will be denied simply because more parties are able to raise exceptions.<sup>135</sup>

*1. Thwarting the Texas Public Information Act's Overarching Purpose to Promote Transparency*

It is true, as Boeing argued, that § 552.104 does not expressly indicate that private third parties do not have standing to raise the exception.<sup>136</sup> Silence on behalf of the legislature within § 552.104(a) is not alone proof that the legislature intended third parties to have standing.<sup>137</sup> The legislature was not silent when it dictated how the provisions of the TPIA were to be construed.<sup>138</sup> The preamble of the TPIA could not be more clear.<sup>139</sup> When a court is faced with two arguments, one seeking to construe the TPIA in a way that favors disclosure despite potential “inconvenience” to third parties that may result, and another seeking to withhold information from the public, the legislature intended for it to be a simple decision.<sup>140</sup> The Texas Supreme Court chose instead to adopt an interpretation of § 552.104(a) that frustrates open government.<sup>141</sup>

It is also true, as Boeing argued, that a few other provisions in the TPIA recognize the potential implication of third-party interests in open records disputes.<sup>142</sup> It does not follow, however, that the recognition of third-party interests means that the legislature intended third parties to have standing to raise § 552.104(a)—an exception that is silent on the issue of third parties.<sup>143</sup> If anything at all, the recognition of third-party interests in other provisions of the TPIA strongly suggests that the legislature contemplated third-party interests when drafting the TPIA.<sup>144</sup> If the legislature recognized that the TPIA's broad policy favoring disclosure affected third-party interests, then

134. See *supra* text accompanying note 45 (explaining the underlying purpose of the statute).

135. *Boeing*, 466 S.W.3d at 841. For specific information to qualify for the § 552.104(a) exception, the government or a private party must prove “whether knowing another bidder’s overhead costs would be an advantage, not whether it would be a decisive advantage.” *Id.*

136. See *supra* text accompanying note 121 (discussing third-party interests and possible standing); see also § 552.104(a).

137. See § 552.001(a).

138. See *id.*

139. See *id.*

140. See *Arlington Indep. Sch. Dist. v. Tex. Atty. Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.); *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 552 (Tex. App.—Austin 1983, writ ref’d n.r.e.).

141. See *Boeing Co. v. Paxton*, 466 S.W.3d 831, 842 (Tex. 2015).

142. *Id.* at 838; see also § 552.305(a) (“In a case in which information is requested under this chapter and a person’s privacy or property interests may be involved, including a case under Section 552.101, 552.104, 552.110, or 552.114 . . .”).

143. See § 552.104(a).

144. See § 552.305(a).

the legislature would have expressly recognized that third parties have standing under those provisions; thus, its refusal to do so is telling.<sup>145</sup>

Interpreting § 552.104(a) in a way that creates a “super exception” that, in effect, gives private parties a tool to chip away at what the statute as a whole was intended to do: prevent corruption and secrecy in government dealings from being hidden from the people.<sup>146</sup> The preamble of the TPIA clearly states that, “[I]t is the policy of this state that each person is entitled, unless otherwise *expressly* provided by law, at all times to complete information about the affairs of government” and that this policy “shall be liberally construed” in favor of government transparency.<sup>147</sup> However, the analysis in *Boeing* seems to do just the opposite, by interpreting the § 552.104(a) exception broadly and the overarching purpose of the TPIA narrowly.<sup>148</sup>

## 2. *The Section 552.104 Exception Is Not a Private Party Rescue Provision*

One of the Texas Supreme Court’s main concerns in *Boeing* was that private parties will be discouraged from entering into contracts with government entities in Texas out of fear that their private business information will be aired out for all to see.<sup>149</sup> In line with this idea, Justice Guzman stated that “[t]here is little to support the view that open-records laws were envisioned as tools to pry open the sensitive records of private entities or to function as a private discovery tool.”<sup>150</sup> Although it may be true that the TPIA was not intended to exist for the sole purpose of exposing sensitive private business information, the TPIA was certainly not intended to exist for the protection of private-party information either.<sup>151</sup> Before *Boeing*, it was generally accepted that “[l]iberal construction of the [Texas Public Information] Act may require disclosure even in instances where inconvenience or embarrassment may result.”<sup>152</sup>

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145. *See generally id.*

146. *Boeing*, 466 S.W.3d at 836; *see also supra* text accompanying note 117 (describing the attorney general’s argument that Boeing’s interpretation of the § 552.104(a) creates a “super exception”).

147. § 552.001(a) (emphasis added).

148. *See Boeing*, 466 S.W.3d at 842.

149. *Id.* at 835 (“[Boeing] argues that the information it redacted from the lease contains financial or commercial information that would, if disclosed, put Boeing at a competitive disadvantage when bidding on future large government contracts.”).

150. *Greater Hous. P’ship v. Paxton*, 468 S.W.3d 51, 62–68 (Tex. 2015); *see also* Brad Young, *Supreme Court Clarifies Effect of Act on Private Parties*, TEX. CITY ATT’Y ASS’N, Vol. 12 Issue 9 (2015), <https://tcaanewsletter.org/august-2015/supreme-court-clarifies-effect-of-public-information-act-on-private-parties/>.

151. § 552.001(a) (describing the purpose of the TPIA as promoting government transparency and accountability through a strong policy favoring disclosure of information held by the government to citizens that request to see it).

152. *Arlington Indep. Sch. Dist. v. Tex. Atty. Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.); *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 552 (Tex. App.—Austin 1983, writ ref’d n.r.e.).

Allowing private parties who fail to keep their sensitive information confidential through other avenues of law gives private parties a safety net, assuring them that if all else fails, they may still keep their information secret by using § 552.104(a) as a last resort.<sup>153</sup> Protecting private parties who fail to take adequate steps to protect their trade secrets or fail to establish confidentiality over sensitive information in government contracts is not what the legislature intended when passing § 552.104(a).<sup>154</sup> It is not the role of the TPIA to come to a third party's rescue; it is the goal of the TPIA to err on the side of disclosure.<sup>155</sup> Nevertheless, after *Boeing*, § 552.104(a) has become the private parties' safety net—rescuing them from public disclosure of information they fail to protect under trade-secret law or prove confidential under other law.<sup>156</sup>

IV. A TRAIL TOWARD CORRUPTION AND THE RAMIFICATIONS OF *BOEING*  
V. *PAXTON*

*“If there’s a place where corruption can fester, it’s here . . . . It’s the interface between those who are seeking to work for the government and the government. That’s where the money is.”*<sup>157</sup>

What the holding in *Boeing* means for future interpretations and applications of the TPIA and of the future use of the § 552.104(a) exception is becoming clear.<sup>158</sup> The Texas Supreme Court's decision in *Boeing* does not bode well for the future of government transparency in Texas.<sup>159</sup> Moving forward, it is important to be watchful of the precedent that *Boeing* set,

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153. See *Texas Supreme Court Boosts Corporate Confidentiality Protections*, *supra* note 19.

154. See § 552.001(a) (describing the policy and purpose of the TPIA); § 552.104(a).

155. § 552.001(a) (describing the policy and purpose of the TPIA).

156. § 552.007 (“(a) This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, *unless the disclosure is expressly prohibited by law or the information is confidential under law.*” (emphasis added)); see also Young, *supra* note 150 (discussing the Texas Supreme Court's holding in *Boeing*); *Texas Supreme Court Boosts Corporate Confidentiality Protections*, *supra* note 19 (“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.”).

157. Malewitz, *supra* note 4 (quoting open-government attorney Joe Larsen, “who also serves on the Freedom of Information Foundation of Texas”).

158. See, e.g., Dug Begley, *Texas Supreme Court Ruling Helps Bar the Door to Public Release of Company Records*, HOUS. CHRON. (May 3, 2016), <http://www.houstonchronicle.com/news/politics/texas/article/Texas-Supreme-Court-ruling-helps-bar-the-door-to-7390323.php>; Malewitz, *supra* note 4; see also Young, *supra* note 150 (discussing the impact of *Boeing* on current public records issues); *Texas Supreme Court Boosts Corporate Confidentiality Protections*, *supra* note 19.

159. See, e.g., Young, *supra* note 150; Begley, *supra* note 158; Malewitz, *supra* note 4; *Texas Supreme Court Boosts Corporate Confidentiality Protections*, *supra* note 19.

observing what its effect has been, and will continue to be, on transparency in Texas government.<sup>160</sup>

*A. How Texas Courts Responded: An Emerging Pattern Threatening the Integrity of the Texas Public Information Act*

Just one week after the *Boeing* decision, the Texas Supreme Court faced the task of interpreting another provision of the TPIA in *Greater Houston Partnership v. Paxton*.<sup>161</sup> The Court in *Greater Houston* placed less emphasis on the overarching policy and purpose of the TPIA to further the goal of “increasing governmental transparency” through liberal construction favoring disclosure.<sup>162</sup> Similar to its analysis in *Boeing*, the Court’s analysis in *Greater Houston* focused on the “plain and unambiguous language” of the TPIA.<sup>163</sup> The Greater Houston Partnership (GHP), a nonprofit organization, brought suit against the attorney general seeking declaratory judgment that it is not a “governmental body” within the meaning of the TPIA, and therefore should not be subject to open records requests.<sup>164</sup> Involved in various contracts with the City of Houston over the years, GHP provided “consulting, event planning, and marketing services” to the city.<sup>165</sup> A private citizen submitted an open records request seeking various checks issued by GHP throughout the year on the basis that GHP is an organization supported “in whole or in part by public funds,” subjecting it to the TPIA according to § 552.003(1)(A)(xii).<sup>166</sup> The attorney general made a strong argument that narrowing the scope of § 552.003(1)(A)(xii) by “limiting the statute’s reach to entities that exist solely to carry out government functions would frustrate its purpose of openness, and GHP is ‘supported’ by public funds.”<sup>167</sup> Nevertheless, the Court, led by Justice Guzman, held that GHP was not “supported in whole or in part by public funds,” and thus, was not a “governmental body,” within the meaning of § 552.003(1)(A)(xii).<sup>168</sup>

The Court in both *Boeing* and *Greater Houston* favored closer, more technical readings of individual provisions of the TPIA.<sup>169</sup> These cases represent an emerging pattern of statutory interpretation that favors a

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160. See § 552.001(a) (explaining that an informed public is necessary for the purpose of “retain[ing] control over the instruments [the people] have created”).

161. *Greater Hous. P’ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015); see also *Texas Supreme Court Boosts Corporate Confidentiality Protections*, *supra* note 19.

162. *Texas Supreme Court Boosts Corporate Confidentiality Protections*, *supra* note 19.

163. *Greater Hous. P’ship*, 468 S.W.3d at 62–68 (analyzing the TPIA using a “plain-meaning construction”).

164. *Id.* at 54–55.

165. *Id.* at 54.

166. *Id.* at 54–55.

167. *Id.* at 56.

168. *Id.* at 67.

169. See *Boeing Co. v. Paxton*, 466 S.W.3d 831, 835–42 (Tex. 2015); *Greater Hous. P’ship*, 468 S.W.3d at 62–68.

hyper-focused interpretation of specific provisions of the TPIA while failing to properly interpret those provisions in light of the overarching goals of the TPIA and in a way that is consistent with the Act's provisions *in toto*.<sup>170</sup> This emerging method of analyzing TPIA issues threatens to “curb the sweeping reach” of the TPIA.<sup>171</sup>

*B. The Response of Private Parties: Emboldened and Unafraid to Use Section 552.104 as a Tool to Avoid Disclosure*

With a seat at the table and a chance to intervene in open records disputes like never before, third parties have been far from quiet in their response to *Boeing*.<sup>172</sup> The fallout of *Boeing*, and the broadening of the § 552.104(a) exception in general, is well displayed by a recent incident involving an Enrique Iglesias concert in McAllen, Texas.<sup>173</sup> The City of McAllen paid Enrique Iglesias to perform in the city's holiday parade and estimates of the contract price indicate that the city may have paid up to half a million dollars in signing Iglesias.<sup>174</sup> When taxpayers submitted open records requests seeking the final contract price, the attorney general's office ruled that the government-held information should not be disclosed because the Court in *Boeing* made it clear that the government would likely win an argument that the information falls within the newly-broadened § 552.104(a) exception to disclosure.<sup>175</sup> Before *Boeing*, the information in this case would

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170. See *Boeing*, 466 S.W.3d at 835–42; *Greater Hous. P'ship*, 468 S.W.3d at 62–68. Texas courts, including the Court in *Greater Houston Partnership*, recognize that statutes must be interpreted in the backdrop of their overarching purpose, but do not always reach holdings that are consistent in doing so. See *Greater Hous P'ship*, 468 S.W.3d at 59 (“We must therefore analyze the reasonableness of each definition in light of the statutory context.”); *Jaster v. Comet II Const., Inc.*, 438 S.W.3d 556, 562 (Tex. 2014); *R.R. Comm'n v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 628 (Tex. 2011) (“We generally avoid construing individual provisions of a statute in isolation from the statute as a whole.”); *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011) (“It is a fundamental principle of statutory construction and indeed of language itself that words' meanings cannot be determined in isolation but must be drawn from the context in which they are used.”); see also TEX. GOV'T CODE § 552.001(a) (West 2012).

171. *Texas Supreme Court Boosts Corporate Confidentiality Protections*, *supra* note 19.

172. Malewitz, *supra* note 4. (“Private and public entities have since seized on [the] ruling, using it to persuade Paxton's office to rule in their favor in a host of records disputes.”).

173. TEX. ATT'Y GEN. OR2016-05179, at 1; Mitchell Ferman, *McAllen Continues to Withhold Parade Information*, MONITOR (Mar. 22, 2016), [http://www.themonitor.com/news/local/article\\_5bf42796-f092-11e5-8dee-b7d17764d379.html](http://www.themonitor.com/news/local/article_5bf42796-f092-11e5-8dee-b7d17764d379.html); Malewitz, *supra* note 4.

174. Malewitz, *supra* note 4; Analise Ortiz, *Report: McAllen Lost Nearly \$771,000 on Enrique Iglesias Concert, Holiday Parade*, VALLEY CENT. NEWS (Mar. 8, 2016), <http://valleycentral.com/news/local/report-mcallen-lost-nearly-771000-on-enrique-iglesias-concert-holiday-parade>.

175. TEX. ATT'Y GEN. OR2016-05179, at 1.

The city has withheld the records since local news media requested them, arguing that the government has “specific marketplace interests” in the information and releasing it would “place the city at a competitive disadvantage” when negotiating future contracts, according to a March 7 ruling from Paxton's office. The letter sided with the city and referenced the *Boeing* decision.

Malewitz, *supra* note 4.

likely have been made public upon request because courts interpreted exceptions to disclosure narrowly.<sup>176</sup> However, *Boeing* has lowered the bar significantly for meeting this broad exception to disclosure, and it is being used by the government, as well as private parties, to keep information secret.<sup>177</sup> Granting both the government and private parties such a tool to legally sidestep transparency measures is a dangerous omen, putting the stamp of approval on government secrecy and encouraging corruption.<sup>178</sup>

### C. A Troubling Future for Government Transparency in Texas

Granting both the government and private parties a tool to legally corrode transparency measures put in place by the people of Texas is a harbinger of corruption.<sup>179</sup> *Boeing* and other cases interpreting the TPIA represent a trend toward secrecy that is justified by a statutory interpretation of the TPIA that fails to give proper weight to what the TPIA was meant to do—prevent government secrets and corruption so that events like the Sharpstown Scandal never happen again.<sup>180</sup> The people of Texas cannot hold their representatives accountable when the very transparency measures they put in place to ensure accountability no longer function for that purpose.<sup>181</sup>

## V. RECOMMENDATION: A LEGISLATIVE FIX

The best solution to fix the “monstrous loophole” created by the Texas Supreme Court in *Boeing v. Paxton* is a simple clarification by the legislature.<sup>182</sup> Texas legislators have addressed threats to government accountability before, and it is time to do it again.<sup>183</sup> The legislature should make it clear that private third parties do not have standing to raise the § 552.104(a) exception to disclosure. An efficient way to do this would be

176. Malewitz, *supra* note 4; *see also supra* text accompanying note 21 (discussing the § 552.104(a) exception as available only to the government); *supra* text accompanying note 51 (detailing the historically narrow construction of the § 552.104(a) exception).

177. Malewitz, *supra* note 4. Part of the Texas Supreme Court’s holding in *Boeing* was that the “test under section 5[5]2.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015).

178. Shannon, *supra* note 20 (“Our current state lawmakers, like their predecessors, should value open government as a foundation of our democracy.”).

179. *See id.*; *Texas Supreme Court Boosts Corporate Confidentiality Protections*, *supra* note 19.

180. *See* TEX. GOV’T CODE ANN. § 552.001(b) (West 2012) (“This chapter shall be liberally construed in favor of granting a request for information.”); *see also* DEATON, *supra* note 28 (describing the events of the Sharpstown Scandal); KATZ, *supra* note 28 (same).

181. *See* Malewitz, *supra* note 4; *Texas Supreme Court Boosts Corporate Confidentiality Protections*, *supra* note 19.

182. *See* Malewitz, *supra* note 4.

183. *See supra* Section II.A (discussing the Texas legislative response to the 1971 Sharpstown Scandal that became the impetus for the passage of the Texas Open Records Act in 1973 and was later recodified in 1993 as the Texas Public Information Act).

to adopt language from New York's version of open records legislation, the Freedom of Information Law (FOIL).<sup>184</sup> Compared with § 552.104 of the TPIA, New York's open records legislation contains a similar exception to disclosure of information that would give bidders a competitive advantage.<sup>185</sup> New York's version, § 82(2) reads:

2. Each agency shall, in accordance with its published rules, make available for public inspection and copying all records, except that such *agency may deny access* to records or portions thereof that:

....

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise . . . .<sup>186</sup>

Two aspects of § 87(2) of the FOIL are relevant.<sup>187</sup> First, by indicating in the exception itself that an “agency may deny access” to records that qualify for the exception, New York makes it clear that only the government “agency” has standing to raise the exception.<sup>188</sup> Additionally, the New York provision makes the exception discretionary to the government agency by using the word “may” instead of “shall.”<sup>189</sup> The Texas Legislature should adopt both of these aspects in § 552.104(a) of the TPIA.

Adopting language from § 87(2) of the FOIL is a simple and effective way for the Texas Legislature to clarify that government agencies have standing to raise the § 552.104 exception at their discretion. Therefore, the Texas Legislature should amend § 552.104(a) to read:

(a) A government body may deny access to information that, if released, would give advantage to a competitor or bidder.<sup>190</sup>

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184. N.Y. PUB. OFF. LAW § 84. (McKinney 2017); *see also* Bryan Arnold, *A Survey of Public Records Laws — Issues Affecting State and Local Contracts, Bidders, and Contractors*, GORDEE, NOWICKI & AUGUSTINI LLP (May 2010), [http://apps.americanbar.org/dch/thedl.cfm?filename=/PC500000/relatedresources/A\\_SURVEY\\_OF\\_OPEN\\_GOVERNMENT\\_LAWS.pdf](http://apps.americanbar.org/dch/thedl.cfm?filename=/PC500000/relatedresources/A_SURVEY_OF_OPEN_GOVERNMENT_LAWS.pdf).

185. N.Y. PUB. OFF. § 87; *see also* Arnold, *supra* note 184.

186. N.Y. PUB. OFF. § 87(2)(d) (emphasis added).

187. *Id.* § 87(2).

188. *Id.* § 87(2)(d). The New York Freedom of Information Law defines an “agency” as “any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.” *Id.* § 86(3).

189. *Id.* § 87(2).

190. *Cf.* TEX. GOV'T CODE ANN. § 552.104(a) (West 2012) (“(a) Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.”).

This proposed version of § 552.104(a) integrates both of the relevant pieces of the FOIL § 87(2) previously mentioned.<sup>191</sup> First, it identifies “a governmental body” as the party with standing to raise the exception.<sup>192</sup> “Governmental body,” as defined in the TPIA, is comparable to an “agency,” as defined in the FOIL.<sup>193</sup> Second, it includes the phrase “may deny access,” indicating the discretionary nature of the exception.<sup>194</sup> This proposed version of § 552.104(a) would correct the concerns raised by the opinion in *Boeing*<sup>195</sup> by effectively taking away the third-party standing granted in *Boeing*.<sup>196</sup>

As an alternative to a legislative fix, a different judicial approach to interpreting the § 552.104 exception in future open records disputes could serve as an equally effective way to overrule the holding in *Boeing*. Texas courts should look to the Supreme Court of Arkansas as persuasive authority.<sup>197</sup> The Arkansas Freedom of Information Act contains an exception to disclosure that is very similar to § 552.104(a) of the TPIA.<sup>198</sup> However, Arkansas courts have not interpreted its version of the § 552.104 exception in a way that grants third parties standing to raise the exception.<sup>199</sup> Instead, Arkansas has held that the burden is on government agencies to show that the information requested qualifies for the exception to disclosure, and that state agencies may raise the exception on behalf of third parties.<sup>200</sup>

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191. See N.Y. PUB. OFF. § 87(2)(d); see also *supra* text accompanying notes 184–87 (explaining that § 82(2) of FOIL contains language that makes the exception to disclosure discretionary, and available only to government agencies).

192. See *supra* text accompanying note 190 (modeling a proposed version of TPIA’s § 552.104(a) that expressly grants standing to raise the exception to government bodies only).

193. Compare TEX. GOV’T CODE ANN. § 552.003 (“‘Governmental body’ . . . means: . . . a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members; . . . a county commissioners court in the state; . . . a municipal governing body in the state . . .”), with N.Y. PUB. OFF. § 86(3) (“‘Agency’ means any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.”).

194. See N.Y. PUB. OFF. § 87(2); see also *supra* text accompanying note 188 (using the word “may” in order to give government agencies the option to disclose information even when they qualify for the § 552.104 exception to disclosure, thus fostering government transparency).

195. See *supra* Sections III.C.1–2.

196. See *Boeing v. Paxton*, 466 S.W.3d 831, 838 (Tex. 2015).

197. See generally *Ark. Dep’t of Fin. & Admin. v. Pharmacy Assocs.*, 970 S.W.2d 217 (Ark. 1998).

198. Compare ARK. CODE ANN. § 25-19-105 (West 2017) (“It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter: . . . [f]iles that if disclosed would give advantage to competitors or bidders . . .”), with TEX. GOV’T CODE ANN. § 552.104(a) (West 2012) (“Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.”).

199. See *Ark. Dep’t of Fin., & Admin.*, 970 S.W.2d at 219.

200. *Id.*



*A. Reassurance for Private Parties Contracting with Government Entities:  
Your Private Business Information Is Safe*

On the same day that the Texas Supreme Court decided *Boeing*, the Court denied the petition to review *Waste Management of Texas, Inc. v. Abbott*, a case involving a private party that was able to withhold its information from a TPIA request by successfully arguing that the requested information was a trade secret under § 552.110(a).<sup>201</sup> This is evidence that the TPIA does not need to have a broad exception to disclosure available to third parties under § 552.104, as the Court in *Boeing* suggested, because truly sensitive information is protectable if the party can show that the information qualifies as a trade secret or is “confidential under law.”<sup>202</sup>

The TPIA expressly protects from disclosure information that qualifies as a “trade secret.”<sup>203</sup> In Texas, trade secrets are defined as “any formula, pattern, device, or compilation of information which is used in one’s business and presents an opportunity to obtain an advantage over competitors who do not know or use it.”<sup>204</sup> The courts weigh factors in determining whether a trade secret exists.<sup>205</sup> Despite the fact that the lease information in *Boeing* was “not generally known” and was kept relatively unavailable to all but senior staff, Boeing was unable to successfully argue that the lease information qualified for the § 552.110(a) trade secret exception.<sup>206</sup> The third factor, “the extent of measures taken to guard the secrecy of the information,” was the main reason why Boeing was unable to prove that the lease information was a trade secret.<sup>207</sup> Boeing failed to show evidence of any confidentiality agreement between Boeing and the Port Authority, or any evidence that it “took any reasonable precautions to prevent the Port [Authority] from disclosing the [l]ease information.”<sup>208</sup> Had it done so,

201. *Waste Mgmt. of Tex., Inc. v. Abbott*, 406 S.W.3d 626, 637–38 (Tex. App.—Eastland 2013, pet. denied); Young, *supra* note 150.

202. TEX. GOV’T CODE ANN. § 552.007 (West 2012) (describing the government’s discretion in disclosing requested information “unless the disclosure is expressly prohibited by law or the information is confidential under law”).

203. *Id.* § 552.110 (“A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of Section 552.021.”).

204. *Boeing Co. v. Abbott*, 412 S.W.3d 1, 9 (Tex. App.—Austin 2012, pet. granted), *rev’d sub nom.* *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015) (quoting *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003)).

205. *In re Bass*, 113 S.W.3d at 739. These factors include:

(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of the measures taken by him to guard the secrecy of the information; (4) the value of the information to him [and] his competitors; (5) the amount of effort or money expended by him in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Id.* (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 reporter’s n. cmt. d (1995); RESTATEMENT OF TORTS § 757 cmt. b (1939)).

206. *Abbott*, 412 S.W.3d at 10–11.

207. *Id.* at 9 (quoting *In re Bass*, 113 S.W.3d at 739).

208. *Id.* at 11.

Boeing's argument that its information was a protectable trade secret under § 552.110(a) would have been much more persuasive, as would an argument that the lease information was "confidential under law."<sup>209</sup>

Private parties entering contracts with the government can still protect their confidential business information—and avoid the need to rely on exceptions like § 552.104 as Boeing did—through diligence in drafting contracts and monitoring the use of their confidential information.<sup>210</sup> When negotiating contracts with government entities, private parties should be sure to "include appropriate safeguards to protect confidentiality."<sup>211</sup> The court in *Waste Management* considered the existence of a confidentiality clause as a factor favoring the existence of a trade secret.<sup>212</sup> Third parties should make sure, through confidentiality agreements and other contractually-imposed duties, that the government entity they contract with is aware that the information being disclosed and shared is confidential and cannot be released to the media.<sup>213</sup> Doing so will help persuade courts, like the court in *Waste Management*, that trade secret protection has not been waived.<sup>214</sup>

## VI. REMEMBER THE SHARPSTOWN SCANDAL: A FINAL THOUGHT

It is key to remember that the TPIA, passed in response to the deep corruption unearthed during the events of the Sharpstown Scandal, was intended to give individual citizens access to all information held by the government, subject to narrowly construed exceptions.<sup>215</sup> The entire dispute in *Boeing* revolved around portions of a government lease that were included in an open records request made by a disgruntled former employee.<sup>216</sup> Amplifying the voice of private parties and interpreting the TPIA in a way that favors private interests discounts the goals of the TPIA, giving private-party interests a seat at the table that these interests never had

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209. See TEX. GOV'T CODE ANN. § 552.007 (West 2012); *Abbott*, 412 S.W.3d at 12 ("Based on our review of the record, the evidence fails to conclusively establish that the [l]ease information is a trade secret.").

210. See Young, *supra* note 150.

211. *Id.* (emphasis in original).

212. See *Waste Mgmt. of Tex., Inc. v. Abbott*, 406 S.W.3d 626, 636 (Tex. App.—Eastland 2013, pet. denied); Young, *supra* note 150.

213. Young, *supra* note 150 ("One of the challenges in the *Boeing* case was that there was some evidence that the Port Authority had provided some information in the lease to the media.").

214. See *Waste Mgmt. of Tex., Inc.*, 406 S.W.3d at 635–37 ("Waste Management did not waive trade secret protection by sharing pricing and volume information . . . [u]nlike the LOA in this case, the lease agreement in *Boeing* did not contain confidentiality provisions . . . . [T]hus the facts in *Boeing* are markedly different from those in the instant case."); see also Young, *supra* note 150 (stating that the court of appeals, affirmed by the Supreme Court of Texas on the issue of trade secret protection, relied on the fact that Boeing did not present evidence that it took reasonable steps to maintain confidentiality "as one of the facts that led it to the conclusion that any trade secret protections had been waived").

215. TEX. GOV'T CODE ANN. § 552.001(a) (West 2012) ("This chapter shall be liberally construed in favor of granting a request for information.").

216. See *Boeing Co. v. Paxton*, 466 S.W.3d 831, 834 (Tex. 2015).

before.<sup>217</sup> Protecting private interests over the public right to transparency is not the goal of the TPIA.<sup>218</sup> However, the outcome, analysis, and reasoning of the Texas Supreme Court in *Boeing v. Paxton* all suggest that open records policy in Texas is moving in a direction that places private interests over public interests.<sup>219</sup> Therefore, it is for the people of Texas, through their elected representatives in the legislature, to “insist” on remedial action if strong open government policies are to survive in Texas.<sup>220</sup>

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217. *Texas Supreme Court Boosts Corporate Confidentiality Protections*, *supra* note 19.

218. *See* § 552.001.

219. *See Boeing*, 466 S.W.3d at 831.

220. § 552.001 (“The people insist on remaining informed so that they may retain control over the instruments they have created.”). The “need for an informed citizenry” is essential to ensuring government accountability according to the Texas Public Information Act. OFFICE OF THE ATTORNEY GEN. OF TEX., *supra* note 1.