



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 14, 2010

Mr. Charles Stokes  
Staff Attorney  
General Law Division  
Texas Commission in Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2010-08595

Dear Mr. Stokes:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 382487 (PIR #10.03.24.19).

The Texas Commission on Environmental Quality (the "commission") received a request for HUB Subcontracting forms and price lists for RFP #582-10-90274.<sup>1</sup> You state you have released a portion of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You also state that release of the submitted information may implicate the proprietary interests of Xenco Laboratories. Accordingly, you state, and provide documentation showing, you notified Xenco Laboratories of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances).* We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup>We note the commission sought and received clarification of the information requested. *See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).*

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. The commission raises section 552.101 in conjunction with the federal Freedom of Information Act ("FOIA"). See 5 U.S.C. § 552. We note, however, that FOIA is applicable to information held by an agency of the federal government. In this instance, the information at issue was created for and is maintained by the commission, which is subject to the state laws of Texas. See Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988), 124 (1976); see also Open Records Decision No. 561 at 7 n 3 (1990) (noting that federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law); *Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA). Accordingly, the commission may not withhold the submitted information under section 552.101 in conjunction with FOIA.

The commission raises section 552.110 of the Government Code for the information at issue. The commission claims release of the information may cause harm to Xenco Laboratories competitive position, as well as impair the commission's ability to obtain similar information in the future.<sup>2</sup> We note that section 552.110 is designed to protect the interests of third parties such as Xenco Laboratories, not the interests of a governmental body. Thus, we do not address the commission's arguments under section 552.110. As Xenco Laboratories does not raise section 552.110 for this information, none of it may be withheld on this basis.

Xenco Laboratories argues that portions of its information are excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. See Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As the commission does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to Xenco Laboratories' information. See ORD 592 (governmental body may waive section 552.104). Accordingly, none of the submitted information may be withheld under section 552.104 of the Government Code. As you raise no further exceptions to disclosure, the submitted information must be released.

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<sup>2</sup>We note the ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied); ORD 661 at 5-6 (discussing enactment of section 552.110(b) of the Government Code by Seventy-sixth Legislature).

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Andrea L. Caldwell  
Assistant Attorney General  
Open Records Division

ALC/eeg

Ref: ID# 382487

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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(w/o enclosures)