



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 1, 2012

Mr. Frank J. Garza
For Brownsville Public Utility Board
Davidson, Troilo, Ream & Garza, P.C.
7550 West Interstate 10, Suite 800
San Antonio, Texas 78229-5815

OR2012-12048

Dear Mr. Garza:

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# 460725.

The Brownsville Public Utility Board (the "board"), which you represent, received a request for "the winning bid for the Analytical Laboratory Service Contract for 2012-2014." We understand you to claim portions of the submitted information are excepted from disclosure under section 552.110 of the Government Code. Further, you state the proprietary interests of Xenco Laboratories ("Xenco") might be implicated. Accordingly, you notified Xenco of the request and of its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

You argue the release of customer lists within the submitted proposals will have a chilling effect on the board's ability to obtain qualified contractors to respond to the board's future requests for proposals. In advancing this argument, you appear to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in

National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides commercial or financial information is confidential if disclosure of the information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d 765. However, section 552.110(b) of the Government Code has been amended since the issuance of *National Parks*. Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information. The current statute does not incorporate this aspect of the *National Parks* test; it now requires only a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See Open Records Decision No. 661 at 5-6 (1999) (discussing enactment of section 552.110(b) by Seventy-Sixth Legislature). Thus, the ability of a governmental body to obtain information from private parties is no longer a relevant consideration under section 552.110(b). *Id.* Although we understand you to argue the customer lists within the submitted proposals are excepted under section 552.110, we note this exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address your arguments under section 552.110. However, we will address the proprietary interests of Xenco in the submitted information.

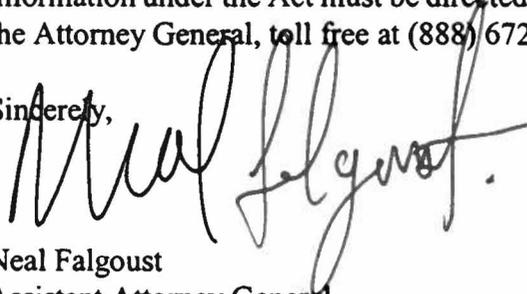
An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from Xenco. Thus, Xenco has not demonstrated it has a protected proprietary interest in any of the submitted information. See *id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the board may not withhold the submitted information on the basis of any proprietary interests Xenco may have in the information. As you raise no exceptions to disclosure, the submitted information must be released in its entirety.

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, 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,

A handwritten signature in black ink, appearing to read 'Neal Falgoust', written over the word 'Sincerely,'.

Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 460725

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. April Brandon
XENCO Laboratories
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(w/o enclosures)