ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 16, 2014

Ms. Laura Pfefferle
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2014-18671

Dear Ms. Pfefferle:

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# 541310 (DSHS File No. 23261/2014).

The Texas Department of State Health Services (the "department") received a request for the Tier Two chemical reports for a named facility at a specified address from 1986 to 2012. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.[1] You also state release of the submitted information may implicate the interests of a third party. Accordingly, you state you notified the third party of the request and of its rights to submit arguments stating why the information should not be released. *See*

[1]We note, and you acknowledge, the department failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office. *See* Gov't Code § 552.301(b) (requiring governmental body to ask for ruling and state exceptions that apply within ten business days of receiving written request), (e) (requiring governmental body to submit within fifteen business days of receiving request for information comments explaining applicability of raised exceptions, copy of request for information, signed statement of date governmental body received request or evidence sufficient to establish date, and copy of information governmental body seeks to withhold or representative samples). Nonetheless, section 552.101 is a mandatory exception that can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* §§ 552.007, .302. Furthermore, third party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* § 552.302; Open Records Decision No. 150 at 2 (1977). Accordingly, we will consider the department's arguments under section 552.101 and whether the information at issue must be withheld under the Act on behalf of a third party.

Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 exception you claim and reviewed the submitted representative sample of information.[2]

You explain the department maintains the requested information through the Tier Two Chemical Reporting Program, a program implemented in accordance with the federal Emergency Planning and Community Right-to-Know Act ("EPCRA") and the Texas right-to-know laws. *See* 42 U.S.C. §§ 11011-11050; Health & Safety Code §§ 505.001-.017, 506.001-.017, 507.001-.013. As explicitly stated in the federal provisions, the EPCRA does not preempt any state or local law. *See* 42 U.S.C. § 11041(a). Thus, we look to the statutory scheme established under Texas law to determine the disposition of the requested information. Facilities subject to Tier Two chemical reporting requirements must report required data concerning Tier Two chemicals to the department, the local emergency planning committee, and the local fire chief. Health & Safety Code §§ 505.006(c), (e), 506.006(c)-(d), 507.006(c), (e). Sections 505.006(h), 506.006(g), and 507.006(h) provide that all Tier Two reporting documents filed with the department are subject to the Act. *Id.* §§ 505.006(h), 506.006(g), 507.006(h). Thus, the statutory language makes clear that Tier Two information filed with the department is subject to all provisions of the Act, including the Act's exceptions. It is this information, that is, information held by the department as part of the Tier Two Chemical Reporting Program, that we address in this ruling. This ruling does not impact the legal right of citizens to access hazardous chemical information directly from a facility for community right-to-know purposes. *Id.* §§ 505.007(a), 506.007(a). Sections 505.007(b) and 506.007(b) require any facility subject to chapter 505 or chapter 506 of the Health and Safety Code to furnish, upon request, the facility's existing workplace chemical list within ten working days of the date of receipt of a written request. *Id.* §§ 505.007(b), 506.007(b).[3] Violations of chapter 505, chapter 506, or chapter 507 may be reported to the department for investigation and possible administrative penalty. *Id.* §§ 505.010, 506.010, 507.009.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You contend the submitted information is confidential

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[2]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

[3]Chapter 507 of the Health and Safety Code, which applies to non-manufacturing facilities, does not contain a direct access provision.

under section 552.101 in conjunction with section 418.178 of the Government Code. This section was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act ("HSA"). Section 418.178 provides:

> (a) In this section, "explosive weapon" has the meaning assigned by Section 46.01, Penal Code.
>
> (b) Information is confidential if it is information collected, assembled, or maintained by or for a governmental entity and:
>
> > (1) is more than likely to assist in the construction or assembly of an explosive weapon or a chemical, biological, radiological, or nuclear weapon of mass destruction; or
> >
> > (2) indicates the specific location of:
> >
> > > (A) a chemical, biological agent, toxin, or radioactive material that is more than likely to be used in the construction or assembly of such a weapon; or
> > >
> > > (B) unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.

Id. § 418.178. The fact that information may be related to a biological toxins does not make such information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). As with any confidentiality statute, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of that provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You contend the submitted information is confidential under section 418.178(b) because it reveals information regarding a specific facility that stores hazardous chemicals that are more than likely to assist in the construction or assembly of an explosive weapon. You explain the location of threshold quantities of hazardous substances and extremely hazardous substances at any Texas facility must be reported to the department under the Tier Two Chemical Reporting Program. You assert releasing the submitted information would identify the location of dangerous chemicals in the state and allow terrorists to identify critical infrastructure for targeting. Typically, only that information which would reveal the location of these hazardous chemicals is protected under section 418.178(b). However, in this instance, the requestor seeks the Tier Two report for one specified facility. Thus, because the location of the facility at issue is already known to this requestor, withholding only that information which would indicate the location of the hazardous chemicals would not

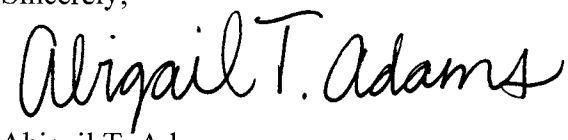
effectuate the purpose of section 418.178 and would, in fact, result in the release of confidential information. Accordingly, we conclude the submitted information is confidential under section 418.178 of the Government Code.

We recognize the public's legitimate interest in obtaining information concerning hazardous substances stored in Texas communities. However, we must follow the plain language of section 418.178 which, through its unconditional mandate of confidentiality, does not allow us to take into account the public interest that exists in the release of this information. Thus, we conclude the submitted information is confidential under section 418.178 of the Government Code, and the department must withhold it under section 552.101 of the Government Code.[4] However, as stated above, this ruling does not impact the legal right of citizens to access a facility's existing workplace chemical list directly from any facility covered under chapter 505 or chapter 506 of the Health and Safety Code.

You ask this office to issue a previous determination permitting the department to withhold information that confirms a facility reports in the Tier Two system and to withhold the Tier Two report of any facility when requested under the Act. *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). We decline to issue such a previous determination at this time. Accordingly, 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Abigail T. Adams
Assistant Attorney General
Open Records Division

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[4]As our ruling is dispositive, we do not address the remaining arguments against disclosure.

Ref: ID# 541310

Enc. Submitted documents

c: Requestor
(w/o enclosures)