



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 14, 2014

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

OR2014-20753

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# 543101 (DSHS File No. 23417/2014).

The Texas Department of State Health Services (the "department") received a request for information pertaining to two specified properties. You claim the requested information is excepted from disclosure under section 552.101 of the Government Code.<sup>1</sup> You also state release of the requested information may implicate the proprietary interests of a third party. Accordingly, you state, and provide documentation showing, you notified the third party of the request for information and of its right to submit arguments to this office as to why the requested 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

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<sup>1</sup>We note, and you acknowledge, the department did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b). Nonetheless, because section 552.101 of the Government Code and third party interests can provide compelling reasons to overcome the presumption of openness, we will consider the applicability of section 552.101 and the third party's interests in relation to the requested information. *See id.* §§ 552.007, .302, .352.

exception in the Act in certain circumstances). We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

We understand 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).<sup>3</sup> 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 exempts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that is made confidential by other statutes. The department raises section 552.101 in conjunction with section 418.178 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 as part of the HSA. These

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<sup>2</sup>We assume 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.

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

provisions make certain information related to terrorism confidential. 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 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). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You argue the submitted information is confidential under section 418.178(b) because it reveals information regarding specified facilities that store hazardous chemicals that are more than likely to assist in the construction or assembly of an explosive weapon. 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 information pertaining to specified facilities. Thus, because the locations of the facilities at issue are already known to this requestor, withholding only that information which would indicate the locations 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 in conjunction with section 418.178 of the Government Code.<sup>4</sup> 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 id.* § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code). We decline to issue such a previous determination at this time. Accordingly, this letter ruling is limited to the particular records 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 records 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](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,



Joseph Bennke  
Assistant Attorney General  
Open Records Division

JB/som

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

Ref: ID# 543101

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Tier Two Reporting Facility  
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