



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 23, 2014

Mr. Marc Allen Connelly
Deputy General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2014-10745

Dear Mr. Connelly:

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# 525130 (DSHS File No. 22751/2014).

The Texas Department of State Health Services (the "department") received a request for the number of facilities in Texas that store ammonium nitrate, the location of those facilities, and the amount of ammonium nitrate stored at each facility. You claim the requested information is excepted from disclosure under sections 552.101 and 552.139 of the Government Code. You also state release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified the third parties of the request for information and of their 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 received comments from some of the third parties. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

¹We 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.

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).² 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.

Next, we note that although the department seeks to withhold the entirety of its Tier Two database, as well as electronic access to this database, the requestor seeks only three categories of information – the number of facilities in Texas that store ammonium nitrate, the location of those facilities, and the amount of ammonium nitrate stored at each facility. Additionally, we note two of the third parties inform our office they no longer store ammonium nitrate at their facilities. To the extent these companies did not store ammonium nitrate at their facilities on the date the department received the request for information, their information does not fall within the scope of the request for information. This ruling only addresses information that falls within the three categories of the request. It does not address the public availability of non-responsive information, and the department need not release non-responsive information in response to this request.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov’t*

²Chapter 507 of the Health and Safety Code, which applies to non-manufacturing facilities, does not contain a direct access provision.

Code § 552.305(d)(2)(B). We have received comments from third parties. However, we have no basis to conclude any other third party who has not submitted comments to this office explaining why its information has not been released as of the date of this letter has a protected proprietary interest in the information at issue. *See id.* § 552.110; 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 department may not withhold any of the information at issue on the basis of any proprietary interest any of the third parties that did not submit comments may have in it.

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 and some of the third parties raise section 552.101 in conjunction with section 418.178 of the Texas Homeland Security Act (the “HSA”), chapter 418 of the Government Code. Additionally, one of the third parties raises sections 418.177 and 418.181 of the HSA. Sections 418.176 through 418.182 were added to chapter 418 as part of the HSA. These provisions make certain information related to terrorism confidential. Section 418.177 provides that information is confidential if it:

- (1) is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity; and
- (2) relates to an assessment by or for a governmental entity, or an assessment that is maintained by a governmental entity, of the risk or vulnerability of persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

Id. § 418.177. 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. Section 418.181 provides:

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. The fact that information may be related to a governmental body's security concerns, biological toxins, or emergency preparedness 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).

The department argues the responsive information is confidential under section 418.178(b) because it reveals information regarding facilities that store hazardous chemicals that are more than likely to assist in the construction or assembly of an explosive weapon. As you explain, ammonium nitrate is a hazardous substance that can be used as the main component of an explosive weapon. 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 find the names and locations of facilities that store ammonium nitrate are confidential under section 418.178 of the Government Code. Therefore, the department must withhold the names and locations of facilities storing ammonium nitrate within the submitted information under section 552.101 in conjunction with section 418.178 of the Government Code.³ However, as stated above, this ruling does not impact the legal right of citizens to access this information directly from any facility covered under chapter 505 or chapter 506 of the Health and Safety Code.

³As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

The remaining responsive information does not indicate the specific locations of chemicals that are more than likely to assist in the construction or assembly of an explosive weapon. Further, neither the department nor any of the third parties have explained how section 418.178(b)(1) or section 418.178(b)(2)(B) encompasses any of the remaining responsive information. Additionally, the third party that raised sections 418.177 and 418.181 has failed to demonstrate the remaining responsive information is confidential under those sections. Accordingly, the department may not withhold any of the remaining responsive information under section 552.101 of the Government Code in conjunction with section 418.177, section 418.178, or section 418.181 of the Government Code.

One of the third parties generally asserts its information is excepted under section 552.101 of the Government Code, which, as previously discussed, excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). However, that third party has not directed our attention to any law under which any of its remaining responsive information is considered to be confidential for the purposes of section 552.101. Therefore, we conclude that the department may not withhold that third party's remaining responsive information under section 552.101 of the Government Code.

One of the third parties claims the remaining responsive information is excepted under section 552.101 of the Government Code in conjunction with section 3 of the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act, Public Law 106-40. Section 3 amended section 112(r) of the federal Clean Air Act, which is codified at section 7412(r) of title 42 of the United States Code. *See* Chemical Safety Information, Site Security and Fuels Regulatory Relief Act, 1999, Pub. L. No. 106-40, 113 Stat. 207, 208-214 (1999). Section 7412(r) of title 42 of the United States Code required the United States Environmental Protection Agency (the "EPA") to promulgate regulations and guidance for chemical accidental release prevention at facilities using certain regulated substances that pose a great risk of accidental release, including the requirement that owners and operators prepare and implement a risk management plan. *See* 42 U.S.C. § 7412(r)(7). Section 7412(r)(7)(H) contains provisions for public access to off-site consequence analysis information, including provisions prohibiting the disclosure of off-site consequence analysis information in certain circumstances under the Federal Freedom of Information Act and by covered persons. *See id.* § 7412(r)(7)(H); *see also id.* § 7412(r)(7)(H)(iii)-(v). "Off-site consequence analysis information" is defined as "those portions of a risk management plan, excluding the executive summary of the plan, consisting of an evaluation of [one] or more worst-case release scenarios or alternative release scenarios, and any electronic data base created by the [EPA] from these portions." *Id.* § 7412(r)(7)(H)(i)(III). "Risk management plan" is defined as "a risk management plan submitted to the [EPA] by an owner or operator of a stationary source under subparagraph (B)(iii)." *Id.* § 7412(r)(7)(H)(i)(IV); *see also id.* § 7412(r)(7)(B)(iii). Section 7412(r)(7)(H)(x) provides that "this subparagraph (including

the regulations promulgated under this subparagraph) shall supercede any provision of [s]tate or local law that is inconsistent with this subparagraph (including the regulations)” but “[n]othing in this subparagraph precludes a [s]tate from making available data on the off-site consequences of chemical releases collected in accordance with [s]tate law.” *Id.* § 7412(r)(7)(H)(x). We note the information at issue consists of Tier Two data collected by the department. The third party has not explained how this information consists of off-site consequence analysis information submitted as part of a risk management plan to the EPA. Accordingly, we find the third party has failed to demonstrate the applicability of section 7412(r) of title 42 of the United States Code to the remaining responsive information, and the department may not withhold it under section 552.101 of the Government Code on that basis.

One of the third parties claims its remaining responsive information is excepted under section 552.101 of the Government Code in conjunction with sections 27.400(d)(1) and (d)(2) of title 6 of the Code of Federal Regulations. Part 27 of chapter I of title 6 of the Code of Federal Regulations consists of the Chemical Facility Anti-terrorism Standards Regulations established by the United States Department of Homeland Security (“DHS”). Section 27.400(d) of title 6 sets forth specific duties for certain individuals in order to protect “chemical-terrorism vulnerability information” (“CVI”), and states, in part, the following:

(d) *Duty to protect information.* A covered person must—

- (1) Take reasonable steps to safeguard CVI in that person’s possession or control, including electronic data, from unauthorized disclosure. When a person is not in physical possession of CVI, the person must store it in a secure container, such as a safe, that limits access only to covered persons with a need to know; [and]
- (2) Disclose, or otherwise provide access to, CVI only to persons who have a need to know[.]

6 C.F.R. § 27.400(d)(1)-(2); *see also id.* § 27.400(c), (e) (defining “covered person” and “need to know”). Section 27.400(b) of title 6 of the Code of Federal Regulations defines CVI as:

- (1) Security Vulnerability Assessments under [6 C.F.R.] § 27.215;
- (2) Site Security Plans under [6 C.F.R.] § 27.225;
- (3) Documents relating to the [DHS’s] review and approval of Security Vulnerability Assessments and Site Security Plans, including Letters of Authorization, Letters of Approval and responses thereto; written notices; and other documents developed pursuant to [6 C.F.R.] §§ 27.240 or 27.245;

- (5) Documents relating to inspection or audits under [6 C.F.R.] § 27.250;
- (6) Any records required to be created or retained under [6 C.F.R.] § 27.255;
- (7) Sensitive portions of orders, notices or letters under [6 C.F.R.] § 27.300;
- (8) Information developed pursuant to [6 C.F.R.] §§ 27.200 and 27.205; and
- (9) Other information developed for chemical facility security purposes that the Secretary [of DHS], in his discretion, determines is similar to the information protected in [6 C.F.R.] § 27.400(b)(1) through (8) and thus warrants protection as CVI.

Id. § 27.400(b). The third party states it received a letter from DHS “mandating that [a]mmonium [n]itrate on our facility be ‘safeguarded and protected from disclosure in accordance with the requirements of [section 27.400 of title 6 of the Code of Federal Regulations].’” We note section 27.400(d)(4) provides that a covered person must mark CVI in accordance with section 27.400(f). *See id.* § 27.400(d)(4), (f) (covered person must mark paper records containing CVI by placing protective marking on top and distribution limitation statement on bottom of front and back cover, title page, and each page of document). The remaining responsive information at issue does not contain any such marking. Additionally, the third party does not explain how the remaining responsive information constitutes CVI under section 27.400(b). *See id.* § 27.400(b). Accordingly, we find the third party has failed to demonstrate the applicability of sections 27.400(d)(1) and (d)(2) to the remaining responsive information at issue, and the department may not withhold it under section 552.101 of the Government Code on either of these bases.

One of the third parties claims its information is excepted under constitutional privacy. Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual’s interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual’s autonomy within “zones of privacy” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual’s privacy interests and the public’s need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find the third party has not provided any arguments explaining how its remaining responsive information is confidential under constitutional privacy, and the department may not withhold any of the remaining responsive information under section 552.101 on that basis.

Some of the third parties claim their information is excepted under section 552.110 of the Government Code, which protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov't Code § 552.110(a), (b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. See *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); see also ORD 552. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also *Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. See ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable unless

⁴The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

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

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6 (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).

Upon review, we find the third parties whose information is at issue have failed to establish a *prima facie* case that any portion of their remaining responsive information meets the definition of a trade secret and they have not demonstrated the necessary factors to establish a trade secret claim for that information. Additionally, we find the third parties have failed to demonstrate the release of any of their remaining responsive information would result in substantial harm to their competitive position. Accordingly, the department may not withhold any of the remaining responsive information under section 552.110 of the Government Code.

Section 552.139 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body’s or contractor’s electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). The department and some of the third parties contend the remaining responsive information is excepted under section 552.139. Upon review, we find the department and the third parties have not demonstrated how any of the remaining responsive information relates to computer network security, restricted information under section 2059.055, or to the design, operation, or defense of the computer network as contemplated in section 552.139(a). Further, we find the department and the third parties have failed to explain how any of the remaining responsive information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the department may not withhold any of the remaining responsive information under section 552.139 of the Government Code.

In summary, the department must withhold the names and locations of facilities storing ammonium nitrate within the responsive information under section 552.101 in conjunction with section 418.178 of the Government Code. The department must release the remaining responsive information, which consists of the amount of ammonium nitrate stored at each facility and the total number of facilities storing ammonium nitrate. This ruling does not impact the legal right of citizens to access this information directly from a facility covered by chapter 505 or chapter 506 of the Health and Safety Code.

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,



Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/tch

Ref: ID# 525130

Enc. Submitted documents

c: Requestor
(w/o enclosures)