



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 22, 2014

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

OR2014-14876

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# 533672 (DSHS22947/2014 and 22988/2014).

The Texas Department of State Health Services (the "department") received three requests from different requestors for Tier Two chemical reporting information for two named companies. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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).<sup>1</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 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 under section 552.101 in conjunction with section 418.178 of the Government Code. Section 418.178 was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act and provides as follows:

(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.

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<sup>1</sup>Chapter 507 of the Health and Safety Code, which applies to non-manufacturing facilities, does not contain a direct access provision.

*Id.* § 418.178. The fact that information may be related to biological toxins does not make such information *per se* confidential under section 418.178. *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 section 418.178 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 specific facilities that store 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 locations of dangerous chemicals in the state and allow terrorists to identify critical infrastructure for targeting. 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.<sup>2</sup> However, we understand one of the facilities at issue no longer holds chemicals required to be reported under the Tier Two program. Thus, to the extent this facility no longer stores these hazardous chemicals, the requested information pertaining to this facility is not confidential under section 418.178 and may not be withheld. Furthermore, although you raise other provisions of the Homeland Security Act for information pertaining to this facility, none of those provisions would apply to a facility that no longer stores hazardous chemicals.

In summary, to the extent the facilities at issue continue to store hazardous chemicals, the submitted information is confidential under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code. 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.

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.

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<sup>2</sup>As our ruling is dispositive, we do not address the remaining arguments against disclosure.

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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JLU/akg

Ref: ID# 533672

Enc. Submitted documents

c: 3 Requestors  
(w/o enclosures)