



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 10, 2015

Mr. Ruhee G. Leonard
Assistant District Attorney
Waller County Criminal District Attorney's Office
645 12th Street
Hempstead, Texas 77445

OR2015-16460

Dear Mr. Leonard:

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# 574861.

The Waller County Office of Emergency Management (the "office") received a request for all Tier Two reports for facilities in Waller County (the "county") that filed reports with the local emergency planning committee. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state the release of the information at issue may implicate the interests of third parties. Accordingly, you state the office notified the third parties of the request for information and of their right to submit arguments stating why their 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); 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 received comments from one of the third parties. We have reviewed the submitted information and the submitted arguments.

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) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has

received comments from only one of the third parties explaining why its information should not be released to the requestor. Thus, we have no basis to conclude the release of the submitted information would implicate the interests of the remaining third parties, and none of the submitted information may be withheld on that basis. *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.

You explain the office 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 of State Health Services (“DSHS”), 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). It is this information, that is, information held by the office 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).¹ Violations of chapter 505, chapter 506, or chapter 507 may be reported to DSHS 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 and the third party that submitted comments (the “third party”) 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.

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

(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 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 and the third party contend the submitted information is confidential under section 418.178(b) because it reveals information regarding the locations of 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 certain facilities must be reported to the county's local emergency planning committee under the Tier Two Chemical Reporting Program. 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. 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 submitted information demonstrates the requestor knows the location of one of the facilities at issue; thus, withholding only information which would indicate the location of the hazardous chemicals at the facility at issue would not effectuate the purpose of section 418.178 and would, in fact, result in the release of confidential information. Accordingly, the office must withhold the entirety of the information pertaining to this facility, which we have marked, under section 552.101 in conjunction with section 418.178(b)(2)(A). With respect to the remaining facilities, we conclude the office

must withhold the information which would indicate the specific locations of the facilities at issue, which we have marked, under section 552.101 in conjunction with section 418.178(b)(2)(A). 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.

The remaining 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, the office has not explained how section 418.178(b)(1) or section 418.178(b)(2)(B) encompasses any of the remaining information. Accordingly, the office may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 418.178.

In summary, the office must withhold the information we have marked pertaining to the identified facility at issue and the information which would indicate the specific locations of the remaining facilities at issue, which we have marked, under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code. The office must release the remaining information. This ruling does not impact the legal right of citizens to access a facility's existing workplace chemical list 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,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive, flowing style.

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/dls

Ref: ID# 574861

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third parties
(w/o enclosures)