



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 18, 2016

Mr. David Timberger
Director
General Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2016-21896A

Dear Mr. Timberger:

This office issued Open Records Letter No. 2016-21896 (2016) on September 28, 2016. Since that time, we have received new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on September 28, 2016. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")). This ruling was assigned ID# 638379.

The Texas Commission on Environmental Quality (the "commission") received a request for Tier Two reports for twenty two specified facilities. 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 representative sample of information.¹

You explain the commission maintains the requested information through the Tier Two Chemical Reporting Program, a program implemented in accordance with the federal

¹We 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 those records contain substantially different types of information than that submitted to this office.

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 ch. 505-507. 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 commission, the local emergency planning committee, and the local fire chief. Health & Safety Code §§ 505.006(c), (e)-(e-2), 505.0061, 506.006(c)-(d-2), 507.006(c), (e)-(e-2), 507.0061). Sections 505.006(h), 506.006(g), and 507.006(h) provide that all Tier Two reporting documents filed with the commission are subject to the Act. Health & Safety Code §§ 505.006(h), 506.006(g), 507.006(h). Thus, the statutory language makes clear that Tier Two information filed with the commission is subject to all provisions of the Act, including the Act’s exceptions. It is this information, that is, information held by the commission 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 commission for investigation and possible administrative penalty. Health & Safety Code §§ 505.018, 506.018, 507.014; Water Code §§ 7.052(b-4), .1021, .1851.

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 sections 418.177, 418.178, and 418.181 of the Government Code. These sections were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (“HSA”). 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.

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

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). 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 the location, quantity, and identity of hazardous chemicals that are more than likely to assist in the construction or assembly of an explosive weapon. You further contend because the instant request includes a list of specified facilities, the submitted NAICS and SIC codes sufficiently correlate with the names and business activities of some of the facilities such that the specific locations of these facilities could be determined by matching the codes or descriptors to the requested list. You explain the location of threshold quantities

of hazardous substances and extremely hazardous substances at any Texas facility must be reported to the commission 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. 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. Therefore, the commission must withhold the information which would indicate the specific locations of the facilities at issue, a representative sample of which we have marked, under section 552.101 of the Government Code 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 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 commission has not explained how section 418.178(b)(1) or section 418.178(b)(2)(B) encompasses any of the remaining information. We also find the commission failed to demonstrate the remaining information is confidential under sections 418.177 and 418.181 of the Government Code. Accordingly, the commission may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with sections 418.177, 418.178, or 418.181 of the Government Code.

In summary, the commission must withhold the information which would indicate the specific locations of the facilities at issue, a representative sample of which we have marked, under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code. The commission 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.

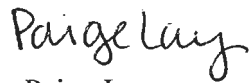
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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/>

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

[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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/som

Ref: ID# 638379

Enc. Submitted documents

c: Requestor
(w/o enclosures)