



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 6, 2017

Ms. Charmaine K. Backens
Acting Director
Litigation Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

OR2017-25316

Dear Ms. Backens:

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# 685491 (ORR# 17-35658).

The Texas Commission on Environmental Quality (the "commission") received a request for a list of all facilities that are required to file Tier Two reports. The commission claims the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception the commission claims and reviewed the submitted representative sample of information.¹

The commission explains it maintains the requested Tier Two 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 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

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.

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. *Id.* §§ 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. *Id.* §§ 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. This exception encompasses information that is made confidential by other statutes. The commission raises section 552.101 in conjunction with sections 418.177, 418.178, and 418.181 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 provisions make certain information related to terrorism confidential. Section 418.177 provides,

Information is confidential if the information:

- (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:

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

(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 biological toxins or to a governmental body’s security concerns 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 commission argues the submitted information is confidential under section 418.178(b) because it reveals the locations of facilities that store hazardous chemicals that are more than likely to assist in the construction or assembly of an explosive weapon. The commission maintains the requested information under the Tier Two Chemical Reporting Program. The commission asserts releasing the information at issue would identify the locations of dangerous chemicals. 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 submitted information that indicates the specific locations of the facilities at issue, which we have noted, 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 demonstrated section 418.178(b)(1) or section 418.178(b)(2)(B) encompasses any of the remaining information. Accordingly, the commission may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code.

The commission also generally argues the remaining information is confidential under sections 418.177 and 418.181 of the Government Code. However, the commission has not demonstrated any portion of the remaining information was collected, assembled, or maintained by or for the commission for the purpose of preventing, detecting, or investigating an act of terrorism or related criminal activity and relates to an assessment of the risk or vulnerability of persons or property to an act of terrorism or related criminal activity. Additionally, we understand the commission to assert the facilities at issue are critical infrastructure for the purposes of section 418.181 of the Government Code. *See id.* § 421.001 (defining "critical infrastructure" to include all public or private assets, systems, and functions vital to security, governance, public health and safety, economy, or morale of state or nation). However, the commission has not demonstrated the remaining information identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Consequently, the commission may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 418.177 or section 418.181 of the Government Code.

In summary, the commission must withhold the information we 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.


The commission also asks this office to issue a previous determination that would permit it to withhold information under section 552.101 of the Government Code in conjunction with

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

sections 418.177, 418.178, and 418.181 of the Government Code without requesting a ruling from this office. Open Records Decision No. 673 (2001). We decline to issue such a previous determination at this time. Accordingly, 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/tdw

Ref: ID# 685491

Enc. Submitted documents

c: Requestor
(w/o enclosures)