



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 30, 2020

Ms. Courtney M. White
Assistant City Attorney
City of Amarillo
P.O. Box 1971
Amarillo, Texas 79105-1971

OR2020-09705

Dear Ms. White

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# 820006 (ORR No. 2719).

The City of Amarillo (the "city") received a request for the Tier Two forms from a named facility for reporting years 2017, 2018, and 2019. You state you do not have information responsive for reporting year 2019.¹ 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 understand the city 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 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 Texas Commission on Environmental Quality ("TCEQ"), 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. It is this information, that is, information held by the city as part of the Tier Two Chemical Reporting Program, that we address in this ruling. This ruling does not impact the legal right of

¹ The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

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 TCEQ 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. 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 ("HSA") 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.

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 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 submitted information consists of the Tier Two chemical inventories on file with the city's local emergency planning committee. The city states the requested Tier Two reports

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

reveal the quantities and locations of chemicals that are more than likely to assist in the construction or assembly of an explosive or chemical weapon. You state the location of threshold quantities of hazardous substances and extremely hazardous substances at any Texas facility must be reported to the city's local emergency planning committee under the Tier Two Chemical Reporting Program. 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 requestor only seeks information pertaining to the specified facility. Accordingly, the location of the facility at issue is already known to this requestor and withholding only that information, which would indicate the location of the hazardous chemicals, would not effectuate the purpose of section 418.178 and would, in fact, result in the release of confidential information.

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 requested Tier Two reports are confidential under section 418.178 of the Government Code, and the city must withhold them under section 552.101 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.

The city 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 the HSA 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Michelle Garza
Assistant Attorney General
Open Records Division

MG/rm

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Enc. Submitted documents

c: Requestor
(w/o enclosures)