



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 26, 2022

Ms. Bridgette A. Begle
Counsel for the City of Freeport
Olson & Olson, L.L.P.
2727 Allen Parkway, Suite 600
Houston, Texas 77019-2133

OR2022-29767

Dear Ms. Begle:

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# 974344 (Freeport22-001).

The City of Freeport (the "city"), which you represent, received a request for certain information pertaining to a specified facility, including information regarding incidents or inspections of the facility during a stated period of time and certain communications during a stated period of time. We understand the city has redacted motor vehicle record information pursuant to section 552.130(c) of the Government Code and certain information pursuant to section 552.136(c) of the Government Code.¹ You state the city has released some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.² Additionally, you state release of the information at issue may implicate the proprietary interests of Atkins

¹ Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

² We note, and you acknowledge, the city did not comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b), (e). Nonetheless, because section 552.101 of the Government Code and third-party interests can provide compelling reasons to overcome the presumption of openness, we will consider whether the information at issue is excepted from disclosure under the Act. *See id.* §§ 552.007, .302, .352; Open Records Decision No. 150 at 2 (1977).

(SNC-Lavalin); Freeport LNG Development, L.P. (“Freeport LNG”); Technip FMC; and Zachry. Accordingly, you state, and provide documentation demonstrating, the city notified these interested third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov’t Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Freeport LNG and Zachry. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments submitted on behalf of the requestor. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor’s assertion the city may possess additional information responsive to the request. We note the Act does not require a governmental body to answer general questions, perform legal research, or create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. Open Records Decision No. 561 at 8-9 (1990). In this instance, you state the city has released some information and the information submitted for our review consists of the remaining requested information. Therefore, we assume the city has made a good-faith effort to locate any information responsive to the request at issue, and we will address the arguments to withhold the information at issue.

We understand the city maintains some of the submitted 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 information at issue. 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 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).³ Violations of chapter 505, chapter 506, or chapter 507 may be reported to TCEQ for

³ Chapter 507 of the Health and Safety Code, which applies to non-manufacturing facilities, does not contain a direct access provision.

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 section encompasses information made confidential by other statutes, such as section 418.178 of the Government Code was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (“HSA”). 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. 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 contains Tier Two chemical inventories on file with the city’s local emergency planning committee. Freeport LNG and Zachry state the Tier Two reports at issue reveal the quantities and locations of chemicals, which may assist in the construction or assembly of an explosive or chemical weapon. We understand 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 specified facilities. Accordingly, the locations of the facilities at issue are 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 submitted 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.⁴ 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.

We will now address the arguments under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. Section 552.101 also encompasses section 418.181, which was added to chapter 418 of the Government Code as part of the HSA. Section 418.181 provides "[t]hose 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; *see also id.* § 421.001(2) (defining "critical infrastructure" to include "all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation"). The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the HSA. *See* ORD 649 at 3. 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 confidentiality provision, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive information falls within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A).

The city, Freeport LNG, and Zachry assert the remaining information is made confidential by section 418.181 of the Government Code. Freeport LNG and Zachry explain the information at issue pertains to a natural gas liquefaction facility (the "facility") that can produce over 2.1 billion cubic feet of liquified natural gas per day, and Freeport LNG states the facility "is vital to the public's health, safety, and security as well as the Texas economy and the international energy security of many of our foreign allies." Freeport LNG and Zachry assert, and we agree, the facility constitutes critical infrastructure for purposes of section 418.181. *See generally id.* § 421.001. Freeport LNG and Zachry state the information at issue contains schematics or diagrams of the facility. The city, Freeport LNG, and Zachry assert that release of the information at issue would identify the technical details of particular vulnerabilities of the facility to an act of terrorism. Based on these arguments and our review of the information at issue, we find the city, Freeport LNG, and Zachry have demonstrated release of the remaining information would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

⁴ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

Accordingly, the city must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

In summary, the city must withhold the submitted Tier Two reports under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code. The city must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 418.181 of the Government 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 <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,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/jm

Ref: ID# 974344

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

c: 4 Third Parties
(w/o enclosures)