



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 26, 2015

Ms. Laura Pfefferle
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2015-05816

Dear Ms. Pfefferle:

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# 562137 (DSHS File No. 24116).

The Texas Department of State Health Services (the "department") received a request for all Tier Two reports for thirteen specified zip codes for the years 2011 through 2015. You state the department does not have any information responsive to a portion of the request.¹ You claim the remaining requested information is excepted from disclosure under section 552.101 of the Government Code.² We have considered the exception you claim and reviewed the submitted representative sample of information.³

¹The 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).

²You acknowledge, and we agree, the department failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office. *See Gov't Code* § 552.301(b), (e). Nonetheless, section 552.101 is a mandatory exception that can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will address the applicability of this exception to the submitted information, notwithstanding the department's violation of section 552.301 in requesting this decision.

³We assume that 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 that those records contain substantially different types of information than that submitted to this office.

You explain the department maintains the information at issue 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, 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). Sections 505.006(h), 506.006(g), and 507.006(h) of the Health and Safety Code provide that all Tier Two reporting documents filed with the department 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 department is subject to all provisions of the Act, including the Act’s exceptions. It is this information, that is, information held by the department 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) of the Health and Safety Code 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).⁴ Violations of chapter 505, chapter 506, or chapter 507 of the Health and Safety Code may be reported to the department 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 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

⁴Chapter 507 of the Health and Safety Code, which applies to non-manufacturing facilities, does not contain a direct access provision.

persons or property, including critical infrastructure, to an act of terrorism or related criminal activity.

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 information regarding specific 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 any Texas facility must be reported to the department under the Tier Two Chemical Reporting Program. You assert releasing the submitted information would identify

the locations 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 department 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.⁵ 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 department 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 department failed to demonstrate the remaining information is confidential under sections 418.177 and 418.181 of the Government Code. Accordingly, the department 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 department 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 department 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.

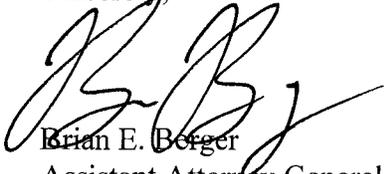
You ask this office to issue a previous determination permitting the department to withhold information that confirms a facility reports in the Tier Two system and to withhold the Tier Two report of any facility when requested under the Act. Additionally, you ask this office to issue a previous determination permitting the department to withhold information identifying facilities that report in the Tier Two system, such that only specified information is releasable in response to requests for information about chemicals reported under Tier Two. *See id.* § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). We decline to issue such previous determinations 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;

⁵As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

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,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 562137

Enc. Submitted documents

c: Requestor
(w/o enclosures)