



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 30, 2015

Ms. Myrna S. Reingold
Legal Department
County of Galveston
County Courthouse
722 Moody Street, Fifth Floor
Galveston, Texas 77550-2317

OR2015-08414

Dear Ms. Reingold:

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# 563670.

The Galveston County Office of Emergency Management (the "office") received a request for "the most recent chemical inventory and/or Tier II report for all facilities in [the office's] Local Emergency Planning Committee response area." You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the present request for information because it does not consist of chemical inventories or Tier II reports. This ruling does not address the public availability of non-responsive information, and the office is not required to release non-responsive information in response to this request.

Next, you inform us some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-16809 (2014). In that ruling, we concluded the office must withhold the information which would indicate the specific locations of the facilities at issue, a representative sample of which we

marked, under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code and must release the remaining information. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2014-16809, the office must continue to rely on Open Records Letter No. 2014-16809 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous ruling, we will address the submitted arguments.

You explain the office maintains the requested information in its capacity as a local emergency planning committee 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 Texas Department of State Health Services (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). It is this information, that is, information held by the office as part of the Tier Two Chemical Reporting Program, that we address in this ruling. This ruling does not reach 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).¹ 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. This exception encompasses information that is made confidential

¹Chapter 507 of the Health and Safety Code, which applies to non-manufacturing facilities, does not contain a direct access provision.

by other statutes. You raise section 552.101 in conjunction with sections 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 418.178 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). 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).

You argue the submitted information is confidential under section 418.178(b) because it reveals information regarding facilities that store hazardous chemicals that are more than likely to assist in the construction or assembly of an explosive weapon. You explain that the location of facilities holding threshold quantities of hazardous substances and extremely hazardous substances must be reported to the office under the Tier Two Chemical Reporting Program. The office asserts that releasing the submitted information would identify the locations of dangerous chemicals in the county 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 office 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.² 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 responsive 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, you have not explained how section 418.178(b)(1) or section 418.178(b)(2)(B) encompasses any of the remaining responsive information. Additionally, you have failed to demonstrate any of the remaining responsive information is confidential under section 418.181. Accordingly, the office may not withhold any of the remaining responsive information under section 552.101 of the Government Code in conjunction with section 418.178 or section 418.181 of the Government Code.

The office claims some of the remaining responsive information is excepted under section 552.101 of the Government Code in conjunction with sections 27.400(d)(1) and (d)(2) of title 6 of the Code of Federal Regulations. Part 27 of chapter I of title 6 of the Code of Federal Regulations consists of the Chemical Facility Anti-terrorism Standards Regulations established by the United States Department of Homeland Security ("DHS"). Section 27.400(d) of title 6 sets forth specific duties for certain individuals in order to protect "chemical-terrorism vulnerability information" ("CVI"), and states, in part, the following:

(d) *Duty to protect information.* A covered person must—

- (1) Take reasonable steps to safeguard CVI in that person's possession or control, including electronic data, from unauthorized

²As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

disclosure. When a person is not in physical possession of CVI, the person must store it in a secure container, such as a safe, that limits access only to covered persons with a need to know; [and]

(2) Disclose, or otherwise provide access to, CVI only to persons who have a need to know[.]

6 C.F.R. § 27.400(d)(1)-(2); *see also id.* § 27.400(c), (e) (defining “covered person” and “need to know”). Section 27.400(b) of title 6 of the Code of Federal Regulations defines CVI as:

- (1) Security Vulnerability Assessments under [6 C.F.R.] § 27.215;
- (2) Site Security Plans under [6 C.F.R.] § 27.225;
- (3) Documents relating to [DHS’s] review and approval of Security Vulnerability Assessments and Site Security Plans, including Letters of Authorization, Letters of Approval and responses thereto; written notices; and other documents developed pursuant to [6 C.F.R.] §§ 27.240 or 27.245;
- (4) Alternative Security Programs under [6 C.F.R.] § 27.235;
- (5) Documents relating to inspection or audits under [6 C.F.R.] § 27.250;
- (6) Any records required to be created or retained under [6 C.F.R.] § 27.255;
- (7) Sensitive portions of orders, notices or letters under [6 C.F.R.] § 27.300;
- (8) Information developed pursuant to [6 C.F.R.] §§ 27.200 and 27.205; and
- (9) Other information developed for chemical facility security purposes that the Secretary [of DHS], in his discretion, determines is similar to the information protected in [6 C.F.R.] § 27.400(b)(1) through (8) and thus warrants protection as CVI.

Id. § 27.400(b). We note section 27.400(d)(4) provides that a covered person must mark CVI in accordance with section 27.400(f). *See id.* § 27.400(d)(4), (f) (covered person must mark paper records containing CVI by placing protective marking on top and distribution limitation statement on bottom of front and back cover, title page, and each page of document). We note, and the office acknowledges, the remaining responsive information at issue does not contain any such marking. Additionally, the office does not explain how the remaining responsive information constitutes CVI under section 27.400(b). *See id.* § 27.400(b). Accordingly, we find the office has failed to demonstrate the applicability of

sections 27.400(d)(1) and (d)(2) to the remaining responsive information, and the office may not withhold it under section 552.101 of the Government Code on either of these bases.

In summary, the office 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 office must release the remaining responsive 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 also ask this office to issue a previous determination that would permit the office to withhold Tier Two information without the necessity of requesting a decision under section 552.301 of the Government Code. 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,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/cbz

Ref: ID# 563670

Enc. Submitted documents

c: Requestor
(w/o enclosures)