



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 3, 2015

Ms. Sarah Stallberg
Assistant County Attorney
Montgomery County Attorney's Office
501 North Thompson, Suite 300
Conroe, Texas 77301

OR2015-23071

Dear Ms. Stallberg:

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# 586065 (Montgomery County ORR File 15PIA498).

The Montgomery County Office of Emergency Management and the Montgomery County Fire Marshal's Office (collectively, the "fire marshal's office") and the Montgomery County Attorney's Office (the "county attorney's office") received a request for the last two Tier Two chemical reports submitted by any facility in the applicable jurisdiction.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.²

¹We note you sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²We 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.

Initially, the county attorney's office argues its information may not be subject to the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) defines "public information" as the following:

[I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). The county attorney's office states it is not the "custodian of records" of the submitted information and only maintained the submitted information for the purpose of responding to an open records request and advocating for claimed exceptions on behalf of the fire marshal's office. Upon review, however, we find the county attorney's office's information was written, produced, collected, assembled, or maintained in connection with the transaction of official business by the county attorney's office. Thus, the submitted information is subject to the Act and the county attorney's office must release it unless it falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302.

Next, we note portions of the requested information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter 2015-16868 (2015). In Open Records Letter No. 2015-16868, this office held the fire marshal's office must withhold the information under section 552.101 of the Government Code in conjunction with section 418.178 of the Government Code and release the remaining information. We have no indication the law, facts, and circumstances on which this ruling was based have changed. Accordingly, for the requested information that is identical to the

information previously requested and ruled upon by this office, the fire marshal's office must continue to rely on Open Records Letter No. 2015-16868 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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 requested information is not encompassed by the previous ruling, we will consider the submitted arguments against disclosure.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You seek to withhold the information possessed by the county attorney's office under section 552.107 of the Government Code. You claim the information you have indicated

consists of communications between the county attorney's office and the fire marshal's office in its capacity as a client. You state these communications were made for purpose of providing legal services to the fire marshal's office. We understand these communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the county attorney's office has demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the county attorney's office may withhold the information you have indicated under section 552.107(1) of the Government Code.³

Now, we turn to your arguments against disclosure of the information in possession of the fire marshal's office. We note the Texas Commission on Environmental Quality (the "commission")⁴ 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 commission, the local emergency planning committee, and the local fire chief. Act of May 25, 2015, 84th Leg., R.S., ch. 515, §§ 6-7, 16, 26-27, 2015 Tex. Sess. Law Serv. 1878, 1880-1881, 1883, 1885-1886 (Vernon) (to be codified as amendments to Health & Safety Code §§ 505.006(c), (e)-(e-2), 505.0061, 506.006(c)-(d-2), 507.0006(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. Health & Safety Code §§ 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

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

⁴The Eighty-Fourth Legislature amended chapters 505, 506, and 507 of the Health and Safety Code effective September 1, 2015, to transfer from the Texas Department of State Health Services to the commission the powers, duties, obligations, and liabilities relating to chapters 505, 506, and 507 of the Health and Safety Code. Act of May 25, 2015, 84th Leg., R.S., ch. 515, § 37(a)(1), 2015 Tex. Sess. Law Serv. 1878, 1888 (Vernon).

a written request. *Id.* §§ 505.007(b), 506.007(b).⁵ Violations of chapter 505, chapter 506, or chapter 507 may be reported to the commission for investigation and possible administrative penalty. Act of May 25, 2015, 84th Leg., R.S., ch. 515, §§ 12, 21, 31, 33-35, 2015 Tex. Sess. Law Serv. 1878, 1882, 1884, 1887-1888 (Vernon) (to be codified as Health & Safety Code §§ 505.018, 506.018, 507.014 and 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 in the possession of the fire marshal’s office is confidential under section 552.101 in conjunction with sections 418.177, 418.178, and 418.181 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act. Section 418.177 of the Government Code 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 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

⁵ Chapter 507 of the Health and Safety Code, which applies to non-manufacturing facilities, does not contain a direct access provision.

(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 in the possession of the fire marshal's office is confidential under section 418.178(b) because it reveals information regarding specific facilities holding hazardous chemicals that are more than likely to assist in the construction or assembly of an explosive weapon. The location of any Texas facility holding threshold quantities of hazardous substances and extremely hazardous substances must be reported to the committee under the Tier Two Chemical Reporting Program. 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 fire marshal's office must withhold the information which would indicate the specific locations of the facilities at issue within the submitted information, 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. 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 fire marshal's office has not explained how section 418.178(b)(1) or section 418.178(b)(2)(B) encompasses any of the remaining information. Accordingly, the fire marshal's office 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. Further, you have failed to demonstrate the remaining information is confidential under sections 418.177 or 418.181 of the Government Code. Therefore, the fire marshal's office may not withhold any of the

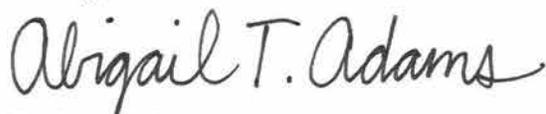
remaining information under section 552.101 of the Government Code in conjunction with sections 418.177 or 418.181 of the Government Code.

In summary, to the extent the requested information in the possession of the fire marshal's office is identical to the information previously requested and ruled upon by this office, the fire marshal's office must continue to rely on Open Records Letter No. 2015-16868 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. The county attorney's office may withhold the information it has indicated under section 552.107(1) of the Government Code. The fire marshal's office must withhold the information which would indicate the specific locations of the facilities at issue within the submitted information, 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 fire marshal's office must release the remaining requested information. 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.

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,



Abigail T. Adams
Assistant Attorney General
Open Records Division

ATA/akg

Ref: ID# 586065

Enc. Submitted documents

c: Requestor
(w/o enclosures)