

## **Q&A on the Confidentiality of Terrorism documents**

Department of State Health Services

Office of General Counsel

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### **Are documents relating to bioterrorism confidential?**

Some of them are. In 2003, the 78<sup>th</sup> Texas Legislature passed legislation that amended the Texas Disaster Act of 1975 by adding sections 418.176-418.183, to the Government Code, all of which deal with confidentiality. The 78<sup>th</sup> Legislature also amended Government Code, section 418.175, which also deals with confidentiality.

### **How are these laws different from other laws relating to medical information?**

Public health workers have always worked with laws that protect the privacy of the medical information of individuals. Texas Government Code, sections 418.176 through 418.183, are designed to protect sensitive information that might benefit the efforts of terrorists.

### **Who must follow these provisions?**

These provisions apply to state and local governmental entities, the entities covered by the Texas Public Information Act (also known as the Open Records Act, or PIA, Government Code Chapter 552). This term may include some nonprofit corporations under the Texas Water Code.

### **What kinds of documents are confidential?**

Sections 418.175 through 418.183 of the Government Code create several classes of confidential information. They are:

- “Information that relates to physically or mentally disabled individuals . . . that is maintained for purposes of emergency management or disaster planning.” (Gov’t Code §418.175). Note: this provision existed prior to 2003 but was amended by the 78<sup>th</sup> Legislature.)
- “Information [that] is collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, responding to or investigating an act of terrorism or related criminal activity”, specifically:
- “(1) [information that] relates to the staffing requirements of an emergency response provider . . .
- “(2) [information that] relates to a tactical plan of the provider; or
- “(3) consists of a list or compilation of pager or telephone numbers . . .” (Gov’t Code §418.176(a))

- “Information [that] is (1) 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 . . .” (Gov’t Code §418.177)
- “Information [that] 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 indicates the specific location of 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 unpublished information relating to a potential vaccine or to a device that detects biological agents or toxins.” (Gov’t Code §418.178)
- “Information relating to encryption codes and security keys for communications system” (Gov’t Code §418.179)
- Information prepared for the United States that relates to terrorism, or is required to be kept confidential by federal law or by agreement. (Gov’t Code §418.180)

**Who within the department can see confidential information?**

There are no limitations on the internal distribution of these documents. But prudence should be exercised in handling and storing the documents. They should not be distributed beyond those who need to know the information. They should not be discussed during open meetings. (Gov’t Code §418.183(f))

**Can other governmental entities see this confidential information?**

Based on prior decisions of the Attorney General, they may be shared with other state and local governmental entities.

**Can governmental entities outside Texas see this confidential information?**

No.

**May this information be shared with non-governmental entities?**

There is no provision of law that would allow this information to be shared with private or non-governmental entities. Any release to non-governmental entities would create a strong presumption that the releasing agency has determined they are not confidential. Under Texas Public Information Law, government agencies cannot selectively release documents. What is available to one, is available to all.

## **What should we do if we receive a request for information for documents that might be confidential?**

If there is any question about the confidentiality of the documents the question should be referred to the public information officer or general counsel of the agency. If they are thought to be confidential, they will be referred to the attorney general for a ruling.

## **When can confidential documents be disclosed?**

The law makes special allowances for disclosure “during a state of disaster . . . if the executive or administrative head of the governmental entity believes that the other person or entity has a legitimate need for the information.” (Gov’t Code §418.183)

## **What are the consequences of improperly disclosing confidential documents?**

There are criminal penalties for improper release. Government Code § 552.352 calls for penalties of up to six months in jail and a fine of up to \$1000 for improper release of confidential information. Individuals who violate these laws may be subject to personnel sanctions, because the same provision in the government code describes improper release as “official misconduct”. Individuals or other entities may also be subject to contract sanctions, that is, the department may decline to contract with those entities that do not treat the documents as confidential. Once documents are improperly released, it may become difficult to argue they are confidential when other parties request them under the Public Information Act.

## **As a practical matter how do we go about preventing improper release of confidential documents?**

These documents may contain some data (or portions) that are not confidential, but other portions that are, depending on how Government Code sections 418.176-418.182 are interpreted. Rather than going through and trying to make this determination on a section by section (or paragraph by paragraph) basis when the documents are created or distributed, “tag” any potentially confidential portion of the document with a header or footer. It should say something like the following:

**Portions of this document may be confidential under §§418.176-418.182 of the Texas Government Code or other law. Before releasing this document outside your governmental entity, please consult your Open Records Coordinator or Attorney.**

This means that our staff and other governmental staff to whom we give these documents will at least be required to think about these laws before they release the documents. At that time they will actually apply the law and determine what is and is not "collected, assembled, or maintained by or for a governmental entity for the purpose of preventing, detecting, or investigating an act of terrorism" (Gov't Code § 418.176).

**How can we be certain that provisions like this will be interpreted consistently?**

The decision to request an opinion from the attorney general will be made by the agency from which the information is requested. That might be the department in some cases, but it might be other state and local government agencies in others. And as in all open records requests, the Attorney General's Open Records Division will ultimately decide if the material is confidential under state law based on the request and arguments submitted to that office.

**Who at the department will decide what should and should not be confidential?**

As in all other open records requests, the program, together with the open records coordinator and Office of General Counsel will be involved in this decision. Local governments may have a different procedure but the end result will be the same: a decision to release or seek an Attorney General's opinion.