



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 25, 2003

Ms. Mia Settle-Vinson
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2003-8543

Dear Ms. Settle-Vinson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191501.

The City of Houston (the "city") received a request for all pager and cell phone numbers for all city employees, including employees of the police and fire departments. You inform us that the city has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.¹

You first argue that the cellular phone and pager numbers of city Aviation Department employees, which you have not submitted to this office for review, are excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law.² As federal law preempts state law to the extent that state law actually conflicts with federal law, we will consider your arguments. *See English v. General Elec. Co.*, 496 U.S. 72, 79

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. *See Gov't Code* § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

²Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

(1990); *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Effective November 19, 2001, Congress enacted the Aviation and Transportation Security Act ("ATSA"), which created the United States Transportation Security Administration ("TSA"), a new agency within the United States Department of Transportation ("DOT") headed by the Undersecretary of Transportation for Security (the "undersecretary"). *See* 49 U.S.C. § 114(a), (b)(1). ATSA provides that, by November 19, 2002, the responsibility for inspecting persons and property carried by aircraft operators and foreign air carriers will be transferred from the Federal Aviation Administration ("FAA") administrator to the undersecretary as head of TSA. These responsibilities include carrying out the requirements of chapter 449 of title 49 of the United States Code, which pertain to civil aviation security. *See* 49 U.S.C. § 114(d)(1). Section 40119 of title 49, a provision that formerly applied to the FAA Administrator, now states:

Notwithstanding [the Federal Freedom of Information Act ("FOIA"),] the Under Secretary shall prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security or research and development activities . . . if the Under Secretary decides disclosing the information would --

- (A) be an unwarranted invasion of personal privacy;
- (B) reveal a trade secret or privileged or confidential commercial or financial information; or
- (C) be detrimental to the safety of passengers in transportation.

49 U.S.C. § 40119(b)(1). The language of this provision authorizes TSA's undersecretary to prescribe regulations "prohibiting disclosure of information obtained or developed in carrying out security or research and development activities." The undersecretary is authorized to prescribe regulations that prohibit disclosure of information requested not only under FOIA, but also under other disclosure statutes. *Cf. Public Citizen, Inc. v. Federal Aviation Administration*, 988 F.2d 186, 194 (D.C. Cir. 1993) (former section 40119 authorized FAA administrator to prescribe regulations prohibiting disclosure of information under other statutes as well as under FOIA). Thus, section 40119(b)(1) authorizes the undersecretary to prescribe regulations that prohibit disclosure of information requested under the Texas Public Information Act (the "Act"), chapter 552 of the Government Code.

Pursuant to the mandate and authority of section 40119, DOT's FAA and TSA jointly published new regulations pertaining to civil aviation security, which are found at title 49 of the Code of Federal Regulations and which took effect February 17, 2002. *See* 67 Fed. Reg. 8340. Section 1520.1(a) of these regulations explains that the regulations govern the release, by TSA "and by other persons, of records and information that has [sic] been

obtained or developed during security activities or research and development activities.” 49 C.F.R. § 1520.1(a) (emphasis added). The “other persons” to which these regulations apply include local governmental entities such as the city. *See* 49 U.S.C. § 40102(a)(32) (“person” includes “a governmental authority”); *see also* 67 Fed. Reg. at 8342 (definition of “person” is based on 49 U.S.C. § 40102). Thus, the regulations at title 49 of the Code of Federal Regulations apply to the city.

Section 1520.3(a) of title 49 of the Code of Federal Regulations provides in part that, “notwithstanding the [FOIA] or other laws,” records that meet the definition in section 1520.7 are not available for public inspection or copying, nor is information contained in those records to be released to the public. *See* 49 C.F.R. § 1520.3(a). Such information is defined to include “[a]ny information that TSA has determined may reveal a systemic vulnerability of the aviation system, or a vulnerability of aviation facilities, to attack.” *Id.* § 1520.7(h). This information includes, but is not limited to, “details of inspections, investigations, and alleged violations and findings of violations.” *See id.* As to the release of information by persons other than TSA, section 1520.5 provides that those covered by the regulation, which includes airport and aircraft operators and their employees, contractors, and agents, among others, “must restrict disclosure of and access to sensitive security information . . . to persons with a need to know *and must refer requests by other persons for such information to TSA* or the applicable DOT administration[.]” *Id.* § 1520.5(a) (emphasis added).

You inform us that a TSA senior field counsel has reviewed the present request for information and a representative sample of the records at issue. You indicate that the senior field counsel has advised the city that TSA has classified the responsive cellular phone and pager numbers of Aviation Department employees as confidential sensitive security information. You therefore believe that the city must comply with TSA’s directives and withhold the pager and cell phone numbers of aviation employees. Based on your representations and the federal statutory and regulatory scheme described above, we conclude that the decision to release or withhold the pager and cell phone numbers of aviation employees is not for this office or the city to make, but rather is a decision for the undersecretary as head of TSA. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (state law preempted to extent it actually conflicts with federal law); *see also Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1986) (federal agency acting within scope of its congressionally delegated authority may preempt state regulation). Consequently, we conclude that the responsive information relating to aviation department employees, which the city has not submitted to this office for review, need not be released.

You also assert that other responsive pager and cell phone numbers are confidential under section 418.176 of the Government Code. Section 418.176 provides in part:

Sec. 418.176. CONFIDENTIALITY OF CERTAIN INFORMATION
RELATING TO EMERGENCY RESPONSE PROVIDERS.

(a) Information is confidential if the information 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 and:

(1) relates to staffing requirements of an emergency response provider, including law enforcement agency, a fire-fighting agency, or an emergency services agency;

(2) relates to a tactical plan of the provider; or

(3) consists of a list or compilation of pager or telephone numbers, including mobile and cellular telephone numbers, of the provider.

Act of June 2, 2003, 78th Leg., R.S., ch. 1312, § 3, 2003 Tex. Sess. Law Serv. 4814 (to be codified at Gov't Code § 418.176).

You contend that section 418.176 encompasses the responsive pager and cell phone numbers of police officers, fire fighters, emergency medical services providers, bioterrorism emergency responders, and other city employees. Having considered your arguments and reviewed the submitted information that you seek to withhold, we conclude that the pager numbers of bioterrorism team members contained in Exhibit 3C are confidential under section 418.176 of the Government Code. We have marked that information. The city must withhold the marked information under section 552.101 of the Government Code. We otherwise find that you have not established that any of the remaining information at issue was "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," so as to come within the scope of section 418.176 of the Government Code. Therefore, none of the remaining information is excepted from disclosure under section 552.101 of the Government Code.

You also claim that the responsive pager and cell phone numbers of police officers are excepted from disclosure under section 552.108 of the Government Code. Section 552.108(b)(1) excepts from required public disclosure an internal record of a law enforcement agency maintained for internal use in matters relating to law enforcement or prosecution if "release of the internal record or notation would interfere with law enforcement or prosecution." A governmental body that seeks to withhold information under section 552.108(b)(1) must sufficiently explain how and why the release of the information would interfere with law enforcement and crime prevention. *See* Gov't Code § 552.301(e)(1)(A); *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet. h.) (Gov't Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws);

Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). In Open Records Decision No. 506 (1988), this office determined that the statutory predecessor to section 552.108(b) excepted from disclosure “cellular mobile phone numbers assigned to [Harris C]ounty officials and employees with specific law enforcement responsibilities.” *Id.* at 2. We noted that the purpose of the cellular telephones was to ensure immediate access to individuals with specific law enforcement responsibilities and that public access to these numbers could interfere with that purpose. *Id.*

You inform us that the pager and cell phone numbers contained in Exhibit 2 are those of law enforcement officers, are paid for by the city, and are for use solely in conducting official city business. You assert that the release of these pager and cell phone numbers would interfere with law enforcement and crime prevention. Based on your representations and our review of the information at issue, we conclude that the city may withhold the responsive pager and cell phone numbers of police officers that are contained in Exhibit 2 under section 552.108(b)(1) of the Government Code.

In summary, the city need not release the responsive pager and cell phone numbers of Aviation Department employees that it has not submitted in requesting this decision. The city must withhold the marked pager numbers in Exhibit 3C under sections 552.101 and 418.176 of the Government Code. The city may withhold the pager and cell phone numbers of police officers in Exhibit 2 under section 552.108(b)(1). The city must release the rest of the requested information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

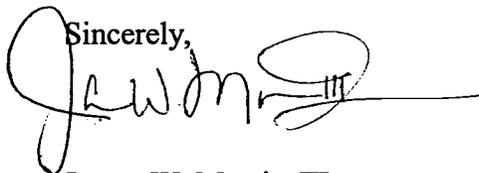
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,


James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 191501

Enc: Submitted documents

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