



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 13, 2004

Ms. Anne M. Constantine  
Legal Counsel  
D/FW International Airport  
P.O. Box 619428  
DFW Airport, Texas 75261-9428

OR2004-2965

Dear Ms. Constantine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199314.

The Dallas-Fort Worth International Airport Board (the "board") received a request for information relating to "any 'no fly' list or other watchlist that has been used at the Dallas Fort Worth International Airport for identifying individuals considered potential threats to transportation or national security." You state that you will provide the requestor with some responsive information. However, you claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted sample of information.<sup>1</sup>

You argue that all or portions of the responsive documents are excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. As federal law preempts state law to the extent that state law actually conflicts with federal law, we will

---

<sup>1</sup> We 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.

consider your arguments. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (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"), an agency within the United States Department of Transportation ("DOT") headed by the Under Secretary of Transportation for Security (the "Under Secretary"). *See* 49 U.S.C. § 114(a), (b)(1). The ATSA provides that, effective November 19, 2002, the responsibility for inspecting persons and property carried by aircraft operators and foreign air carriers is transferred from the Federal Aviation Administration (the "FAA") Administrator to the Under Secretary as head of the 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 (the "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 the TSA's Under Secretary to prescribe regulations "prohibiting disclosure of information obtained or developed in carrying out security or research and development activities." Further, the Under Secretary is authorized to prescribe regulations that prohibit disclosure of information requested not only under the FOIA, but also under other disclosure statutes. *Cf. Pub. Citizen, Inc. v. Fed. Aviation Admin.*, 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 the FOIA). Thus, the Under Secretary is authorized by section 40119(b)(1) 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, the DOT's FAA and TSA jointly published new regulations pertaining to civil aviation security, which are found in 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 the 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). Such “other persons” to which these regulations apply include local governmental entities such as the board. *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 in title 49 of the Code of Federal Regulations apply to the board. Section 1520.3(a) of title 49 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. 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 the TSA, section 1520.5 provides that those covered by the regulation, which, among others, includes airport and aircraft operators, their employees, contractors, and agents, “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).

Based on this statutory scheme, we conclude that the decision to release or withhold the requested information at issue here is not for this office or the board to make, but rather a decision for the Under Secretary as head of the TSA. *See English*, 496 U.S. 72, 79 (state law preempted to extent it actually conflicts with federal law); *see also Louisiana Pub. Serv. Comm’n*, 476 U.S. 355, 369 (federal regulation enacted by agency acting within scope of its congressionally delegated authority may preempt state regulation). In this instance, you inform us that the board has referred the request and the relevant documents to the TSA for review. You state that “TSA counsel has reviewed the documents and determined that the ‘no fly’ list is sensitive security information in its entirety.” You further state that the related police reports contain sensitive security information relating to the “no fly” list and have been redacted accordingly. We therefore conclude that the board must comply with the TSA’s directives on this matter with regard to the information at issue.

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,



Jennifer E. Berry  
Assistant Attorney General  
Open Records Division

JEB/sdk

Ref: ID# 199314

Enc: Submitted documents

c: Mr. Thomas R. Burke  
Davis Wright Tremaine, L.L.P.  
One Embarcadero Center, Suite 600  
San Francisco, California 94111-3611  
(w/o enclosures)