



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 21, 2004

Ms. Elaine S. Hengen
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th floor
El Paso, Texas 79901

OR2004-5013

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203937.

The City of El Paso (the "city") received a request for the "daily activity log sheet of city officers at the El Paso Airport" for specified periods of time. You claim that the requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.108, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.¹

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.

¹ 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.

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, the DOT, 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).

Based upon this statutory scheme, we conclude that the decision to release or withhold the requested information 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. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law preempted to extent it actually conflicts with federal law); *see also La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation). In this instance, you inform us that the city referred this request for information and the relevant documents to the TSA for review. You also inform us that TSA counsel has reviewed the documents at issue and determined that the requested information constitutes sensitive security information that is protected from release by part 1520 of title 49 of the Code of Federal Regulations. Accordingly, we conclude that the city must comply with TSA’s directives on this matter with regard to the requested information.²

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

² As our ruling is dispositive, we need not address your remaining arguments.

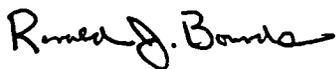
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 203937

Enc. Submitted documents

c: Mr. Richie Cazares
Ray, Valdez, McChristian & Jeans
5822 Cromo
El Paso, Texas 79912
(w/o enclosures)