



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2007

Mr. Robert Martinez
Director Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2007-04723

Dear Mr. Martinez:

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# 276671.

The Texas Commission on Environmental Quality (the "commission") received a request for a specified application, and any supporting documentation, filed by the Lower Neches Valley Authority ("LNVA"). You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the LNVA and by an attorney on behalf of the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, LVNA informs us that the requested application is a direct result of a vulnerability assessment mandated by the United States Coast Guard Port Security Assessment Team of the Maritime Safety Office of Port Arthur, Texas pursuant to section 103 of title 33 of the Code of Federal Regulations. See 33 C.F.R. 103.400 (b) (providing that a Coast Guard Port Security Assessment Team may complete a risk based Area Maritime Security Assessment mandated under section 103.400(a) of title 33 of the Code of Federal Regulations). Therefore, LVNA asserts that some of the documents contained in the application at issue are confidential under federal law. In this regard, we note that on November 25, 2002, the President signed the Homeland Security Act ("HSA") and the Maritime Transportation Security Act ("MTSA"). The HSA created the Department of Homeland Security ("DHS")

and transferred the Coast Guard and the Transportation Security Administration (“TSA”), a new agency created in the Department of Transportation (“DOT”) the previous year to oversee the security of air travel, to DHS. *See* 6 U.S.C. §§ 111, 203, 468. The MTSA, among other things, added chapter 701 to title 46 of the United States Code, consisting of new provisions enhancing the security of seagoing vessels and port and harbor facilities. Under the MTSA, the Secretary of DHS is responsible for regulation of port security through the Coast Guard and the TSA, along with the Maritime Administration of the DOT.

In connection with the transfer of TSA to DHS, the HSA also transferred TSA’s authority concerning sensitive security information (“SSI”) under section 40119 of title 49 of the United States Code to section 114(s) of title 49 of the United States Code, and amended section 40119 to vest similar SSI authority in the Secretary of the Department of Transportation.¹ Section 114(s) of title 49 states:

Notwithstanding [the Federal Freedom of Information Act (the “FOIA”),] the Under Secretary [for Transportation Security, head of TSA] shall prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act . . . 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 security of transportation.

49 U.S.C. § 114(s). This provision requires the TSA’s Under Secretary to “prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act.” *Id.* It authorizes the Under Secretary to prescribe regulations that prohibit disclosure of information requested not only under the 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 the FOIA). Thus, the Under Secretary is authorized by section 114(s) to prescribe regulations that prohibit disclosure of information requested under chapter 552 of the Government Code.

Pursuant to the mandate and authority of section 114(s) of title 49, TSA published regulations found in title 49 of the Code of Federal Regulations which took

¹This ruling does not construe the parallel federal statutes and regulations which apply to the Department of Transportation.

effect June 17, 2004. *See* 69 Fed. Reg. 28066. Section 1520.1(a) of these regulations provides that the regulations govern the disclosure of records and information that TSA has determined to be SSI as defined in section 1520.5 of title 49 of the Code of Federal Regulations. 49 C.F.R. § 1520.1(a). Section 1520.5 defines SSI to include information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would be detrimental to the security of transportation. 49 C.F.R. § 1520.5(a)(3).

Section 1520.5 lists sixteen categories of information that constitute SSI, including “any vulnerability assessment directed, created, held, funded, or approved by the DOT, DHS, or that will be provided to DOT or DHS in support of a Federal security program.” 49 C.F.R. § 1520.5(b)(5). SSI also includes “any vessel, maritime facility, or port area security plan required or directed under Federal law[.]” 49 C.F.R. § 1520.5(b)(1)(ii). Those covered by the regulations include “each person for which a vulnerability assessment has been directed, created, held, funded, or approved by the DOT, DHS, or that has prepared a vulnerability assessment that will be provided to DOT or DHS in support of a Federal security program.” *Id.* § 1520.7(1). Section 1520.9 provides that those covered must “take reasonable steps to safeguard SSI . . . from unauthorized disclosure[.]” must “disclose, or otherwise provide access to, SSI only to covered persons who have a need to know, unless otherwise authorized in writing by TSA, the Coast Guard, or the Secretary of DOT[.]” and must “refer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS.” *Id.* § 1520.9(a).

On this basis, we understand that LNVA is an entity covered under the federal regulations, and that it provided the information at issue to the commission on a need to know basis or as authorized in writing by TSA, the Coast Guard, or the Secretary of DOT. *Id.* Accordingly, we assume that the commission is also covered under the federal regulations. *See* 49 C.F.R. § 15.7(j), (m). Therefore, based upon the above-described statutory and regulatory scheme, we conclude that the decision to release or withhold the requested information is not for this office or the commission to make, but rather is a decision for the Under Secretary as head of the TSA. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law is preempted to extent it actually conflicts with federal law); *see also Louisiana 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). Consequently, we conclude the commission may not release any of the requested information at this time under the Act, and instead must refer the information request to the TSA for its decision concerning disclosure of the information at issue. Because our ruling on this issue is dispositive, we need not address your remaining arguments against disclosure.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jb

Ref: ID# 276671

Enc. Submitted documents

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