



ATTORNEY GENERAL OF TEXAS
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Ms. Susan Denmon Gusky
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OR2007-10093

Dear Ms. Gusky:

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# 286955.

The Port of Houston Authority (the "port") received a request for (1) all inspection reports or audits of any port property, facility, equipment, vessel, waterway, personnel or system completed since September 1, 2001; (2) all communications relating to the aforementioned information; and (3) all citations and basic information regarding any arrest made on or relating to activity on port property. You state that you will release the information responsive to the last of these items. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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. This section encompasses information protected by other statutes, including federal law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). 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 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 Department of Transportation.

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 the 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 the 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 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. *Id.* § 1520.5(a)(3).

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

Section 1520.5 lists sixteen categories of information that constitute SSI, including vulnerability assessments, security inspection or investigative information, security measures, and critical maritime infrastructure asset information. *Id.* § 1520.5(b)(5), (6), (8), (12). Section 1520.9 provides that those covered by the regulation, which, among others, includes the operator of a maritime facility required to have a security plan under the MTSA, “must [t]ake reasonable steps to safeguard SSI . . . from unauthorized disclosure[.]” and must “[r]efer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS.” *Id.* § 1520.7(a), .9(a).

You advise that the port is an operator of a maritime facility required to have a security plan under the MTSA. *See* 46 U.S.C. § 70103(c); 33 C.F.R. § 105.400 (requiring owner or operator of maritime facility to submit security plan to DHS). Under section 101.305 of title 33 of the Code of Federal Regulations, an operator of a maritime facility required to have a security plan must report breaches of security to the National Response Center of the Coast Guard. Under section 70103(d), information related to security plans, procedures, or programs for vessels and port facilities is protected from public disclosure. *See* 46 U.S.C. § 70103(d).

You state that the submitted information contains SSI and that you have referred the request to the Coast Guard. Based upon the above described statutory and regulatory scheme, we thus conclude that the decision to release or withhold the requested information is not for this office or the port to make, but rather is a decision for the TSA and the Coast Guard. *See English*, 496 U.S. at 79 (state law is preempted to extent it actually conflicts with federal law). Consequently, we conclude the port may not release any of the requested information at this time under the Act, and instead must allow the TSA and the Coast Guard to make a determination concerning disclosure of 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, upon receiving this ruling, the governmental body

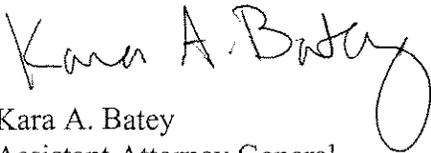
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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,



Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/mcf

Ref: ID# 286955

Enc. Submitted documents

c: Mr. Steve McVicker
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(w/o enclosures)