



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 31, 2009

Ms. Evelyn Njuguna
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2009-12257

Dear Ms. Njuguna:

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# 354450.

The City of Houston (the "city") received a request for "documents pertaining to any travel conducted by Airport System Employees and/or Houston Airport System Development Corporation employees." You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is made confidential by other statutes, including federal law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). 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 Under Secretary of Transportation for Security (the "Under Secretary"). *See* 49 U.S.C. § 114(a), (b)(1). The 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 (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 id.* § 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")] and the establishment of a Department of Homeland Security [{"DHS"}], the [Under Secretary] shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title 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 transportation safety.

Id. § 40119(b)(1). The language of this provision authorizes TSA's Under Secretary to prescribe regulations "prohibiting disclosure of information obtained or developed in ensuring security." 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. 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 FOIA). Thus, the Under Secretary is authorized by section 40119(b)(1) to prescribe regulations that prohibit disclosure of information requested under the Act.

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 "maintenance, safeguarding, and disclosure of records and information that TSA has determined to be Sensitive Security Information [{"SSI"}], as defined in § 1520.5." 49 C.F.R. § 1520.1(a). Section 1520.7 states that the covered persons to which these regulations apply to include, among others, airport operators, such as the city, and "[e]ach person employed by, contracted to, or acting for a covered person[.]" *See id.* § 1520.7(a), (k). Further, section 1520.7(j) specifies that these regulations apply to "[e]ach person who has access to SSI, as specified in [section] 1520.11." *Id.* § 1520.7(j). Pursuant to section 1520.11(a), a person has a need to know SSI "[w]hen the person requires access to specific SSI to carry out transportation security activities approved, accepted, funded, recommended, or directed by

DHS or DOT.” *See id.* § 1520.11(a). Section 1520.11(b) further states that a local government employee has a need to know SSI if access to the information is necessary for performance of the employee’s official duties on behalf or in defense of the interests of the local government. *See id.* § 1520.11(b)(1). Thus, the regulations in title 49 of the Code of Federal Regulations apply to the city.

As to the release of information by persons other than TSA, section 1520.9(a) of title 49 provides in part that a person to which these regulations apply has a duty to protect information, and may disclose 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.” 49 C.F.R. § 1520.9(a). Section 1520.9(a)(3) of title 49 further provides that those covered by the regulation must “[r]efer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS.” *Id.* § 1520.9(a)(3). SSI is defined to include certain information obtained or developed in the conduct of security activities, the disclosure of which TSA has determined would constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information obtained from any person, or be detrimental to the security of transportation. *Id.* § 1520.5(a). SSI includes, but is not limited to, “identifying information of certain transportation security personnel[,]” and “[l]ists of the names or other identifying information that identify persons as— . . . [h]aving unescorted access to a secure area of an airport[.]” *See id.* § 1520.5(b).

You state that you are withholding the requested records relating to the city’s airport system employees and referring this information to the TSA. Based on the statutory and regulatory scheme described above, we agree that the decision to release or withhold the information in question is not for this office or the city to make, but rather is a decision for the Under Secretary as head of the TSA. *See English*, 496 U.S. at 79 (state law is preempted to extent it actually conflicts with federal law). Therefore, the city may not release any of that information at this time under the Act. Instead, this information request must be referred to the TSA for its decision concerning disclosure of the information at issue.¹

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read 'ME' followed by a stylized flourish.

Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/sdk

Ref: ID# 354450

Enc. Submitted documents

c: Requestor
(w/o enclosures)