ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 18, 2014

Ms. Cari Bernstein
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2014-20965

Dear Ms. Bernstein:

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# 542596 (PIR # 14-3208).

The Texas Department of Public Safety (the "department") received a request for specified documents pertaining to grant applications involving the State Homeland Security Program, Urban Areas Security Initiative, and Operation Stonegarden. Although you take no position as to whether the submitted information is excepted under the Act, you inform us release of the submitted information may implicate the privacy interests of an interested third party. Accordingly, you state, and have provided documentation showing, you notified the interested third party of its rights to submit comments to this office explaining why the submitted information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."[1] *Id.* § 552.101. Section 552.101 encompasses information protected by other statutes, including

[1]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

federal law. On November 25, 2002, the president signed the federal Homeland Security Act ("HSA"). The HSA created the United States Department of Homeland Security ("DHS") and transferred the Transportation Security Administration ("TSA"), a new agency created in the Department of Transportation ("DOT") the previous year to oversee the security of transportation, to DHS. *See* 6 U.S.C. §§ 111, 203.

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(r) of title 49 of the United States Code and amended section 40119 to vest similar SSI authority in the secretary of DOT.[2] Section 114(r) of title 49 states, in relevant part:

> (1) 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 –
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> > (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(r)(1). This provision authorizes the TSA's 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 Admin.*, 988 F.2d 186, 194 (D.C. Cir. 1993) (former section 40119 authorized Federal Aviation Administration administrator to prescribe regulations prohibiting disclosure of information under other statutes as well as under FOIA). Thus, the Under Secretary is authorized by section 114(r) to prescribe regulations that prohibit disclosure of information requested under the Act.

Pursuant to the mandate and authority of section 114 of title 49, TSA published regulations in title 49 of the Code of Federal Regulations that took effect June 17, 2004. *See* 69 Fed. Reg. 28066. Section 1520.1(a) of these regulations provides that the regulations govern the "maintenance, safeguarding, and disclosure of records and information that TSA has determined to be [SSI], as defined in § 1520.5." 49 C.F.R. § 1520.1(a). Section 1520.7

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[2]This ruling does not construe the parallel federal statutes and regulations that apply to DOT.

states that the covered persons to which these regulations apply include, among others, to "[e]ach person who has access to SSI, as specified in § 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." *Id.* § 1520.11(a)(1). Section 1520.11(b)(1) further states that a state or local government employee, contractor, or grantee 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. *Id.* § 1520.11(b)(1). Section 15201.11(b)(2) further states a state or local government employee, contractor, or grantee has a need to know SSI if the person is "acting in the performance of a . . . grant from" a federal government agency "if access to the information is necessary to performance of the . . . grant." *Id.* § 1520.11(b)(2). Thus, the regulations in title 49 of the Code of Federal Regulations apply to the department.

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." *Id.* § 1520.9(a)(2). 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). Section 1520.5(b) of title 49 specifically defines fifteen categories of SSI and provides SSI includes "[a]ny information not otherwise described in [section 1520.5] that TSA determines is SSI under 49 U.S.C. 114(s) or that the Secretary of DOT determines is SSI under 49 U.S.C. 40119." *See id.* § 1520.5(b).

The submitted information consists of information pertaining to grant applications made to and grant funds received from DHS. We understand the submitted information consists of SSI. Based on the statutory and regulatory scheme described above and our review, we conclude the decision to release or withhold the submitted information is not for this office or the department to make, but rather is a decision for the Under Secretary as head of the TSA. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (state law is preempted to extent it actually conflicts with federal law). Therefore, the department may not release the submitted information at this time under the Act, but instead must refer the information to the TSA to make a determination concerning disclosure of that information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/ds

Ref: ID# 542596

Enc. Submitted documents

c: Requestor
(w/o enclosures)