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ATTORNEY GENERAL OF TEXAS

September 12, 2017

Ms. Halfreda Anderson-Nelson
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2017-20898

Dear Ms. Anderson-Nelson:

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# 675289 (DART ORR Nos. W001760-062117 and W001770-062317).

Dallas Area Rapid Transit ("DART") received two requests for information pertaining to a specified incident. DART states it has released some information. DART claims the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information was the subject of a previous request for information in response to which this office issued Open Records Letter No. 2017-15460 (2017). In Open Records Letter No. 2017-15460, we ruled with the exception of basic information, which must be released, DART may withhold the information at issue under section 552.108(a)(1) of the Government Code. As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, DART may continue to rely on Open Records Letter No. 2017-15460 as a previous determination and withhold or release the information we have indicated in accordance with that ruling.¹ See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was

¹As we are able to make this determination, we need not address DART's arguments against disclosure of this information.

based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will address DART's arguments against disclosure of the information not subject to the previous ruling.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information protected by other statutes, including federal law. On November 25, 2002, the President of the United States signed the Homeland Security Act ("HSA"). The HSA created the 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 pertinent part:

(1) In general. – 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–

...

(C) be detrimental to the security of transportation.

49 U.S.C. § 114(r)(1)(C). This provision 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 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.

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

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. TSA subsequently published additional regulations regarding the security of passenger and freight rail services found in title 49 of the Code of Federal Regulations, which took effect December 26, 2008, with amendments taking effect on May 20, 2009. *See* 73 Fed. Reg. 77531; 74 Fed. Reg. 23656. 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 [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 include, among others, rail transit systems subject to the requirements of part 1580 and “[e]ach person employed by, contracted to, or acting for a covered person[.]” *Id.* § 1520.7(k), (n). We note section 1580 states “Rail transit system or ‘Rail Fixed Guideway System’ means any light, heavy, or rapid rail system, monorail, inclined plane, funicular, cable car, trolley, or automated guideway that traditionally does not operate on track that is part of the general railroad system of transportation.” *Id.* § 1580.3. Further, section 1520.7(j) specifies that these regulations apply 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). 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.” *Id.* § 1520.11(b)(1). Thus, the regulations in title 49 of the Code of Federal Regulations apply to DART.

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). SSI also includes “[s]pecific details of . . . rail transportation security measures, both operational and technical, whether applied directly by the Federal government or another person, including . . . [s]ecurity measures or protocols recommended by the Federal government[.]” and “[a]ny information not otherwise described . . . 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.” *Id.* § 1520.5(b)(8)(i), (16).

DART asserts the information it has indicated provides the armed security guard schedule at various DART properties. DART further asserts if this information is released, it would reveal the security information and vulnerabilities at each DART property and could endanger the lives of DART transit riders because it reveals the times and days each DART property is not secured. Based on the statutory and regulatory scheme described above, we agree the decision to release or withhold the information in question is not for this office or DART 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, DART may not release the information it has indicated at this time under the Act, but must allow the TSA to make a determination concerning disclosure of the requested information.³

In summary, DART may continue to rely on Open Records Letter No. 2017-15460 as a previous determination and withhold or release the information we have indicated in accordance with that ruling. DART may not release the information it has indicated at this time under the Act, but must allow the TSA to make a determination concerning disclosure of this 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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/tdw

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of the information at issue.

Ref: ID# 675289

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)