



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

December 11, 2017

Mr. Oscar G. Gabaldon, Jr.  
Assistant City Attorney  
City of El Paso  
P.O. Box 1890  
El Paso, Texas 79950-1890

OR2017-28068

Dear Mr. Gabaldon:

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# 693897 (Ref. No. 17-1003-702).

The City of El Paso (the "city") received a request for information pertaining to specified incidents at the city's airport during a specified time period.<sup>1</sup> You claim 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 representative sample of information.<sup>2</sup>

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<sup>1</sup>You state the city sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.101 of the Government Code exempts 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. In addition, a federal regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101 of the Act. *See* Open Records Decision No. 599 at 5 (1992). 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 the covered persons to which these regulations apply 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 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 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.” *Id.* § 1520.9(a). Section 1520.9(a)(3) of title 49 further provides 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[.]” “[l]ists of the names or other identifying information that identify persons as . . . [h]aving unescorted access to a secure area of an airport,” 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).

You state the requested information pertains to security features of the city’s airport, designed for the security and safety of airport personnel and patrons. 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 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 the

requested information at this time under the Act, but must allow the TSA to make a determination concerning disclosure of the requested information.<sup>3</sup>

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](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,



Meredith L. Coffman  
Assistant Attorney General  
Open Records Division

MLC/tdw

Ref: ID# 693897

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>As our ruling is dispositive, we do not address your remaining arguments to withhold this information.