



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 17, 2019

Mr. Mark Triesch
Assistant City Attorney
City of San Antonio - Aviation Department
Terminal A - Mezzanine
9800 Airport Boulevard
San Antonio, Texas 78216-9990

OR2019-16357

Dear Mr. Triesch:

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# 768263 (File No. W255529-031119).

The City of San Antonio (the "city") received a request for a specified list of personnel and specified records and photos pertaining to named individuals. You indicate the city does not possess some of the requested information.¹ You claim the information at issue is excepted from disclosure under section 552.101 of the Government Code. You also state the city notified the United States Transportation Security Administration ("TSA") of the request, and its right to submit arguments to this office.² See Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released). We have considered the exception you claim and reviewed the submitted information.

¹The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²As of the date of this letter, we have not received comments from TSA.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 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 TSA, a new agency within the United States Department of Transportation (“DOT”) headed by the Administrator of TSA. *See* 49 U.S.C. § 114(a), (b)(1). The ATSA provides that the responsibility for inspecting persons and property carried by aircraft operators and foreign air carriers will be transferred from the Federal Aviation Administration (“FAA”) Administrator to the Administrator of 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). On November 25, 2002, the president signed the federal Homeland Security Act (the “HSA”). The HSA created the United States Department of Homeland Security (“DHS”) and transferred TSA 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 former section 40119 of title 49 of the United States Code to section 114(r) of title 49 of the United States Code. Section 114(r) states, in pertinent part:

Notwithstanding [the Federal Freedom of Information Act (the “FOIA”)], the Administrator [of TSA] shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of [ATSA] or under chapter 449 of this title if the Administrator [of TSA] 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(r)(1). The language of this provision authorizes TSA’s Administrator to prescribe regulations “prohibiting disclosure of information obtained or developed in carrying out security.” It authorizes the Administrator of TSA 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

Administrator of TSA is authorized by section 114(r)(1) to prescribe regulations that prohibit disclosure of information requested under the Act.

Pursuant to the mandate and authority of former section 40119, 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 [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) 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) 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). Section 1520.5(b) describes information constituting SSI, which includes "[a]ny information not otherwise described . . . that TSA determines is SSI under 49 U.S.C. 114(s)[.]" *Id.* § 1520.5(b).

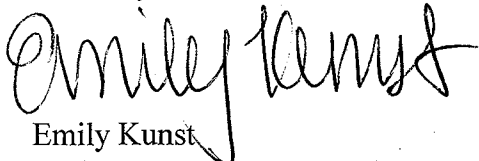
You state the information at issue pertains to security features of the city's airport and "[a]ccess to the requested information could allow a third-party to discover security vulnerabilities, target individual personnel, probe and/or test security measures and possibly access secured areas of the airport." Additionally, you have submitted guidelines from TSA indicating the information at issue constitutes SSI. Based on the statutory and regulatory scheme described above, we agree the decision to release or withhold the information at issue is not for this office or the city to make, but rather is a decision for the Administrator of 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 information at issue at this time under the Act, but must allow TSA to make a determination concerning disclosure of the information at issue.

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,

A handwritten signature in black ink that reads "Emily Kunst". The signature is written in a cursive, flowing style.

Emily Kunst
Assistant Attorney General
Open Records Division

EK/be

Ref: ID# 768263

Enc. Submitted documents

c: Requestor
(w/o enclosures)

1 Third Party
(w/o enclosures)