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ATTORNEY GENERAL OF TEXAS

May 26, 2020

Mr. David F. Brown
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OR2020-14551

Dear Mr. Brown:

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# 828936.

The Port of Houston Authority (the "port"), which you represent, received a request for information related to a specified incident. The port claims the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions the port claims and reviewed the submitted representative sample of information.¹

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 section encompasses information protected by other statutes, including federal law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). On November 25, 2002, the President signed the federal Homeland Security Act ("HSA") and the Maritime Transportation Security Act (the "MTSA"). The HSA created the Department of Homeland Security ("DHS") and transferred the Coast Guard and the Transportation Security Administration ("TSA"), a new agency created in the Department of Transportation the previous year to oversee the security of air travel, to DHS. *See* 6 U.S.C.

¹ We assume 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 those records contain substantially different types of information than that submitted to this office.

§§ 111, 203, 468. The MTSA, among other things, added chapter 701 to title 46 of the United States Code, consisting of new provisions enhancing the security of seagoing vessels and port and harbor facilities. Under the MTSA, the Secretary of DHS is responsible for regulation of port security through the Coast Guard and TSA, along with the Maritime Administration of the Department of Transportation.

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 of title 49 of the United States Code, and amended section 40119 to vest similar SSI authority in the Secretary of the Department of Transportation.² Section 114(r)(1) of title 49 states in relevant part:

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-

(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 requires TSA's Under Secretary to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act." *Id.* 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. Public Citizen, Inc. v. Federal 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 the 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(r) of title 49, TSA published regulations found in title 49 of the Code of Federal Regulations, which took effect June 17, 2004. *See* 69 Fed. Reg. 28066. Section 1520.1(a) of these regulations provides the regulations govern the disclosure of records and information that TSA has determined to be SSI as defined in section 1520.5 of title 49 of the Code of Federal Regulations. *See* 49 C.F.R. § 1520.1(a). Section 1520.5 defines SSI to include information obtained or

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

developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would be detrimental to the security of transportation. *Id.* § 1520.5(a)(3).

Section 1520.5 lists sixteen categories of information that constitute SSI, including “[s]pecific details of . . . maritime . . . transportation security measures[.]” *Id.* § 1520.5(b)(8). Section 1520.9 provides those covered by the regulation, which include, among others, the operator of a maritime facility required to have a security plan under the MTSA, “must [t]ake reasonable steps to safeguard SSI . . . from unauthorized disclosure” and 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). The port states it is an owner and operator of a maritime facility that is required to have a security plan under the MTSA. *See* 46 U.S.C. § 70103(c); *see also* 33 C.F.R. § 105.400 (requiring owner or operator of maritime facility to submit security plan to DHS). Under section 101.305 of title 33 of the Code of Federal Regulations, an operator of a maritime facility that is required to have a facility security plan must report breaches of security to the National Response Center of the Coast Guard. Under section 70103(d), information related to security plans, procedures, or programs for vessels and port facilities is protected from public disclosure. *See* 46 U.S.C. § 70103(d).

In this instance, the port also explains some of the requested information consists of investigative work product, video, or images that contain SSI pertaining to port facilities. Based on the above-described statutory and regulatory scheme and our consideration of the port’s arguments, we find the decision to release or withhold the information at issue is not for this office or the port to make, but rather is a decision for TSA and the Coast Guard. *See English*, 496 U.S. at 79 (state law is preempted to extent it actually conflicts with federal law). Consequently, we conclude at this time, the port may not release any such information under the Act and instead, the port must allow TSA and the Coast Guard to make a determination concerning its disclosure.³

Section 552.108(a)(1) of the Government Code exempts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The port informs us the port’s police department and the Texas Rangers have an ongoing investigation related to the incident at issue. Thus, the port argues the submitted information pertains to an active criminal investigation. Based on this representation, we conclude the release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in

³As we are able to make this determination, we do not address the port’s remaining arguments against disclosure of this information.

active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the submitted information.

However, we note section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle*. See 531 S.W.2d at 186-88; Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of the basic information, the port may withhold the submitted information under section 552.108(a)(1) of the Government Code.⁴

In summary, any investigative work product, video, or images that contain SSI pertaining to port facilities may not be released at this time and, instead, the port must allow TSA and the Coast Guard to make a determination concerning its disclosure. With the exception of the basic information, which must be released, the port may withhold the submitted information under section 552.108(a)(1) of the Government Code.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/jlbm

Ref: ID# 828936

c: Requestor

⁴ As our ruling is dispositive, we need not address the remaining arguments against disclosure, except to note basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).