



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 11, 2022

Mr. Ariel San Miguel
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2022-31125

Dear Mr. San Miguel:

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# 977189 (Ref. Nos. S000305 & R076326).

The City of Houston (the “city”) received two requests from the same requestor for information pertaining to airport employees and operations. You state the city does not maintain information responsive to a portion of the requests.¹ You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.² We have considered the exception you claim and 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.” 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

¹ The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. 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), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

² We note, and the city acknowledges, the city did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See Gov’t Code § 552.301(b), (e)*. Nonetheless, because the exception you claim can provide a compelling reason to overcome the presumption of openness, we will consider its applicability to the submitted information. *See id.* §§ 552.007, .302, .352.

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 submitted information consists of SSI pertaining to an airport. Based on the statutory and regulatory scheme described above, we find 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 submitted information 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 <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,

Colin Henry
Attorney
Open Records Division

CEH/mo

Ref: ID# 977189

Enc. Submitted documents

c: Requestor
(w/o enclosures)