



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 25, 2022

Ms. Laura Cedillo
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2022-33011

Dear Ms. Cedillo:

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# 980168 [File Nos. W463129 & W469409].

The City of San Antonio (the "city") received two requests for information pertaining to a specified solicitation. Although the city takes no position as to whether the submitted information is excepted under the Act, the city states release of the submitted information may implicate the proprietary interests of Infax, Inc.; Radiant Technology Group Inc.; and SITA Information Networking Computing USA, Inc. ("SITA"). Accordingly, the city states, and provides documentation showing, it notified these third parties of the requests for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from SITA. We have reviewed the submitted information and considered the submitted arguments.

Initially, we note the first request is broader than the second request. Accordingly, any submitted information that is beyond the scope of the second request is not responsive to that request, and the city need not release information to the second requestor that is not responsive to her request for information. We also note SITA argues its information is not responsive to the first request for information. However, we note the Act requires a governmental body to make a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8, 561 at 8-9 (1990), 555 at 1-2, 534 at 2-3 (1989). Because the city has submitted the information at issue for our review, we find the city has made a good-faith effort to submit

information that is responsive to the request, and we will address the arguments against disclosure of this information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from the remaining third parties. Thus, we have no basis to conclude the remaining third parties have a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the city may not withhold any of the submitted information on the basis of any proprietary interest the remaining third parties may have in the 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." *Id.* § 552.101. Section 552.101 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 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).

SITA asserts some of the information at issue, which it has indicated, 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 information SITA has indicated at this time under the Act, but must allow the TSA to make a determination concerning disclosure of this information.¹

SITA raises section 552.102(a) of the Government Code for some of the remaining information at issue. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). We understand SITA to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd*, 540 S.W.2d 668, 685 (Tex. 1976). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. See *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. See *id.* at 348. Upon review, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the city may not withhold any portion of the remaining information on that basis.

SITA raises section 552.110 of the Government Code for some of its information. Section 552.110(b) of the Government Code states, “[e]xcept as provided by [s]ection 552.0222, information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” Gov’t Code § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Id. § 552.110(a). Section 552.110(c) of the Government Code states:

Except as provided by Section 552.0222, commercial or financial information for which it is demonstrated based on specific factual evidence

¹ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

that disclosure would cause substantial competitive harm to the person from whom the information was obtained is [excepted from required disclosure].

Id. § 552.110(c). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). SITA argues some of its information consists of trade secrets and commercial or financial information subject to section 552.110(c). Upon review, we find SITA demonstrated portions of its information constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the city must withhold the information we indicated under section 552.110(c) of the Government Code.²

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”³ *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Accordingly, the city must withhold the insurance policy numbers within the remaining information under section 552.136 of the Government Code.

We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the city may not release the information SITA has indicated at this time under the Act, but must allow the TSA to make a determination concerning disclosure of this information. The city must withhold the information we have indicated under section 552.110(c) of the Government Code. The city must withhold the insurance policy numbers within the remaining information under section 552.136 of the Government Code. The city must release the remaining information; however, any information that is subject to copyright may be released only in accordance with copyright law.

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.

² As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

³ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,

Paige Lay
Assistant Attorney General
Open Records Division

PL/pt

Ref: ID# 980168

Enc. Submitted documents

c: Requestor
(w/o enclosures)