



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 19, 2005

Mr. Leo J. Welder, Jr.  
Welder, Leshin & Mahaffey, L.L.P.  
800 North Shoreline Boulevard, Suite 300 North  
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OR2005-07525

Dear Mr. Welder:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 230542.

The Port of Corpus Christi Authority (the "PCCA") received a request for information concerning an incident in which a private boat entered the Port of Corpus Christi Inner Harbor security zone. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

On November 25, 2002, the President signed the Homeland Security Act ("HSA") and the Maritime Transportation Security Act ("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. §§ 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 the 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(s) 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.<sup>1</sup> Section 114(s) of title 49 states:

Notwithstanding [the Federal Freedom of Information Act (the "FOIA"),] the Under Secretary [for Transportation Security, head of TSA] shall prescribe regulations prohibiting 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(s). This provision requires the TSA's Under Secretary to "prescribe regulations prohibiting 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 Administration*, 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(s) to prescribe regulations that prohibit disclosure of information requested under chapter 552 of the Government Code.

Pursuant to the mandate and authority of section 114(s) 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 that 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. 49 C.F.R. § 1520.1(a). Section 1520.5 defines SSI to include information obtained or developed in the conduct of security activities, including research and

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<sup>1</sup>This ruling does not construe the parallel federal statutes and regulations which apply to the Department of Transportation.

development, the disclosure of which TSA has determined would be detrimental to the security of transportation.' 49 C.F.R. § 1520.5(a)(3).

Section 1520.5 lists sixteen categories of information that constitute SSI, including “[d]etails of any security inspection or investigation of an alleged violation of aviation or maritime transportation security requirements . . . that could reveal a security vulnerability[.]” 49 C.F.R. § 1520.5(b)(6)(i). Section 1520.9 provides that those covered by the regulation, which, among others, includes the operator of a maritime facility required to have a security plan under the MTSA “must take reasonable steps to safeguard SSI . . . from unauthorized disclosure[.]” and must “refer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS.” *Id.* § 1520.7(a), 9(a).

You advise that the PCCA is an operator of a maritime facility required to have a security plan under the MTSA. *See* 46 U.S.C. § 70103(c), 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 required to have a 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).

You state that the document responsive to the present request consists of a Coast Guard Suspicious Activity Report (the “Report”) to the National Response Center, pertaining to the prohibited incursion of a recreational vessel into the Port of Corpus Christi Inner Harbor security zone designated in section 165.089(a) of title 33 of the Code of Federal Regulations. *See* 33 C.F.R. part 165 (prescribing regulations controlling access to regulated areas, and designating specific areas subject to specific security requirements). You further advise that the incursion documented in the Report constitutes a “breach of security” as defined under section 101.105 of title 33. Thus, you indicate that the Report constitutes SSI under section 1520.5(b)(6)(i) of title 49 of the Code of Federal Regulations.

Following the above-described statutory and regulatory scheme, we conclude that the decision to release or withhold the Report requested information is not for this office or the PCCA to make, but is rather a decision for the Coast Guard and the TSA. *See English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law is preempted to extent it actually conflicts with federal law); *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (noting that federal agency acting within scope of its congressionally delegated authority may preempt state regulation). You indicate that the Coast Guard and the TSA have advised the PCCA that the Report is SSI that must not be released. We have also received correspondence to that effect from the Corpus Christi sector command of the

Coast Guard. Accordingly, we conclude the PCCA may not release the Report and must abide by the determination of the Coast Guard and the TSA.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 230542

Enc: Submitted documents

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