ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 20, 2006

Ms. J. Middlebrooks
Assistant City Attorney
Criminal Law and Police Section
1400 South Lamar
Dallas, Texas 75215

OR2006-00677

Dear Ms. Middlebrooks:

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# 240487.

The Dallas Police Department (the "department") received a request for a specified internal affairs investigation. You claim that the requested information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.

We note effective November 19, 2001, the United States 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 for the transfer of responsibility for inspecting persons and property carried by aircraft operators and foreign air carriers 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* 49 U.S.C. § 114(d)(1). On November 25, 2002, the President signed into law the Homeland Security Act of 2002 (HSA), which transferred TSA to the newly established Department of Homeland Security ("DHS"). In connection with that transfer, the HSA 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 DOT.[1] Section 114(s) of title 49 now states:

> Notwithstanding [the Federal Freedom of Information Act (the "FOIA"),] the Under Secretary 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–
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> (A) be an unwarranted invasion of personal privacy;
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> (B) reveal a trade secret or privileged or confidential commercial or financial information; or
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> (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 new interim final regulations pertaining to civil aviation security, which are found in title 49 of the Code of Federal Regulations and 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 development, the disclosure of which TSA has determined would be detrimental to the security of transportation. 49 CFR § 1520.5(a)(3). Further, section 1520.5 lists sixteen categories of information that constitute SSI, including security inspection or investigative information, and specific details of aviation or maritime transportation security measures, both operational and technical, whether applied by the

[1]This ruling does not construe the parallel federal statutes and regulations which apply to the DOT.

Federal government or another person. 49 CFR §§ 1520.5(b)(6), (8). Section 1520.9 provides that those covered by the regulation, which, among others, includes airport and aircraft operators, their employees, contractors, and agents, *see* 49 CFR § 1520.7(a), "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.* § 1520.9(a) (emphasis added).

Based upon the above-described statutory and regulatory scheme, we thus conclude that the decision to release or withhold the submitted information is not for this office or the department to make, but rather is a decision for the Under Secretary as head of 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). Consequently, we conclude the department may not release these records at this time, and instead must refer the information request to the TSA for its decision concerning disclosure of this information.[2]

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

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[2]As our ruling is dispositive, we need not consider your remaining arguments for this particular information.

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); *Texas 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 Office of the Attorney General 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. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/segh

Ref: ID# 240487

Enc. Submitted documents

c: Mr. Michael Grabell
The Dallas Morning News
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(w/o enclosures)