ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2006

Mr. Rashaad V. Gambrell
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2006-11115

Dear Mr. Gambrell:

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# 264021.

The Harris County District Attorney (the "district attorney") received a request for "a videotape or videotapes in the possession of the [district attorney] as evidence in case No. 139328801010." The City of Houston responds on behalf of the district attorney, and claims that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes, including federal law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). 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* 49 U.S.C. § 114(d)(1). Section 40119 of title 49, a provision that formerly applied to the FAA Administrator, 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 or research and development activities . . . 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
>
> (C) be detrimental to the safety of passengers in transportation.

49 U.S.C. § 40119(b)(1). The language of this provision authorizes TSA's Under Secretary to prescribe regulations "prohibiting disclosure of information obtained or developed in carrying out security or research and development activities." 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 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 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 release, by the TSA "*and by other persons*, of records and information that has [sic] been obtained or developed during security activities or research and development activities." 49 C.F.R. § 1520.1(a) (emphasis added). Such "other persons" to which these regulations apply include local governmental entities such as the city. *See* 49 U.S.C. § 40102(a)(32) ("person" includes "a governmental authority"); *see also* 67 Fed. Reg. at 8342 (definition of "person" is based on 49 U.S.C. § 40102). Thus, the regulations in title 49 of the Code of Federal Regulations apply to the city.

Section 1520.3(a) of title 49 provides in part that, "notwithstanding the [FOIA] or other laws," records that meet the definition in section 1520.7 are not available for public inspection or copying, nor is information contained in those records to be released to the

public. 49 C.F.R. § 1520.3(a). Such information is defined to include "[a]ny information that TSA has determined may reveal a systemic vulnerability of the aviation system, or a vulnerability of aviation facilities, to attack." *Id.* § 1520.7(h). This information includes, but is not limited to, "details of inspections, investigations, and alleged violations and findings of violations." *See id.*

As to the release of information by persons other than the TSA, section 1520.5 provides that those covered by the regulation, which, among others, includes airport and aircraft operators, their employees, contractors, and agents, "must restrict disclosure of and access to sensitive security information . . . to persons with a need to know *and must refer requests by other persons for such information to TSA* or the applicable DOT administration[.]" *Id.* § 1520.5(a) (emphasis added).

Based upon the above-described statutory and regulatory scheme, we thus conclude that the decision to release or withhold the requested information is not for this office or the district attorney 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). Consequently, we conclude the district attorney may not release any of the requested information at this time under the Act, and instead must refer the information request to the TSA for its decision concerning disclosure of the information at issue.

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); *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,

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/vh

Ref: ID# 264021

Enc. Submitted documents

c: Mr. Harvey Rice
Houston Chronicle
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Houston, Texas 77002
(w/o enclosures)