



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 8, 2008

Mr. William Hulse Wagner
McLeod, Alexander, Powel & Apffel
P.O. Box 629
Galveston, Texas 77553

OR2008-06290

Dear Mr. Wagner:

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# 309713.

The Port of Galveston (the "port"), which you represent, received two requests for information related to an incident on December 2, 2007. The first request seeks ten categories of information, including the following: time cards and payroll records for certain port employees during specified time periods, a specified staff memorandum, taped copies of a particular meeting, information related to door card access, license tag reports, port cell phone records for three named port employees, and a copy of the front register sign-in for a specified time period. The second request seeks reports or complaints pertaining to Officer Perkins. You state that audio copies of the February 21, 2008 meeting have been provided to the requestors. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, 552.117, and 552.139 of the Government Code.¹ We have considered the claimed exceptions and

¹Although you did not raise section 552.102 within the ten-business-day deadline, because section 552.102 is a mandatory exception, we will address the applicability of your arguments. *See* Gov't Code §§ 552.301(b), .302. We note that you initially raised section 552.108 of the Government Code but did not submit arguments in support of the applicability of that exception. Therefore, the port has waived its claim under section 552.108. *See* Gov't Code § 552.301(e)(governmental body must provide arguments explaining why exceptions raised should apply to information requested); *see also* Open Records Decision No. 665 (2000) (discretionary exceptions in general). In addition, although you assert rule 404 of the Texas Rules of Evidence and rule 192.3 of the Texas Rules of Civil Procedure, section 552.101 of the Government Code does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002).

reviewed the submitted information, some of which consists of representative sample information.² We have also considered comments submitted by the requestors. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We begin by noting that one of the submitted documents is not responsive to the instant request for information, as it was created after the date that the port received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the port need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

You inform us that the port asked the requestors for clarification because “[t]he request for payroll records for certain employees from September and December 2007 is not specific enough” for the port to determine what information is being requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). You do not inform us that the port has received a response from the requestors. We note that a governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. Open Records Decision No. 561 (1990). In this case, as you have submitted responsive information for our review and raised exceptions to disclosure for these documents, we consider the port to have made a good faith effort to identify information that is responsive to the request, and we will address the applicability of the claimed exceptions to the submitted information.

We note that you have submitted forty-two pages of documents labeled “Perkins Complaint,” which were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-06236 (2008). As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the port must continue to rely on that ruling as a previous determination and withhold or release the information at issue in accordance with Open Records Letter No. 2008-06236. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body,

²We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

and ruling concludes that information is or is not excepted from disclosure). As we are able to make this determination, we do not address your arguments regarding the complaint 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, including federal law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). 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.³ 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 the 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.

³This ruling does not construe the parallel federal statutes and regulations which apply to the Department of Transportation.

49 U.S.C. § 114(s). This provision requires the TSA's Under Secretary to "prescribe regulations prohibiting the 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 development, the disclosure of which TSA has determined would be detrimental to the security of transportation. *Id.* § 1520.5(a)(3).

Section 1520.5 lists sixteen categories of information that constitute SSI, including "[l]ists of the names or other identifying information that identify persons as . . . having unescorted access to . . . a secure or restricted area of a maritime facility, port area, or vessel[.]" *Id.* § 1520.5(b)(11)(i)(A). 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 [t]ake reasonable steps to safeguard SSI . . . from unauthorized disclosure[]" and must "[r]efer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS." *Id.* § 1520.7(a), .9(a). We understand that the port 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).

You claim that the instant request is for information relating to the port's security system, specifically "for certain information contained in or revealed by security cameras (and the supporting hardware and software interface) that provide surveillance and security" at the port, and state that you "will not submit any of the requested information to [this office] for review because release of the requested information is governed by federal law." We note that you have submitted information labeled "Access Documents," "License Tag Report," "Payroll Records and Time Cards," and "Cell Phone Records" that you have identified as SSI and that you seek to withhold under section 552.101. We determine, based upon the above described statutory and regulatory scheme, that the decision to release or withhold the information at issue is not for this office or the port to make, but rather is a decision for the TSA and the Coast Guard. *See English*, 496 U.S. at 79 (state law is preempted to extent it

actually conflicts with federal law). Consequently, we conclude the port may not release any of the information at issue at this time under the Act, and instead must allow the TSA and the Coast Guard to make a determination concerning disclosure.⁴

In summary, the port must continue to rely on Open Records Letter No. 2008-06236 as a previous determination and withhold or release the complaint information in accordance with our prior ruling. The port may not release any of the submitted information relating to the port's security system at this time under the Act, and instead must allow the TSA and the Coast Guard to make a determination concerning disclosure.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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).

⁴As we are able to make this determination, we do not address your remaining arguments against disclosure of this information.

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/mcf

Ref: ID# 309713

Enc. Submitted documents

c: Ms. Charlotte O'Rourke
Mr. E.L. "Ted" O'Rourke
1123 Postoffice Street
Galveston, Texas 77550
(w/o enclosures)