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June 15, 2010

Ms. Susan Denmon Banowsky
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OR2010-08717

Dear Mr. Eriksson and Ms. Banowsky:

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# 382731.

The Port of Houston Authority (the "authority") received a request for a copy of the authority police department's report involving two named individuals and an incident which occurred on March 21, 2010 at the Bayport Truck Gate 2 Post. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the authority's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e), the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). As of the date of this letter, the authority has not submitted a copy of the written request for information. Consequently, we find the authority failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of the Act results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 at 2 (1977). Section 552.108 is discretionary in nature, and serves only to protect a governmental body's interests; as such, it may be waived. See Open Records Decisions Nos. 665-at-2-n.5 (2000) (discretionary exceptions in general), 177 (1977) (statutory predecessor to section 552.108 subject to waiver). Consequently, the authority may not withhold the submitted information pursuant to section 552.108 of the Government Code. Because section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness, we will consider your argument under this section.

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. 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 ("DOT") 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. See 46 U.S.C. § 70101 *et. seq.* 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 DOT.

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(r) 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(r) of title 49 states:

(1) 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

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

developed in carrying out security under authority of the Aviation and Transportation Security Act . . . if the Under Secretary decides disclosing the information would—

...
(C) be detrimental to the security of transportation.

49 U.S.C. § 114(r)(1)(c). This provision 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 Federal Aviation Administration Administrator to prescribe regulations prohibiting disclosure of information under other statutes as well as under FOIA). Thus, the Under Secretary is authorized by section 114(r) 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 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 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:

(6) Security inspection or investigative information.

(i) Details of any security inspection or investigation of an alleged violation of aviation, maritime, or rail transportation security requirements of Federal law that could reveal a security vulnerability, including the identity of the Federal special agent or other Federal employee who conducted the inspection or audit.

...
(8) Security measures. Specific details of aviation, maritime, or rail transportation security measures, both operational and technical, whether applied directly by the Federal government or another person[.]
...

(11) Identifying information of certain transportation security personnel.

(i) Lists of the names or other identifying information that identify persons as--

(A) Having unescorted access to a secure area of an airport, a rail secure area, or a secure or restricted area of a maritime facility, port area, or vessel; [or]

(C) Holding a position with the Coast Guard responsible for conducting vulnerability assessments, security boardings, or engaged in operations to enforce maritime security requirements or conduct force protection[.]

Id. § 1520.5(b)(6), (8), (11). 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(d), .9(a).

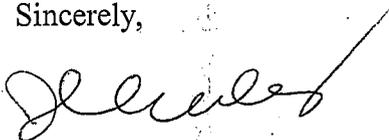
You assert the authority is an operator of a maritime facility required to have a security plan under the MTSA. *See* 46 U.S.C. § 70103(c); 33 C.F.R. § 105.400 (requiring owner or operator of maritime facility to submit security plan to DHS). You assert the submitted information relates to a breach of security under the Code of Federal Regulations. *See* 33 C.F.R. § 101.105 (defining “breach of security” as incident that has not resulted in transportation security incident, in which security measures have been circumvented, eluded, or violated, and defining “transportation security incident” as security incident resulting in significant loss of life, environmental damage, transportation system disruption, or economic disruption in particular area). You assert the submitted information is SSI concerning the investigation of a breach of security which reveals details of the authority’s security measures and identifies transportation security personnel including Coast Guard officers and special agents. You further assert the request has been referred to the Coast Guard as required by section 1520.9(a)(3) of title 49 of the Code of Federal Regulations. Based upon the above-described statutory and regulatory scheme and our review of the submitted information, we agree the decision to release or withhold the requested information is not for this office or the authority to make, but rather is a decision for the TSA and the Coast Guard. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (state law is preempted to extent it actually conflicts with federal law). Consequently, we conclude the authority may not release any of the requested information at this time under the Act, and instead must allow the TSA

and the Coast Guard to make a determination concerning disclosure of the information at issue.

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.

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 http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/eeg

Ref: ID# 382731

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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