



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 30, 2010

Ms. Jessica C. Eales
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2010-19502

Dear Ms. Eales:

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# 406385 (GC Nos. 17864, 17867, 17900, 17901).

The Houston Airport System (the "system") received four requests for information related to a specified incident involving an airport tram. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. Because you believe that the requests may implicate the proprietary interests of an interested third party, you notified Johnson Controls, Inc, of the requests for information and of the company's right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative samples.¹

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information made confidential 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

¹We 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.

("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 id.* § 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")] and the establishment of a Department of Homeland Security ["DHS"], the [Under Secretary] shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title 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 transportation safety.

Id. § 40119(b)(1). The language of this provision authorizes TSA's Under Secretary to prescribe regulations "prohibiting disclosure of information obtained or developed in ensuring security." *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. Pub. Citizen, Inc. v. Fed. Aviation Admin.*, 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 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 "maintenance, safeguarding, and disclosure of records and information that TSA has determined to be Sensitive Security Information ["SSI"], as defined in § 1520.5." 49 C.F.R. § 1520.1(a). Section 1520.7 states that the covered persons to which these regulations apply to include, among others, airport operators, such as the system, and "[e]ach person employed by, contracted to, or acting for a covered person[.]" *See id.* § 1520.7(a), (k). Further, section 1520.7(j) specifies that these regulations apply to "[e]ach person who has access to SSI, as specified in [section] 1520.11." *Id.* § 1520.7(j). Pursuant to section 1520.11(a), a

person has a need to know SSI “[w]hen the person requires access to specific SSI to carry out transportation security activities approved, accepted, funded, recommended, or directed by DHS or DOT.” *See id.* § 1520.11(a). Section 1520.11(b) further states that a local government employee has a need to know SSI if access to the information is necessary for performance of the employee’s official duties on behalf or in defense of the interests of the local government. *See id.* § 1520.11(b)(1). Thus, the regulations in title 49 of the Code of Federal Regulations apply to the system.

As to the release of information by persons other than TSA, section 1520.9(a) of title 49 provides in part that a person to which these regulations apply has a duty to protect information, and may disclose SSI “only to covered persons who have a need to know, unless otherwise authorized in writing by TSA, the Coast Guard, or the Secretary of DOT.” 49 C.F.R. § 1520.9(a). Section 1520.9(a)(3) of title 49 further provides that those covered by the regulation must “[r]efer requests by other persons for SSI to TSA or the applicable component or agency within DOT or DHS.” *Id.* § 1520.9(a)(3). SSI is defined to include certain information obtained or developed in the conduct of security activities, the disclosure of which TSA has determined would constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information obtained from any person, or be detrimental to the security of transportation. *Id.* § 1520.5(a). SSI includes, but is not limited to, “identifying information of certain transportation security personnel[,]” “[l]ists of the names or other identifying information that identify persons as . . . [h]aving unescorted access to a secure area of an airport,” and “[a]ny information not otherwise described . . . that TSA determines is SSI under 49 U.S.C. 114(s) or that the Secretary of DOT determines is SSI under 49 U.S.C. 40119.” *Id.* § 1520.5(b).

You state that you are withholding some of the requested records which relate to system video surveillance. You state you are referring this matter to the TSA. Based on the statutory and regulatory scheme described above, we agree that the decision to release or withhold the information in question is not for this office or the system 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). Therefore, the system may not release any of that information at this time under the Act. Instead, this information request must be referred to the TSA for its decision concerning disclosure of the information at issue.

Next, we address your claim under section 552.108 of the Government Code for the submitted information. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* § 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the submitted information relates to an open and active criminal investigation. Based on this representation, we

conclude that releasing the information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Accordingly, we agree that section 552.108(a)(1) applies to the submitted information.

We note, however, and you acknowledge that basic information about an arrested person, an arrest, or a crime is not excepted from disclosure under section 552.108. Gov't Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle*. *See Houston Chronicle*, 531 S.W.2d 177; *see also* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Therefore, with the exception of basic information, the system may withhold the submitted information pursuant to section 552.108.²

In summary, the system may not release any of the information you have identified as SSI at this time under the Act, and instead must allow the TSA to make a determination concerning disclosure. With the exception of basic information, the system may withhold the remaining information under section 552.108(a)(1) of the Government Code.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

²As our ruling is dispositive, we do not address your remaining claim, except to note that basic information held to be public in *Houston Chronicle* is generally not excepted from public disclosure under section 552.103 of the Government Code. Open Records Decision No. 597 (1991).

Ref: ID# 406385

Enc. Submitted documents

c: Requestors
(w/o enclosures)

Mr. Jerome D. Okarma
General Counsel
Johnson Controls, Inc.
5757 North Green Bay Avenue
Glendale, Wisconsin 53209
(w/o enclosures)