



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2011

Mr. Hyattye Simmons
General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2011-14584

Dear Mr. Simmons:

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# 435048 (DART ORR 8433).

Dallas Area Rapid Transit ("DART") received a request for studies, monthly progress reports, presentations, and other documents prepared by Wai Wize I, LP ("Wai Wize") for DART during a specified time period.¹ You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. In addition, you state release of the requested information may implicate the proprietary interests of Wai Wize. Accordingly, you provide documentation showing you have notified Wai Wize of the request and its right to submit arguments to this office. *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 claimed exception and reviewed the submitted information.

¹You state, and provide documentation showing, DART sought and received clarification of the request. *See* Gov't Code § 522.222(b) (stating if information requested is unclear or large amount has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

We first note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from Wai Wize. Thus, we have no basis to conclude it has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3. Accordingly, DART may not withhold any of the information at issue on the basis of any proprietary interest Wai Wize may have in the information.

Section 552.101 of the Government Code exempts 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"). The HSA created the Department of Homeland Security ("DHS") and transferred the Transportation Security Administration ("TSA"), a new agency created in the Department of Transportation ("DOT") the previous year to oversee the security of transportation, to DHS. *See* 6 U.S.C. §§ 111, 203.

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.² Section 114(r) of title 49 states:

(1) In general.— 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 that 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

²This ruling does not construe the parallel federal statutes and regulations that apply to DOT.

also under other disclosure statutes. *Cf. Public Citizen, Inc. v. Federal Aviation Admin.*, 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 the Act.

Pursuant to the mandate and authority of section 114 of title 49, TSA published regulations in title 49 of the Code of Federal Regulations that took effect June 17, 2004. *See* 69 Fed. Reg. 28066. TSA subsequently published additional regulations regarding the security of passenger and freight rail services found in title 49 of the Code of Federal Regulations, which took effect December 26, 2008, with amendments taking effect on May 20, 2009. *See* 73 Fed. Reg. 77531; 74 Fed. Reg. 23656. 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 [“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 include, among others, rail transit systems subject to the requirements of part 1580 and “[e]ach person employed by, contracted to, or acting for a covered person[.]” *See id.* § 1520.7(k), (n). We note section 1580.3 states “Rail transit system or ‘Rail Fixed Guideway System’ means any light, heavy, or rapid rail system, monorail, inclined plane, funicular, cable car, trolley, or automated guideway that traditionally does not operate on track that is part of the general railroad system of transportation.” *Id.* § 1580.3. Further, section 1520.7(j) specifies that these regulations apply to “[e]ach person who has access to SSI, as specified in § 1520.11.” *Id.* § 1520.7(j). Pursuant to section 1520.11(a)(1), 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.” *Id.* § 1520.11(a)(1). 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. *Id.* § 1520.11(b)(1). Thus, the regulations in title 49 of the Code of Federal Regulations apply to DART.

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.” *Id.* § 1520.9(a)(2). 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 also includes “[a]ny security program or security contingency plan issued, established, required, received, or approved by DOT or DHS,” “[s]pecific details of . . . rail transportation security measures,

both operational and technical, whether applied directly by the Federal government or another person, including . . . [s]ecurity measures or protocols recommended by the Federal government,” 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)(1), (8), (16).

You state the submitted information consists of specifications and drawings for DART’s radio replacement program, including “covert emergency alarm requirements, building specifications and drawings for new radio towers, locations and capabilities of control centers and locations of critical communication houses.” You state the radio towers are a critical part of the communications system between vehicle operators, system maintainers, and law enforcement. You argue this information constitutes “security sensitive information” as defined by the TSA. Based on the statutory and regulatory scheme described above, your arguments, and our review, we conclude the decision to release or withhold the information in question is not for this office or DART to make, but rather is a decision for the Under Secretary as head of the TSA. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (state law is preempted to extent it actually conflicts with federal law). Therefore, DART may not release the submitted information at this time under the Act, and instead must refer the information to the TSA to make a determination concerning disclosure of that information.³

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/agn

³Because our ruling is dispositive, we do not address your remaining argument against disclosure.

Ref: ID # 435048

Enc. Submitted documents

c: Requestor
(w/o enclosures)