



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 1, 2011

Ms. Shirley Thomas
Acting General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2011-16001

Dear Ms. Thomas:

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# 435475 (DART ORR 8451, 8457).

Dallas Area Rapid Transit ("DART") received two requests from the same requestor for information related to a specified request for qualifications and the annual work plan for Dallas Systems Consultants ("DSC") for a particular time period. You state some responsive information has been released to the requestor. You claim that the submitted information in Attachment B is excepted from disclosure under section 552.101 of the Government Code. In addition, you state release of the submitted information in Attachment C may implicate the proprietary interests of Parsons Transportation Group ("Parsons"). Accordingly, you provide documentation showing you have notified Parsons 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 received comments from DSC, a joint venture of Parsons and Paragon Project Resources, Inc. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address DART's obligations under the Act. Section 552.301(e) requires the governmental body to submit to this office, not later than the fifteen-business-day deadline after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and

(4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1)(A)-(D). You inform us that DART received this request on August 22, 2011. Although you submitted some of the responsive records by the fifteen-business-day deadline, a portion of the responsive information was not submitted until September 15, 2011. Consequently, with respect to the additional information submitted in your September 15, 2011 correspondence, we find that DART failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (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 (1977). You assert third party interests are at stake regarding the information submitted in your September 15, 2011 correspondence, which you have labeled as Attachment C. Because the third-party interests at issue here can provide a compelling reason to overcome the presumption of openness, we will consider whether the submitted information in Attachment C is excepted from disclosure under the Act. We will also address your arguments under section 552.101 of the Government Code for the information in Attachment B that was timely submitted.

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 exception 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.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

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

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—

...
(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 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 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), 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). 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 in Attachment B consists of specifications, drawings, and details of DART’s communication and radio systems for DART’s agency radio program, including “building specifications and drawings for new radio towers, locations of control centers and other critical communication operations.” 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 in Attachment B at this time under the Act, but instead must refer the information to the TSA to make a determination concerning disclosure of that information.²

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found personal financial information not relating

²Because our ruling is dispositive, we do not address your remaining argument against disclosure of this information.

to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision No. 545 (1990).

DSC claims that Attachment C, including the names, effective hourly rates, and annual “base cost” for each employee of DSC and its sub-consultants, is confidential under common-law privacy. Upon review, we find some of this information, which we have marked, is highly intimate or embarrassing and not of legitimate public interest. We note that an individual’s name is not ordinarily private information subject to section 552.101. *See* Open Records Decision Nos. 554 (1990), 448 (1986). Thus, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information DSC seeks to withhold, however, is not private, and may not be withheld under section 552.101 on that basis.

To summarize, DART may not release the submitted information in Attachment B at this time under the Act, but instead must refer the information to the TSA to make a determination concerning disclosure of that information. DART must withhold the information we have marked in Attachment C under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information in Attachment C must be released to the requestor.

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

Ref: ID# 435475

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Dallas Systems Consultants
c/o Mr. William I. Gardner
MacDonald Devin
1201 Elm Street, Suite 3800
Dallas, Texas 75270
(w/o enclosures)

Mr. P. Takis Salpeas
Senior Vice President/Division Manager Rail and Transit Systems
Parsons Transportation Group
100 M Street SE, Suite 1200
Washington, D.C. 20003
(w/o enclosures)