



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 20, 2013

Mr. Dennis J. DeVries
Director of Finance and Management
Port of Corpus Christi Authority
P.O. Box 1541
Corpus Christi, Texas 78403

OR2013-14570

Dear Mr. DeVries:

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# 496788.

The Port of Corpus Christi Authority of Nueces County (the "authority") received a request for twenty-one categories of information related to the termination of the requestor's client, including (1) various statutes, rules, regulations, policies, procedures, and administrative codes that govern the authority; (2) various policies, procedures, rules, and regulations that govern the Port of Corpus Christi Police Department ("PCCPD"); (3) the personnel file of the requestor's client; (3) information regarding the termination or suspension of the requestor's client during his tenure at the authority or changes in the operations or format of PCCPD; (4) the complete payroll file of the requestor's client; (5) the complete personnel files of two named police officers; (6) e-mails and text messages between three named individuals or any of the authority's commissioners regarding security or PCCPD from January 1, 2011 until the date of the request; (7) audio recordings, video recordings, and transcripts of authority commission meetings, including those held in executive session, regarding security or PCCPD from January 1, 2011 until the date of the request; (8) authority commission agendas from January 1, 2008 through June 30, 2013; (9) e-mails and text messages between a named authority commissioner and the requestor's client; and (10) investigation notes or reports related to PCCPD interviews conducted by two named attorneys or any representative from a named law firm from August 1, 2012 through May 24, 2013. You state the authority has released some information to the requestor. You

claim the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.111, 552.117, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

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 other statutes make confidential. Section 551.104 of the Open Meetings Act, chapter 551 of the Government Code, provides in part that “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” *Id.* § 551.104(c). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. *See* Gov’t Code § 551.146(a)-(b); *see also* Open Records Decision No. 495 at 4 (1988). You state the requestor seeks information pertaining to the executive sessions of the authority’s Port Commission that is protected by section 551.104(c). Based on your representation, we conclude the authority must withhold the executive session information at issue under section 552.101 in conjunction with section 551.104 of the Government Code.³

Section 552.101 of the Government Code also 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 transportation, to DHS. *See* 6 U.S.C. §§ 111, 203, 468. The MTSA, among other things, added chapter 701

¹Although you raise rule 192.5 of the Texas Rules of Civil Procedure, we note the proper exception to raise when asserting the work product privilege for information not subject to section 552.022 of the Government Code is section 552.111 of the Government Code. *See generally* Open Records Decision No. 676 (2002).

²We assume 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 those records contain substantially different types of information than those submitted to this office.

³We note the authority is not required to submit the certified agenda or tape of a closed meeting to this office for review. *See* ORD 495 at 4 (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information under statutory predecessor to section 552.101).

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 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.⁴ Section 114(r) of title 49 states in relevant part:

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.

49 U.S.C. § 114(r)(1). 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. Fed. 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, 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 constitute an

⁴This ruling does not construe the parallel federal statutes and regulations which apply to DOT.

unwarranted invasion of privacy, including information contained in any personnel file, or be detrimental to the security of transportation. *Id.* § 1520.5(a)(1), (3). Section 1520.5 also encompasses “[a]ny information not otherwise described in this section 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)(16).

Section 1520.5 lists sixteen categories of information that constitute SSI, including “[s]pecific details of . . . maritime . . . transportation security measures[.]” *Id.* § 1520.5(b)(8). Section 1520.7(j) specifies the 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). 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 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 contend exhibits D-2, D-5, D-6, D-7, and the information on the submitted flash drive constitute SSI as defined by the TSA. You assert the information at issue “solely concerns SSI, including the qualifications, training, and hours worked of security personnel, the staffing and location of [authority] property, and on-site surveillance activities and responsibilities.” You further argue the disclosure of this information could compromise the authority’s security operations. Based on the above described statutory and regulatory scheme and our review, we find the decision to release or withhold the information at issue is not for this office or the authority 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). Consequently, we conclude the authority may not release any of the information in exhibits D-2, D-5, D-6, D-7, and the information on the submitted flash drive at this time under the Act, but instead must refer the information to the TSA to make a determination concerning disclosure.⁵

Next, we note that some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

⁵As we are able to make this determination, we do not address your remaining arguments against disclosure of this information.

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The information at issue contains completed evaluations that are subject to section 552.022(a)(1). Documents subject to section 552.022(a)(1) are excepted from disclosure only if they are confidential under the Act or other law. You raise section 552.103 as an exception to disclosure for these evaluations. Section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the authority may not withhold the completed evaluations on that basis. As you raise no further exceptions to disclosure for this information, the completed evaluations must be released. We will address your claim under section 552.103 for the remaining information that is not subject to section 552.022.

Section 552.103 of the Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to the pending or

anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the “EEOC”). *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, the requestor’s client filed a complaint against the authority with the EEOC prior to the date the authority received the instant request. Upon review, we agree the authority reasonably anticipated litigation on the date the authority received the present request for information and the information at issue is related to the anticipated litigation. Thus, we conclude section 552.103 is generally applicable to the remaining information not subject to section 552.022.

We note, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We note the opposing party has seen or had access to a portion of the remaining information. Therefore, this information is not protected by section 552.103 and may not be withheld on that basis. Thus, with the exception of the information seen by the opposing party to the anticipated litigation, which we have marked, the authority may withhold the remaining information not subject to section 552.022 under section 552.103.⁶ We note the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the authority must withhold the executive session information at issue under section 552.101 in conjunction with section 551.104 of the Government Code. The authority may not release any of the information in exhibits D-2, D-5, D-6, D-7, and the information on the submitted flash drive at this time under the Act, but instead must refer the information to the TSA to make a determination concerning disclosure. With the exception of the

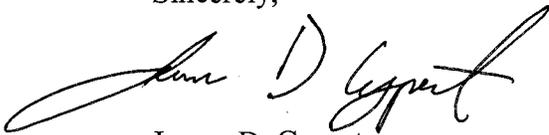
⁶As we are able to make this determination, we do not address your remaining arguments against disclosure.

information seen by the opposing party to the anticipated litigation, which we have marked, the authority may withhold the remaining information not subject to section 552.022 under section 552.103. The remaining information must be released.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "James D. Cypert", written in a cursive style.

James D. Cypert
Assistant Attorney General
Open Records Division

JDC/ac

Ref: ID# 496788

Enc. Submitted documents

c: Requestor
(w/o enclosures)