



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 15, 2016

Ms. Sarah Parker  
Associate General Counsel  
Texas Department of Transportation  
125 East 11th Street  
Austin, Texas 78701-2483

OR2016-18402

Dear Ms. Parker:

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# 622538.

The Texas Department of Transportation (the "department") received a request for two specified reports concerning Dallas Area Rapid Transit ("DART") and Metropolitan Transit Authority of Harris County (the "authority"). You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.<sup>1</sup> Additionally, you provide documentation showing you have notified DART and the authority of their rights to submit comments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from DART.

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<sup>1</sup>We note we asked the department to provide additional information pursuant to section 552.303 of the Government Code. *See* Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have received and considered the correspondence sent by the department pursuant to that request.

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 of the United States 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.<sup>2</sup> Section 114(r) of title 49 states, in pertinent part:

(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 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 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

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

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[.]” *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 the department.

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 “[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)(8)(i), (16).

You state the submitted information consists of safety reviews of both DART’s and the authority’s rail systems. You explain the reports, which you state consist of SSI, identify the vulnerabilities of both rail systems at issue and would be detrimental to their security. 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 the department 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). Thus, the department may not release the submitted information under the Act at this time, but instead must refer that information to the TSA to make a determination concerning disclosure of that information.<sup>3</sup>

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](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,



Gerald A. Arismendez  
Assistant Attorney General  
Open Records Division

GAA/dls

Ref: ID# 622538

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

2 Third Parties  
(w/o enclosures)

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<sup>3</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of the submitted information.