



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 20, 2017

Ms. Halfreda Anderson-Nelson
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, TX 75266-0163

OR2017-28971

Dear Ms. Anderson-Nelson:

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# 689090 (DART ORR #W002091-100217).

Dallas Area Rapid Transit ("DART") received a request for certain information pertaining to a specified traffic accident. You inform us DART has released some information. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

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 section encompasses information made confidential by other statutes. We note the submitted information consists of a recording from a DART police officer's

¹We 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 that those records contain substantially different types of information than that submitted to this office.

body worn camera. Body worn cameras are subject to chapter 1701 of the Occupations Code. Section 1701.661(a) of the Occupations Code provides:

(a) A member of the public is required to provide the following information when submitting a written request to a law enforcement agency for information recorded by a body worn camera:

- (1) the date and approximate time of the recording;
- (2) the specific location where the recording occurred; and
- (3) the name of one or more persons known to be a subject of the recording.

Occ. Code § 1701.661(a). We note the requestor provided the information required by section 1701.661(a) of the Occupations Code for release of the body worn camera recording. The submitted recording reflects it was required to be made by law or the policies of DART's police department and relates to a law enforcement purpose. *See id.* § 1701.661(h). Further, you have failed to demonstrate the recording could not be used as evidence in a criminal prosecution. *See id.* § 1701.661(d) (stating information "that is or could be used as evidence in a criminal prosecution is subject to the requirements of [the Act.]"). Additionally, we have no indication the body worn camera recording documents an incident that involves the use of deadly force by an officer or relate to an administrative or criminal investigation of an officer. *See id.* § 1701.660(a). The body worn camera recording demonstrates it was not made in a private space for the purposes of section 1701.661(f). *See id.* §§ 1701.661(f), .651(3) (defining "private space" for purposes of section 1701.661(f)). We note, however, section 1701.661(f) provides, in relevant part:

A law enforcement agency may not release any portion . . . of a recording involving the investigation of conduct that constitutes a misdemeanor punishable by fine only and does not result in arrest, without written authorization from the person who is the subject of that portion of the recording or, if the person is deceased, from the person's authorized representative.

Id. § 1701.661(f). Upon review, we are unable to determine whether the body worn camera recording at issue involves an investigation of conduct that constitutes a misdemeanor punishable by fine only and did not result in arrest. Therefore, we must rule conditionally. If the submitted body worn camera recording involves an investigation of conduct that constitutes a misdemeanor punishable by fine only and did not result in arrest, we note there is no indication you have received written authorizations for release from all of the subjects of the recordings. Accordingly, in this instance, the submitted body worn camera recording is confidential and DART must withhold it under section 552.101 of the Government Code

in conjunction with section 1701.661(f) of the Occupations Code. However, if the submitted body worn camera recording does not involve an investigation of conduct that constitutes a misdemeanor punishable by fine only and did not result in arrest, no portion of the recording is confidential under section 1701.661(f) and DART may not withhold it under section 552.101 on that basis. In that instance, we will consider whether DART may withhold the submitted information under the Act.

Section 552.101 of the Government Code also encompasses information protected by other statutes. In addition, a federal regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101 of the Act. *See* Open Records Decision No. 599 at 4 (1992). You raise section 552.101 in conjunction with section 40.321 of title 49 of the Code of Federal Regulations, which relates to the confidentiality of workplace drug and alcohol testing information of employers participating in the United States Department of Transportation drug or alcohol testing process. *See* 49 C.F.R. pt. 40 (procedures for transportation workplace drug and alcohol testing programs). Section 322 of title 49 of the United States Code authorizes the Secretary of Transportation (the “secretary”) to prescribe regulations necessary to carry out the duties and powers of the secretary. *See* 49 U.S.C. § 322. Section 40.321 of title 49 of the Code of Federal Regulations provides:

Except as otherwise provided in this subpart, as a service agent or employer participating in the DOT drug or alcohol testing process, you are prohibited from releasing individual test results or medical information about an employee to third parties without the employee’s specific written consent.

(a) A “third party” is any person or organization to whom other subparts of this regulation do not explicitly authorize or require the transmission of information in the course of the drug or alcohol testing process.

(b) “Specific written consent” means a statement signed by the employee that he or she agrees to the release of a particular piece of information to a particular, explicitly identified, person or organization at a particular time. “Blanket releases,” in which an employee agrees to a release of a category of information (e.g., all test results) or to release information to a category of parties (e.g., other employers who are members of a C/TPA, companies to which the employee may apply for employment), are prohibited under this part.

49 C.F.R. § 40.321. Upon review, we find the submitted information does not consist of drug and alcohol test results or medical information about a DART employee. Therefore, DART may not withhold the submitted information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 452.061 of the Transportation Code. DART is a regional transportation authority governed by chapter 452 of the Transportation Code. *See* Transp. Code ch. 452; *see also id.* § 452.001(1) (defining “authority” for purposes of chapter 452 of the Transportation Code). Section 452.061 provides in relevant part:

(e) Personal identifying information collected by an authority is confidential and not subject to disclosure under [the Act], including a person’s:

- (1) name, address, e-mail address, and phone number;
- (2) account number, password, payment transaction activity, toll or charge record, or credit, debit, or other payment card number; and
- (3) other personal financial information.

Id. § 452.061(e). You assert the submitted information consists of personal identifying information made confidential by section 452.061(e). We note subsection 452.061(e) is contained in section 452.061, which is titled “Fares and Other Charges.” Additionally, subsections (a) through (d) of section 452.061 discuss an authority’s responsibilities in imposing fares and other charges and the state’s power to regulate taxes imposed by an authority or other compensation authorized by this section. *See id.* § 452.061(a)–(d). Accordingly, we conclude section 452.061(e) is only applicable to personal identifying information collected by DART for purposes relating to the collection of fares and other charges. *Cf. Paxton v. Tex. Dep’t of State Health Servs.*, 500 S.W.3d 702, 706 (Tex. App—Austin 2016, no pet.) (holding although isolated reading of section 531.1021(g) of Government Code suggests it applies to any Office of Inspector General (“OIG”) investigation, confidentiality of OIG investigations provided by section 531.1021(g) must be read in context of OIG’s enabling provisions and thus, extended only to OIG investigations concerning fraud, waste, and abuse in the provision and delivery of health and human services in the state). Upon review, we find DART did not collect the personal identifying information for purposes relating to the collection of fares and other charges. Consequently, the personal identifying information is not confidential under section 452.061(e), and DART may not withhold it under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally

highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find you have failed to demonstrate the submitted information is highly intimate or embarrassing and not of legitimate public concern. Therefore, DART may not withhold this information under section 552.101 on that basis.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release.² *See* Gov't Code § 552.130. Accordingly, DART must withhold the motor vehicle record information we have indicated under section 552.130 of the Government Code.

In summary, if the submitted body worn camera recording involves an investigation of conduct that constitutes a misdemeanor punishable by fine only and did not result in arrest, DART must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 1701.661(f) of the Occupations Code. However, if the submitted body worn camera recording does not involve an investigation of conduct that constitutes a misdemeanor punishable by fine only and did not result in arrest, DART must withhold the motor vehicle record information we have indicated under section 552.130 of the Government Code and release the remaining information.

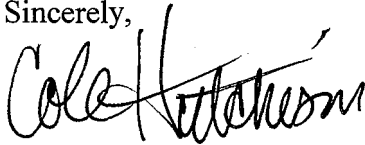
You ask this office to issue a previous determination to DART that would authorize it to withhold personal identifying information collected by DART under section 552.101 of the Government Code in conjunction with section 452.061 of the Transportation Code without the necessity of requesting a ruling from this office. *See* Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code). In the alternative, you ask this office to issue a previous determination to DART that would authorize it to release personal identifying information collected by DART. We decline to issue such a previous determination at this time. Accordingly, 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

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 that reads "Cole Hutchison". The signature is written in a cursive style with a large initial "C" and a long horizontal stroke.

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 689090

Enc. Submitted documents

c: Requestor
(w/o enclosures)