



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 25, 2015

Ms. Halfreda Anderson-Nelson
Public Information Officer
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2015-20138

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# 580889 (DART ORR #11709).

Dallas Area Rapid Transit ("DART") received a request for (1) information regarding corrective or disciplinary actions taken against a named employee and (2) progress, poor performance, or employee performance evaluation reports regarding the same employee.¹ You state DART has no information responsive to the request for corrective or disciplinary actions.² You claim the submitted information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (permitting interested third

¹You inform this office DART sought and received clarification of the information requested. *See* Gov't Code § 552, 222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W. 3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2(1983).

party to submit to attorney general reasons why requested information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information protected by other statutes. As part of the Texas Homeland Security Act (“HSA”), sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. You assert the submitted information is confidential under section 418.181 of the Government Code, which provides “[t]hose documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.” *Id.* § 418.181. The fact that information may relate to a governmental body’s security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You state the submitted information contains detailed rail operation procedures, including rail operators testing materials, emergency procedures, and information about DART’s central train control. You assert, and we agree, DART’s rail system is critical infrastructure. *See generally id.* § 421.001 (defining “critical infrastructure” to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation”). You claim the release of the submitted information could provide a potential terrorist with details regarding the operations of DART’s rail system and operator procedures. Based on your arguments and our review of the information at issue, we find you have demonstrated release of some of the submitted information would identify the technical details of particular vulnerabilities of DART’s rail system to an act of terrorism. Thus, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.³

Section 552.101 of the Government Code also encompasses information made confidential by federal law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). You assert the remaining records are confidential sensitive security information DART must withhold under section 552.101 in conjunction with section 1520.5 of title 49 of the Code of Federal

³As we reach this conclusion, we need not address your remaining claims for this information.

Regulations. We note, however, section 1520.5 defines terms for purposes of title 49 and does not make information confidential. Open Records Decision No. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied). Consequently, DART may not withhold the remaining information under section 552.101 of the Government Code in conjunction with section 1520.5 of title 49 of the Code of Federal Regulations.

Section 552.122 of the Government Code excepts from public disclosure “[a] test item developed by a . . . governmental body[.]” Gov’t Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined the term “test item” in section 552.122 includes “any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated,” but does not encompass evaluations of an employee’s overall job performance or suitability. ORD 626 at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Upon review, we find the remaining information you seek to withhold under section 552.122 does not consist of test items, and thus, the remaining information may not be withheld under this section.

In summary, DART must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. DART must release the remaining submitted information.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 580889

Enc. Submitted documents

c: Requestor
(w/o enclosures)