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May 20, 2016

Confidential: Attorney-Client Privilege¹

Matthew Simpson
American Civil Liberties Union of Texas

Kathy Mitchell
Texas Criminal Justice Coalition

Re: Texas Occupations Code Section 1701.660

Dear Mr. Simpson and Ms. Mitchell,

You ask whether a law enforcement agency subject to subchapter N of chapter 1701 of the Texas Occupations Code has the discretion under section 1701.660 of the Texas Occupations Code to release recordings of incidents involving the use of deadly force recorded by law enforcement officers wearing body cameras. The short answer to your question is that, subject to certain limits, it does. The scope and meaning of the section must be considered in the context of all of the provisions of subchapter N of chapter 1701 that address public access.

CHAPTER 1701 AND BODY WORN CAMERAS

Subchapter N was added by the 84th Texas Legislature with Senate Bill 158. *See* Acts 2015, 84th Tex. Leg., ch 1134(S.B. 158), §1, eff. Sept. 1, 2015. The new law applies to law enforcement agencies that receive grants through the Office of the Governor to defray the cost of implementing subchapter N and of equipping with body cameras peace officers who are primary responders to calls for assistance from the public or who are engaged in traffic or highway patrol or other traffic stops. TEX. OCC. CODE §1701.652(a). A law enforcement agency that receives a grant under subchapter N must adopt a policy that governs the use of body cameras. TEX. OCC. CODE §1701.655(a).

¹ The attorney client privilege belongs to the client and is the client's privilege to preserve or waive. I do not think it would be adverse to the interests of the ACLU of Texas or of the Texas Criminal Justice Coalition to waive that privilege by providing a copy of this letter to a third party not within the privilege.

A law enforcement policy under subchapter N must meet certain criteria:

(b) A policy described by Subsection (a) must ensure that a body worn camera is activated only for a law enforcement purpose and must include:

- (1) guidelines for when a peace officer should activate a camera or discontinue a recording currently in progress, considering the need for privacy in certain situations and at certain locations;
- (2) provisions relating to data retention, including a provision requiring the retention of video for a minimum period of 90 days;
- (3) provisions relating to storage of video and audio, creation of backup copies of the video and audio, and maintenance of data security;
- (4) *guidelines for public access, through open records requests, to recordings that are public information;*
- (5) provisions entitling an officer to access any recording of an incident involving the officer before the officer is required to make a statement about the incident;
- (6) procedures for supervisory or internal review; and
- (7) the handling and documenting of equipment and malfunctions of equipment.

TEX OCC. CODE §1701.655(b)(emphasis added). The emphasized language makes it clear that some recordings not only may but *must* be released to the public.

That conclusion is supported by the language of section 1701.661, which 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.

(b) A failure to provide all of the information required by Subsection (a) to be part of a request for recorded information does not preclude the requestor from making a future request for the same recorded information.

(c) *Except as provided by Subsection (d), information recorded by a body worn camera and held by a law enforcement agency under this subchapter is not subject to the requirements of Section 552.021, Government Code.*

(d) *Information that is or could be used as evidence in a criminal prosecution is subject to the requirements of Section 552.021, Government Code.*

(e) A law enforcement agency may:

(1) seek to withhold information subject to Subsection (d) in accordance with procedures provided by Section 552.301, Government Code;

(2) assert any exceptions to disclosure in Chapter 552, Government Code, or other law; or

(3) *release information requested in accordance with Subsection (a) after the agency redacts any information made confidential under Chapter 552, Government Code, or other law.*

(f) *A law enforcement agency may not release any portion of a recording made in a private space, or 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.*

. . . .

(h) *A recording is confidential and excepted from the requirements of Chapter 552, Government Code, if the recording:*

(1) *was not required to be made under this subchapter or another law or under a policy adopted by the appropriate law enforcement agency; and*

(2) *does not relate to a law enforcement purpose.*

Section 1701.661 establishes the procedures for determining what recordings are and are not to be released to the public. There are several references in section 1701.661 to chapter 552 of the Texas Government Code. Chapter 552 is the Texas Public Information Act (TPIA). Section 552.021 of the TPIA is the provision that generally states that “public information” shall be available to the public. The general rule under the TPIA is that all information collected assembled or maintained by a governmental body must be released to the public unless the information falls within one of the TPIA's specific exceptions to disclosure.

Section 1701.661 limits the applicability of the TPIA to information subject to subsection (d) of section 1701.661, in specific “[i]nformation that is or could be used as evidence in a criminal prosecution.” TEX OCC. CODE §1701.661(c),(d). That does not mean that such information is automatically public or automatically not public; that simply distinguishes legitimate recordings from those that are *not* authorized under subchapter N. *See, e.g.*, TEX OCC. CODE §1701.661(h). With respect to recordings made under the authority of subchapter N of chapter 1701, the law enforcement agency simply follows the procedures applicable under the TPIA prior to withholding recordings. TEX OCC. CODE §1701.661(e); *see e.g.*, Tex. Att’y Gen. Letter Rulings OR2016-09264 (April 25, 2016), OR2016-07229 (March 31, 2016), OR2016-03777 (February 17, 2016), and OR2016-1955 (January 26, 2016). That procedure also applies to section 1701.660.

SECTION 1701.660 – DEADLY FORCE RECORDINGS

Section 1701.660 of the Occupations Code provides as follows:

(a) *Except as provided by Subsection (b), a recording created with a body worn camera and documenting an incident that involves the use of deadly force by a peace officer or that is otherwise related to an administrative or criminal investigation of an officer may not be deleted, destroyed, or released to the public until all criminal matters have been finally adjudicated and all related administrative investigations have concluded.*

(b) *A law enforcement agency may release to the public a recording described by Subsection (a) if the law enforcement agency determines that the release furthers a law enforcement purpose.*

(c) This section does not affect the authority of a law enforcement agency to withhold under Section 552.108, Government Code, information related to a closed

criminal investigation that did not result in a conviction or a grant of deferred adjudication community supervision.

TEX OCC. CODE §1701.660 (emphasis added).

At first blush, section 1701.660 appears to be internally inconsistent. In subsection (a), it *prohibits* the public disclosure of recordings of incidents that involve the use of deadly force by a peace officer (subsection (a)) -- but only until all criminal and administrative proceedings related to the recording have been adjudicated or completed.² But subsection (a) contains a major caveat – the confidentiality it confers is subject to subsection (b), which expressly provides that the law enforcement agency may release such recordings to the public if release furthers a “law enforcement purpose.” TEX OCC. CODE §1701.660(a),(b). That section clearly confers on law enforcement agencies the discretion to determine when such recordings should be released. *See also* TEX OCC. CODE §1701.661(e)(3) (law enforcement agency may release recordings after redacting any information made confidential under Chapter 552, Government Code, or other law).

There are two basic types of exceptions to disclosure under the TPIA– those that confer on governmental bodies the discretion to release information and those that do not. The exceptions to disclosure that do not confer discretion are deemed “mandatory” exceptions, i.e. those that cover information deemed confidential by law, such as section 552.101. The exceptions to disclosure that involve discretion are deemed “permissive” exceptions, such as section 552.108, the “law enforcement” exception. Although section 1701.660(a) initially looks like a mandatory exception, subsection (b) clearly removes it from that category. The TPIA does not prohibit a governmental body from releasing information that might be withheld under a permissive exception. TEX. GOV’T CODE § 552.007(a).

The exercise of such discretion is limited, however, by section 1701.661(f). Section 552.101 of the TPIA protects from required public disclosure “information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision.” TEX. GOV’T CODE § 552.101(emphasis added). Section 1701.661(f) provides that recordings subject to subchapter N of chapter 1701 that are made in a “private space” may not be released to the public without the consent of the person who is the subject of the recording in the private space. TEX OCC. CODE §1701.661(f); Tex. Att’y Gen. Letter Rulings OR2016-09264, OR2016-07229. The Office of the Attorney General has determined that section 1701.661(f), in conjunction with section 552.101 of the TPIA, is a mandatory

² Once there is a final adjudication or a completed administrative proceeding, it would appear the recording must be released, subject only to subsection (c) of section 1701.660 and section 1701.661(f).

exception. *See e.g.*, Tex. Att’y Gen. Letter Rulings OR2016-09264, OR2016-07229; *cf.* Tex. Att’y Gen. Letter Rulings OR2016-03777 (city failed to show recording made in private space), and OR2016-1955 (city failed to show recording made by body camera). Because it is possible that a recording of an incident involving deadly force could have been made in a “private space,” both sections 1701.660 and 1701.661(f) must be considered.

A “LAW ENFORCEMENT PURPOSE”

The final question is what constitutes a release that “furthers a law enforcement purpose.”

It has been suggested that a law enforcement purpose can only be something directly related to the detection, investigation, prevention, and/or prosecution of crime. But that position would make the conditions on *release* under section 1701.660 run parallel to the conditions on *withholding* the recordings under section 552.108 of the TPIA. Since the purpose of subsection 1701.660(b) was clearly to provide discretion to release recordings even before the conclusion of a criminal case or administrative proceeding, it makes no sense to interpret subsection (b) as a prohibition on disclosure. Moreover, section 552.108, the law enforcement exception, is a permissive exception. Reading section 1701.660(b) as a limit on the discretion a governmental body has to release information under section 552.108 makes no sense.

There may be circumstances in which a law enforcement agency wishes to withhold a recording under section 552.108 because the recording could reveal details of the underlying criminal incident or investigation from which the use of deadly force arose. In addition, it is also possible that such a recording could inadvertently disclose a confidential informant or undercover officer. The Office of the Attorney General would likely conclude that section 552.108 justifies withholding the recordings under such circumstances. *See e.g.*, Tex. Att’y Gen. ORD 582 (1990)(applying informer’s privilege).

By the same token, there may be circumstances in which the law enforcement agency wishes to release a recording to maintain public confidence that the officer(s) involved in an incident involving the use of deadly force acted in a manner consistent with the law enforcement agency’s policies regarding the use of deadly force. Conversely, there may be situations in which the law enforcement agency wishes to maintain public confidence that when such policies are not followed, the law enforcement agency will take appropriate action. It is not correct to assume that a law enforcement purpose cannot include public access for its own sake.

Matthew Simpson
Kathy Mitchell
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The scope and purpose of subchapter N of chapter 1701, with its multiple references to the TPIA and to public disclosure, support that conclusion. *See also* TEX OCC. CODE §1701.201-1701.204 (public access to complaint process and public participation). In addition, section 1701.655 requires that the law enforcement agency policies include public access:

(b) A policy described by Subsection (a) must ensure that a body worn camera is activated only for a law enforcement purpose *and must include:*

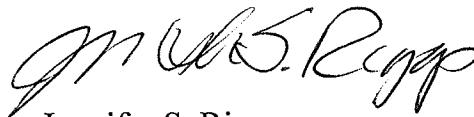
. . . .

(4) *guidelines for public access, through open records requests, to recordings that are public information;*

TEX OCC. CODE §1701.655(b)(emphasis added). The Texas Legislature's inclusion of subsection (b)(4) makes it clear that public access is part of the law enforcement purpose behind subchapter N of chapter 1701.

Please let me know if you have questions or need additional information.

Yours very truly,

A handwritten signature in black ink, appearing to read "J. S. Riggs", written in a cursive style.

Jennifer S. Riggs