



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

April 30, 1990

Mr. Jesus Toscano, Jr.
Assistant City Attorney
City of Dallas
City Hall
Dallas, Texas 75201

OR90-152

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 5862.

You inform us that a police officer employed by the city of Dallas has requested certain items of information generated in connection with the police department's 1989 Police Captain's Examination. The officer, who participated in the examination, requested the following:

- (1) A copy of the questions asked during the "In Basket" portion of the test, as well as a copy of my [the officer's] written responses to them.
- (2) A copy of the "Operational Problems" asked, and my written responses to them.
- (3) A copy of the notes made by the seven (7) assessors who graded me as to their observations and my responses.

You contend that the information requested by the officer is excepted by sections 3(a)(1) and 3(a)(11) of the Open Records Act, article 6252-17a, V.T.C.S.

With respect to section 3(a)(1), you do not cite specific provisions of the state or federal constitutions, statutes, or case law that expressly make the examination materials used by police departments confidential. Instead, you refer to a series of opinions and open records decisions issued by this office that hold that a governmental body

with the authority to administer examinations is not required to disclose the contents of the examinations if to do so would compromise the effectiveness of future examinations. See Open Records Decision No. 118 (1976); Attorney General Opinions H-483, H-242 (1974). The continuing validity of these holdings was most recently confirmed in Open Records Decision No. 543 (1990), where we concluded that the Texas Employment Commission was not required to disclose the contents of an aptitude examination even in the absence of a specific statute or regulation expressly making such examinations confidential. It should also be noted that section 3(a)(22) of the Open Records Act now expressly excepts from required disclosure examination items developed by governmental bodies. Because you advise us that the testing items on the 1989 Police Captain's Examination will be used on future examinations, we conclude that the city is not required to disclose the contents of the examination in this instance.¹

The requestor additionally asks for copies of his handwritten responses to the questions used in the captain's examination. The written responses are divided into two groups. One group answers essay questions based on given sets of facts. The other group is a set of short narrative responses to a particular sequence of facts and to questions relating to that sequence given apparently under tightly controlled and timed conditions.

This office has never directly considered whether a person who sits for an examination administered by a governmental body may obtain access to his own written responses to examination items. In the absence of a special right of access granted by law, see, e.g., Open Records Decision No. 120 (1976), an examinee has no greater right to obtain access to his written responses to test questions than a member of the general public.

1. In a letter to this office, the officer who requested copies of the examination items claims that the captain's examination is administered on a less frequent basis than would appear from your description of the facts. We cannot resolve questions of fact in an Open Records Decision. But even if the allegation is true, we are not persuaded that the examination items should be disclosed to the public, since you emphasize that the police department will use the items on future examinations.

You recently informed us, however, that the city is willing to provide the requestor access to the written responses he gave to the questions on the 1989 Captain's Examination. It is therefore unnecessary to determine whether the officer has a special right of access to his written responses.

You also stated that you are unaware whether the city has a policy of routinely providing examinees access to their written answers or whether the city has chosen to provide the requestor in this instance a right of access not shared by other examinees. If the former scenario applies, it is unlikely that the city has waived the protected status of the examination answers. If, on the other hand, the latter description is accurate, then it is possible that the city has engaged in the selective disclosure of information, a practice prohibited under the Open Records Act. See Open Records Decision Nos. 464, 463 (1987). See also V.T.C.S. art. 6252-17a, § 14(a).

You also claim section 3(a)(11) excepts the requested handwritten notes and observations of the "assessors" of 1989 Police Captain's Examination candidates. "Assessors" are individuals employed by the police department to grade and evaluate candidates for the rank of captain. Their identities are not revealed to the examinees, and the evaluation forms do not disclose their identities. The evaluations are recorded as numerical ratings of individual candidates for particular characteristics and handwritten notes relating to those characteristics.

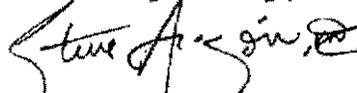
Section 3(a)(11) excepts from public disclosure intra-agency memoranda and letters to the extent they contain advice, opinion, or recommendation used in the decisional process within the agency. Open Records Decision No. 464 (1987) concluded that declarative statements in employee evaluations composed of letter responses corresponding to stipulated criteria were not excepted from disclosure by section 3(a)(11). Narrative responses contained in those evaluations were, however, held to be excepted because they could disclose the identities of the evaluators, thereby discouraging open and frank discussion in the deliberative process of the governmental body. Open Records Decision No. 538 (1990) subsequently concluded that the application of section 3(a)(11) did not depend on the ability to identify the author of the information, but on whether the information itself is advice, opinion, or recommendation used in the deliberative process. It overruled Open Records Decision No. 464 to the extent of conflict; thus, the availability of information under

section 3(a)(11) would no longer depend on whether the identity of the author of the advice, opinion, or recommendation was ascertainable.

It is clear from the face of the evaluations that the assessor's notes comprise advice, opinion, or recommendation used in the process of selecting officers for promotion to the rank of captain. You explain that disclosure of either the assessors' identities or their notes would likely result in their decision not to assist the city on future examinations. Disclosure could also make it more difficult for the city to recruit other individuals to serve as assessors on future examinations. It is also apparent that disclosure might very well inhibit the candor of assessors on future examinations. Accordingly, we conclude that the assessors' notes requested in Item 3 of the officer's request for information may be withheld from disclosure pursuant to section 3(a)(11).

It should be noted that this request was originally submitted several months ago. The response by this office was delayed in part because the request involved issues that were ultimately resolved by Open Records Decision Nos. 538 and 543. We appreciate your patience in awaiting the outcome of this request and we apologize for any inconvenience the delay may have caused you or the requestor. If you have any questions concerning this decision, please refer to OR90-152.

Yours very truly,



Steve Aragón
Assistant Attorney General
Opinion Committee

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Ref.: ID# 5862, 8139, 9051

cc: Daniel H. Davis
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