



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 15, 1994

Mr. Charles Karakashian
Assistant General Counsel
Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

Open Records Decision No. 626

Re: Whether notes and evaluations prepared before an employee promotional board are "test items" within the meaning of section 552.122 of the Texas Open Records Act, Government Code chapter 552 (RQ-576)

Dear Mr. Karakashian:

The Texas Department of Public Safety (the "department") has received two requests for information relating to a department promotional process. Specifically, the requestor seeks "all hand-written notes collected, assembled or maintained by or for the Department in connection with the Motor Vehicle Services promotion board," and "all documents . . . that were relied upon by the Department in determining that I would not be selected for promotion to Sergeant Investigator in the Motor Vehicle Theft Service as a result of the April 1993 interview process," including "the oral examination reports, scores and notes that were compiled by each board member . . . and a copy of the background investigations performed on each candidate that appeared before the board." In addition, the requestor seeks the public portions of "the personnel files of each candidate who appeared before the board." You advise us that some of the requested information has been made available to the requestor, specifically, the public portions of the requested personnel files. You have submitted to us for review, however, representative samples of the remaining information, including an applicant's background investigation, professional certificates and commendations, transcripts from educational institutions, an applicant's personal history statement, a department oral examination report, and representative samples of notes taken by promotion board members. You object to release of this information under subchapter C of the Texas Open Records Act (the "act"), Government Code chapter 552.¹

As a threshold issue, we address your contention that some of the requested information does not constitute public records. You advise us that the promotion board members may or may not take notes during an oral interview; that the board members are not required to take notes; and that if notes are taken, it is within the board member's

¹We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

discretion to keep the notes or not. On the basis of the foregoing, you claim that notes taken by individual board members during oral interviews are not subject to the Open Records Act. We disagree. Section 552.021 of the act provides in pertinent part:

(a) Information is public information if, under a law or ordinance or *in connection with the transaction of official business*, it is collected, assembled, or maintained:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.021 (emphasis added). It is immaterial under the act whether an official who holds records regarding official business has discretion to generate or maintain the records. Cf. Attorney General Opinion JM-1143 (1990) at 2; Open Records Decision No. 142 (1976) at 1-2. Clearly, the board members' notes, to the extent they exist, were created "in connection with the transaction of official business," *i.e.*, in the course of the promotion board's evaluation of applicants for public employment. Accordingly, we conclude that the personal notes are public records subject to the act under section 552.021(a)(1). You claim that the requested information is excepted from required public disclosure by sections 552.102 (former section 3(a)(2)), 552.111 (former section 3(a)(11)), and 552.122 (former section 3(a)(22)) of the act.

Section 552.102 excepts from required public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 protects personnel file information only if its release would cause an invasion of privacy under the test articulated for section 552.101 of the act by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). See *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ *ref'd n.r.e.*). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. Generally, the public has a legitimate interest in the job qualifications of public employees. Open Records Decision Nos. 470; 467 (1987). Information previously held by this office not to be protected by common-law privacy interests includes, for example, applicants' and employees' educational training; names and addresses of former employers, dates of employment, kind of work, salary, and reasons for leaving; names, occupations, addresses and phone numbers of character references; job preferences or ability; and birth dates, height, weight, marital status, and social security numbers. See Open Records Decision No. 455 (1987); see also Open Records Decision Nos. 470, 467; 444 (1986); 421 (1984); 405 (1983).

An applicant's personal financial information, however, may be excepted from required public disclosure under section 552.101. In Open Records Decision No. 373,

this office addressed the availability of personal financial information submitted to a city by an applicant for a housing rehabilitation grant. In that decision, this office concluded as follows:

[a]ll financial information relating to an individual -- including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history -- ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

Open Records Decision No. 373 (1983) at 3. Whether the public has a legitimate interest in such information, however, must be determined on a case-by-case basis. *Id.*; *see also* Open Records Decision Nos. 600 (1992); 545 (1990). In Open Records Decision No. 545, this office applied a similar presumption to personal financial information of public employees and held that, absent "special circumstances," information concerning a public employee's participation in a deferred compensation plan is protected from disclosure by common-law privacy. Open Records Decision No. 545 at 4-5.

The personal history statement submitted to us for review includes information about the applicant's financial history and past credit history. This information reveals the applicant's sources of income, salary, mortgage payments, assets, credit history, and other personal financial information. We conclude that this information is highly intimate or embarrassing. Moreover, the information you have provided does not indicate any special circumstances that would make the applicant's personal financial information a matter of legitimate public concern. Accordingly, most of the financial history and past credit history segments of the personal history statement must be withheld from required public disclosure under section 552.102 of the act. The remaining information submitted to us for review, including the applicant's background investigation, professional certificates and commendations, transcripts from educational institutions, the department oral examination report, the representative samples of the personal notes of promotion board members, and the remaining portions of the personal history statement, contains no information that is intimate or embarrassing. Moreover, this information is of legitimate interest to the public. In addition, this office has previously held that a public employee's salary is disclosable. *See* Open Records Decision Nos. 455; 342 (1982); *see also* Gov't Code § 552.022(2). Accordingly, this information may not be withheld from required public disclosure under section 552.102.

You also claim that the requested information is excepted from required public disclosure by section 552.111 of the act, which excepts an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Some of the documents you have submitted for our review clearly do not constitute internal memoranda containing communications between department

employees. Such documents, *e.g.*, professional certificates and commendations and transcripts from educational institutions, do not fall within the section 552.111 exception in any event.

Furthermore, in Open Records Decision No. 615 (1993), this office reexamined the section 552.111 exception and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.* at 5-6. As the information submitted to us for review relates to an internal administrative and personnel matter, we conclude that section 552.111 does not except it from required public disclosure.

Finally, you claim that some of the requested information is excepted from required public disclosure by section 552.122 of the Government Code. Section 552.122 excepts from disclosure

- (a) A curriculum objective or test item developed by an educational institution that is funded wholly or in part by state revenue . . . [and]
- (b) A test item developed by a licensing agency or governmental body.

Gov't Code § 552.122.² In particular, you claim that the notes and evaluations contained in the information submitted to us for review include "test items" that are protected by section 552.122. No prior decision of this office has examined section 552.122 in the context of employee evaluations and records relating to employee interviews. Consequently, we must determine whether this type of information constitutes "test items" for purposes of the section 552.122 exception.

Prior to the enactment of section 552.122, this office acknowledged that the statutory power to conduct examinations for licensing and other purposes carried the implied power to maintain the confidentiality of the test items, particularly where the test items were used in subsequent examinations. Under this analysis, test items were deemed confidential under section 552.101 of the Government Code (formerly section 3(a)(1), article 6252-17a, V.T.C.S.). For instance, in Attorney General Opinion H-483 (1974) at 2, this office concluded that a statute (in this case, article 4590c, V.T.C.S.) that authorized the Board of Examiners in the Basic Sciences to administer board exams for certification purposes also implied the authority to maintain the confidentiality of the

²The Seventy-third Legislature deleted the reference to "curriculum objectives" in former section 3(a)(22), V.T.C.S. article 6252-17a. See Acts 1993, 73d Leg., ch. 347, § 8.30, at 1557. This amendment is not reflected in the codification of former section 3(a)(22) as section 552.122 of the Government Code.

board exam questions. Relying on the well established principle that a statutory grant of express power carries with it by necessary implication every other power necessary for the execution of that power, this office concluded that

[a]lthough there is no express provision in article 4590c making the Board's examination questions confidential either before or after they have been administered, we believe that the statutory authority to conduct examinations necessarily implies the authority to maintain the confidentiality of the specific questions with which the applicant's knowledge of a subject is to be tested.

Id. at 2; *see also* Attorney General Opinions JM-640 (1987) (finding that the Polygraph Examiners Board's statutory authority to conduct licensing examinations implied the authority to withhold from disclosure examination questions and answers); H-242 (1974) at 5 (holding that the Board of Vocational Nurse Examiners could withhold under section 552.101 examinations it was statutorily required to administer to applicants for licensure); Open Records Decision Nos. 353 (1982) (holding that a city ordinance requiring any person "desiring to qualify for a 'master electrician's license'" to take and pass a particular examination implied the authority to withhold the examination questions from public disclosure); 118 (1976) (applying the policy of "implied confidentiality" to bring Merit System Council competitive examinations within the protection of section 552.101).³

As noted above, a key factor in the analysis applied by these early decisions was whether or not the examination questions at issue were used again in future examinations. *See, e.g.*, Attorney General Opinions JM-640 at 3; H-483 at 3; Open Records Decision Nos. 353; 118. Where it was the policy of the governmental body to reuse test questions, release of such questions would "compromise the effectiveness of future examinations." Open Records Decision No. 118.

In 1987, the legislature added section 3(a)(21) (which was later renumbered as section 3(a)(22) and is now codified as section 552.122) to the act. Acts 1987, 70th Leg., ch. 1053, § 1, at 3585. Section 3(a)(21) was an express provision that excepted from required public disclosure "curriculum objectives and test items developed by educational institutions that are funded wholly or in part by state revenue." *See* Open Records Decision No. 537 (concluding that former section 3(a)(22) provided express authority to a school district to withhold from the public copies of examination questions and answer keys). In 1989, the legislature amended former section 3(a)(22) to except from disclosure

³This office has also applied the policy of "implied confidentiality" to except information other than test items from disclosure. For example, in Open Records Decision 401 (1983) at 5-7, this office held that computer programs were excepted from required public disclosure under former section 3(a)(1), again finding implied confidentiality where no statute expressly required it. In Open Records Decision No. 581 (1990) at 6, however, this office expressly overruled the rationale in Open Records Decision No. 401, holding that because certain computer programs were not subject to the act, it was not necessary to find implied confidentiality under former section 3(a)(1).

"test items developed by licensing agencies or governmental bodies." Acts 1989, 71st Leg., ch. 1248, § 9, at 5025.⁴

Since this exception, now section 552.122, was amended in 1989 to encompass "test items developed by licensing agencies or governmental bodies," it has no longer been necessary to determine whether a legislative grant of authority to administer tests carries with it the implied authority to preserve the confidentiality of the testing items, because section 552.122 *expressly* excepts test items from required public disclosure. The Open Records Act, however, does not define the term "test items." As a result, we must next determine the meaning of this term within the context of section 552.122.

Words not defined in a statute may be understood in their ordinary meaning. *See In re Estate of Furr*, 553 S.W.2d 676, 679 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.); Gov't Code § 312.002. The definition of "test" depends on the context. In the educational context, "test" is defined as "[a]ny series of questions or exercises or other means of measuring the skill, knowledge, intelligence, capacities, or aptitudes of an individual or group." WEBSTER'S NEW INT'L DICTIONARY 2609 (2d ed. unabridged 1947). In the psychological context, "test" is defined as "[a] means of measuring an individual's ability in any direction, by use of some standard task or series of tasks to be performed." *Id.* The word "test" acquires more specificity when read in context with prior decisions of this office. In construing the term "curriculum objectives," which was included in former section 3(a)(22), this office referred to a test as part of the "process by which a student's learning or knowledge is evaluated." Open Records Decision No. 566 (1990) at 2. Thus, the term "test item" in section 552.122 generally includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated. An evaluation does not necessarily constitute a test, however, simply because it is labelled as a test, because it is comprised of questions and answers, or because it involves some sort of scoring system. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis.

⁴In Open Records Decision No. 543, this office overruled an informal letter ruling issued before former section 3(a)(22) had been amended to include "test items developed by licensing agencies or governmental bodies." In that decision, this office addressed the applicability of former section 3(a)(22) to a general aptitude test battery (GATB) obtained from a federal agency and held by the Texas Employment Commission. The informal letter ruling, applying the maxim *expressio unius est exclusio alterius*, had determined that the GATB did not fall within the section 3(a)(22) exception because this section did not include "test items developed by educational institutions." This office said in Open Records Decision No. 543 that "it was incorrect to assume that, by the express mention of educational institutions in section 3(a)(22), the legislature expressed any opinion of the validity of our prior rulings" and "that section 3(a)(22) was simply intended to codify for certain purposes the policy expressed in the prior opinions, not to limit the application of that policy." Open Records Decision No. 543 (1990) at 3.

We now consider the particular information at issue here. You have submitted to us for review the department's policies governing the employee promotion process.⁵ The requestor seeks information relating to promotion to the position of "Motor Vehicle Theft Sergeant/Investigator." Chapter 7 of the "Department of Public Safety's General Manual," titled "Personnel Policies, Procedures, Benefits, and Records," explains the procedures by which department employees are promoted. Section 26.10 of that chapter applies to the position of "Motor Vehicle Theft Sergeant/Investigator," and provides, in part, as follows:

b. Examining Procedure

- 1) A test to determine specific knowledge in the field of criminal investigation and current events. This would be a test developed by the Department to determine the knowledge of the applicant in the field of criminal investigation and may cover such subjects as the Texas Penal Code, the Code of Criminal Procedure, Laws of Search and Seizure, Laws of Arrest, Laws of Evidence, and Techniques of Criminal Investigation, and would include questions on world affairs.
- 2) An interview board will be held for the applicants who successfully complete the written examination.

We are advised that the written examination and the oral interview board are separate requirements for promotion to sergeant. The information at issue here does not relate to the written examination, but to the "interview board." As the department's General Manual does not indicate whether information relating to an interview board for the position of "Motor Vehicle Theft Sergeant/Investigator," contains "test items," we must look to the information submitted to us for review to determine whether it falls within the section 552.122 exception.

You have submitted representative samples of the information you seek to withhold under section 552.122, including several copies of a document titled "Oral Examination Report" (form Pe40a), a document titled "Promotional Potential Rating" (form HQ-127), a document titled "Performance Evaluation Report" (form PE-24), and the handwritten notes of interview board members. The Pe40a is the oral board score sheet. This form is used during the oral interview board promotional process. You advise that it "is a subjective evaluation given to each applicant for promotion by each interview board member" and includes a numerical evaluation of the employee and may include the written comments of interview board members. The HQ-127 is completed by the

⁵Chapter 411 of the Government Code contains statutes governing the Department of Public Safety. Section 411.007 of that chapter provides, in part:

- (b) Appointment or promotion of an officer or employee must be based on merit determined by examination under commission rules that take into consideration the applicant's age, physical condition, experience, and education. Each person who has an application on file for a position in the department shall be given reasonable written notice of the time and place of those examinations.

employee's supervisor at the time the employee makes known his intention to seek promotion. It is generally an evaluation prepared by the applicant's supervisor and includes a numerical rating of the employee. The PE-24 is the annual evaluation given an employee by his supervisor. This evaluation measures the employee's job performance during the previous year and contains the supervisor's rating of the employee's performance as well as any areas needing improvement. An employee's job strengths or superior performance are also noted on this form. Finally, the handwritten notes prepared by the interview board members contain information concerning individual employees who appeared before the board, including notations reflecting the employee's background, appearance, demeanor, and responses to questions.

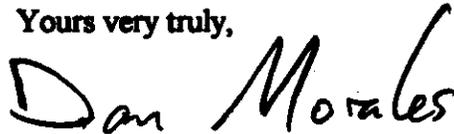
We conclude that forms Pe40a, HQ-127, and PE-24 contain no information that constitutes "test items" within the meaning of section 552.122. The Pe40a contains six "Factors to Consider" which are rated on a scale from 0 to 500, including "General Qualifications," "General Appearance," "Analytical," "Judgment," "Ability to Get Along With Others," and "Career Potential." It does not involve an evaluation of an applicant's knowledge in a particular area. The HQ-127 and PE-24 contain information regarding the applicant's past employment performance and rate such general criteria as "Attitude and Loyalty," "Judgment," "Expression and Communication," "Initiative and Resourcefulness," "Empathy," "Patience," and "Dependability," "Planning and Organizing," "Quality of Work," "Grooming and Dress," "Initiative," and "Energy Conservation." The HQ-127 and PE-24 do not elicit responses to questions, nor do they require the presence or input of the employee to complete. Moreover, the "testing" criteria on these forms are generally available to department employees. Accordingly, these three forms may not be withheld from required public disclosure under section 552.122 of the Government Code and must be released in their entirety.

Finally, we consider the handwritten notes of the interview board members. You claim that release of this information would reveal test questions. The notes appear to reflect the board members' evaluations of the applicants before the board and contain notations reflecting the applicants' responses to questions. In some situations, disclosure of the answers to test questions might reveal the questions themselves. See Attorney General Opinion JM-640 at 3. The board members' notations at issue here, however, do not themselves reveal any specific "test items." Accordingly, the handwritten notes of the interview board members may not be withheld under section 552.122 and must be released in their entirety.

S U M M A R Y

The term "test item" in section 552.122 of the Texas Open Records Act, Government Code chapter 552, includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated. It does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis.

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly slanted style.

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