



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 18, 1996

Ms. Amy L. Whitt
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR96-0343

Dear Ms. Whitt:

You have asked whether certain information is subject to required public disclosure pursuant to chapter 552 of the Government Code. Your request was assigned ID# 38132.

The City of Lubbock (the "city") received a request for information concerning a fitness test used to assess applicants and current employees of the city fire department. The requestor also asked for a performance breakdown by age and gender of those taking the test; copies of job descriptions; information concerning complaints about the test; and copies of medical evaluation forms and medical questionnaires. You state that you have provided job descriptions to the requestor. You contend that the other requested information is excepted from required disclosure pursuant to sections 552.101, 552.110, and 552.122 of the Government Code.¹

The requestor sought information about the test performance of individual employees and recruits on what appears to be a physical fitness or physical coordination and agility assessment test. The requestor also sought copies of the "medical evaluation forms and the medical questionnaire used as a preliminary filter to determine who will be taking" the tests. You submitted to this office a medical questionnaire. We note that federal law may make the physical fitness test performance results and the *completed* medical questionnaires confidential. See 42 U.S.C. § § 12112(d)(3)(B) (Americans with

¹The requestor also asked for the "full name" of the test and a listing of the national pass/fail rate for the test. You contend that there are no existing documents that would provide this information and that the city would have to prepare a new document to provide the full name of the test. We note that chapter 552 does not apply to information that does not exist. Open Records Decision No. 555 (1990). Nor does chapter 552 require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio, 1978, writ dism'd). However, we note that the other information requested is responsive to the query concerning the name of the test.

Disabilities Act requirement to treat as confidential medical record information regarding medical condition or history); *see also* 29 C.F.R. §§ 1630.14(c), 1630.14(d). This office is considering the confidentiality requirements for such information in a pending decision, ID# RQ-753. You may withhold from disclosure the completed medical evaluation questionnaires and also individual performance test results until that opinion is issued.

In regard to complaints made about the examinations, you assert that the complaints are excepted from disclosure under the informer's privilege aspect of section 552.101. This office has interpreted the statutory predecessor to section 552.101 to incorporate the informer's privilege and to protect the identity of a person who reports a possible violation of law to officials having the duty of enforcing particular laws. Open Records Decision No. 549 (1990) at 4-5; 515 (1988) at 2-3. The privilege excepts information from disclosure only to the extent necessary to protect an informer's identity from the subject of the communication. *Rovario v. United States*, 353 U.S. 53 (1957); Open Records Decision Nos. 549 (1990) at 5, 202 (1978) at 2 (informer's privilege exception is not applicable when the identity of the informer is known to the subject of the communication).

The informer's privilege is inapplicable in this situation. The complaints were directed to the city about the city's own procedures. City officials are already aware of the identity of those filing complaints. Further, the complaints do not appear to implicate violations of law.

You state that the testing procedures are copyrighted. Section 552.101 excepts from disclosure information made confidential by law. However, information is not made confidential under section 552.101 simply because it is copyrighted. Open Records Decision No. 180 (1977) (copyrighted training materials not deemed confidential under section 552.101). A governmental body normally must allow inspection of copyrighted materials unless another exception applies to the information. Attorney General Opinion JM-672 (1987). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. The custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *Id.* In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

You also assert that the testing information implicates proprietary and property interests. Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. *See* Open Records Decision Nos. 639 (1996), 554 (1990), 552 (1990). As provided by section 552.305 of the Government Code, this office notified the third party of the request for information and solicited arguments in support of your assertion that the information at issue is confidential. However, the third party submitted no argument in regard to these materials. When the governmental body and the third party fail to provide relevant information to establish that the information at issue contains trade secrets or that it is protected commercial or financial information, this

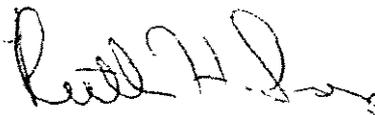
office cannot conclude that section 552.110 is applicable. Open Records Decision Nos. 639 (1996); 402 (1983). Thus, section 552.110 is inapplicable.

You further contend that the information at issue is excepted from disclosure pursuant to section 552.122 of the Government Code. Section 552.122 excepts from disclosure a "test item" developed by a governmental body. In Open Records Decision No. 626 (1994) at 6, this office determined that 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." We also stated that an evaluation does not necessarily constitute a test, however, simply because it involves some sort of scoring process. *Id.* Evaluations of an applicant's overall job performance or suitability are not "test items." *Id.*

You apparently seek to withhold from disclosure the entire testing program or system used by the city. We note that you did not mark specific portions of any of the documents submitted to indicate which portions you believed should be withheld under section 552.122. The submitted documents contain "fitness evaluation standards" that the city uses as part of its evaluation of applicants and employees. These do not appear to be "test items" within the meaning of section 552.122. Nor do the other documents appear to contain "test items." Thus, the documents may not be withheld from disclosure pursuant to section 552.122.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref: ID# 38182

Enclosures: Submitted documents

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(w/o enclosures)