



March 13, 2000

Mr. Kevin McCalla
General Law Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR2000-0998

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 132878.

The Texas Natural Resources Conservation Commission (the "commission") received a request for information related to job posting number 99542. You indicate that you have provided access to responsive information to the requestor. You claim that the submitted information is excepted from disclosure under section 552.122 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122(b) 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. We note that while section 552.122 may apply where release of test items might compromise the effectiveness of future examinations, the questions must first fall within the definition of a "test item." *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994).

You seek to withhold the essay question which tests an applicant's knowledge of air permit requirements and the applicants' responses. You additionally claim that interview questions

7 through 10, the commission's rating criteria (preferred answers), and the applicants' answers are excepted from disclosure under section 552.122. You state that the commission would use the submitted questions and criteria to evaluate applicants in future interviews, and that release of the documents submitted for our review would give future applicants an unfair advantage. After reviewing your arguments and the submitted documents, we agree that the commission may withhold the essay question concerning air permit requirements and the applicants' answers. We agree that this information is a protected "test item." See Open Records Decision No. 626 at 6 (1994). However, we do not agree that interview questions 7 through 10 are "test items" as contemplated by section 552.122(b), in that they evaluate an employee's overall job performance or suitability and do not involve an evaluation of an applicant's knowledge in a particular area. *Id.* at 8. Therefore, the commission may not withhold questions 7 through 10 and related information pursuant to section 552.122 of the Government Code. Consequently, only the air permit essay question and applicants' answers to the essay question may be withheld under section 552.122(b). *Id.* at 8 (when answers to test questions might reveal the questions themselves, the information may be withheld under section 552.122); see Attorney General Opinion JM-640 at 3 (1987). The remaining information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at

877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Carla Gay Dickson
Assistant Attorney General
Open Records Division

CGD/ch

Ref: ID# 132878

Encl. Submitted documents

cc: Mr. Craig Fleming
4002 Fountainwood Circle
Georgetown, Texas 78628
(w/o enclosures)