



July 25, 2000

Mr. Chris M. Borunda
Assistant City Attorney
Office of The City Attorney
The City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2000-2810

Dear Mr. Borunda:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137493.

The City of El Paso (the "city") received a request for information relating to the requestor's assessment conducted for the purpose of evaluating candidates for the position of sergeant of the El Paso Police Department. You indicate that you have released some of the responsive information, but seek to withhold Interview Exercise forms and the assessor's notes, claiming that this information is excepted from disclosure under sections 552.110 and 552.122 of the Government Code. You contend that the rights of a third party, Jack Clancy and Associates ("Clancy"), are implicated by the release of the subject information.

Section 552.305(d) of the Government Code requires a governmental body to make a good faith effort to notify a party whose proprietary interest may be implicated by the release of the requested information. The third party notice must be sent within ten days of the governmental body's receipt of the request and must include a copy of the written request for information and a statement in the form prescribed by the attorney general.¹ The city apparently complied with these requirements. Clancy submitted comments, asserting that the responsive materials are trade secrets and are "confidential examination material." We have reviewed the submitted information and considered the arguments raised by the city and this third party.

Both the city and Clancy assert arguments which invoke section 552.110 of the Government Code, which reads as follows

¹The form can be found in Appendix C of the 2000 Texas Public Information Handbook. The handbook is available online at the Office of the Attorney General's web site at www.oag.state.tx.us.

- (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of Section 552.021.
- (b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

This section protects the property interests of those supplying information to governmental entities by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information. Texas courts apply the meaning specified in Restatement of Torts § 757 cmt. b (1939) for “trade secret.” *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). To wit:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Id.

This office will accept a claim for the trade secret exception when factual allegations sufficient to present a *prima facie* case for the exception are asserted, provided that no one submits an argument that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990).

This office applies the factors delineated in the Restatement of Torts in making a determination that information may be excepted from disclosure as a trade secret. Open Records Decision No. 319 at 2 (1982). The restatement factors to be considered are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended

by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id.

As these factors indicate, a central requirement for establishing a trade secret exception is the demonstration of the extent to which the information is kept *secret*. Here, neither the city nor the third party allege any facts in this regard. We conclude that it has not been demonstrated that the submitted information is a trade secret. Therefore, the information may not be withheld under section 552.110(a) of the Government Code.

Section 552.110(b) of the Government Code excepts commercial or financial information from public disclosure if a demonstration based on specific factual evidence is made that disclosure would cause substantial competitive harm to the supplier of the information. From our review of the materials and the comments submitted we conclude that it has not been demonstrated that release of the Interview Exercise forms or the assessor's notes, would cause substantial competitive harm to Jack Clancy and Associates. We conclude that none of the submitted information may be withheld under section 552.110 of the Government Code.

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. Whether information falls within the section 552.122(b) exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). Traditionally, this office has applied section 552.122(b) where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Further, when answers to test questions might reveal the questions themselves, the answer may also be withheld under section 552.122. *Id.* at 8; *see* Attorney General Opinion JM-640 at 3 (1987).

From our review of the submitted items we conclude that they do not "measure the skill, knowledge, intelligence, capacities, or aptitudes of an individual." Nor are they a "standard means by which an individual's or group's knowledge or ability in a particular area is evaluated." Further, they do not "involve an evaluation of an applicant's knowledge in a particular area." We conclude that these materials are not "test items" as contemplated by section 552.122(b). Therefore, this information may not be withheld under section 552.122(b) of the Government Code. As no exception has been shown to apply to the submitted information, it must be released to this 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,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ljp

Ref: ID# 137493

Encl Submitted documents

cc: Officer Raymond Chaires
El Paso Police Department
Central Regional Command
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El Paso, Texas 79901
(w/o enclosures)