



October 16, 2000

Ms. Lan P. Nguyen
Assistant City Attorney
Legal Department
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2000-4018

Dear Ms. Nguyen:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 140110.

The city of Houston (the "city") received a request for "all materials used for training and testing firefighters to work in dispatch including any training materials, training schedules, and tests given."¹ You claim that the information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

As a preliminary matter, we note that you also raised section 552.110 of the Government Code on behalf of Plant Equipment, Inc., a potentially interested third party pursuant to section 552.305. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). We did not receive a response from Plant Equipment, Inc., and therefore, we have no basis to conclude that any of the information at issue is excepted from disclosure under section 552.110. See Gov't Code § 552.110 (protects trade secrets and commercial and financial information from disclosure); Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of

¹The requestor also requested several other items which the you state the city has released or intends to release to the requestor.

²The submitted information consists of a training manual and a series of test questions used to train firefighters assigned to work 9-1-1 dispatch.

commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that the city may not withhold any information from disclosure under section 552.110.

We turn to your argument concerning section 552.101. Section 552.101 excepts from required public disclosure “information that is confidential by law, either constitutional, statutory, or by judicial decision.” Noting that the submitted training manual is copyrighted, you argue that section 552.101 encompasses copyright laws. You further point out that compliance with the Public Information Act cannot be ordered when it may conflict with the copyright law. We agree that a custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). However, a governmental body *must allow inspection* of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. 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). Therefore, under the Public Information Act, the city has no obligation to provide the requestor with a copy of the copyrighted training manual, but the city must allow the requestor to inspect the training manual. Should the requestor wish to make copies of the manual, she must do so unassisted by the city and she must assume the duty of compliance and the risk of infringement in regard to copyright law.

Next, we consider your argument regarding section 552.122. 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 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 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 where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). We find that the submitted test questions test knowledge or ability in a particular area, and therefore are excepted under section 552.122. Accordingly, the city may withhold the submitted test questions.

In conclusion, while the city has no obligation under the Public Information Act to provide the requestor with a copy of the copyrighted training manual, it must allow the requestor to inspect the training manual. The city may withhold the submitted test questions under section 552.122 of the Government Code.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

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,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF/er

Ref: ID# 140110

Encl: Submitted documents

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