



May 14, 2001

Mr. Dan Junell
General Counsel
State Board for Educator Certification
1001 Trinity
Austin, Texas 78701-2603

OR2001-1956

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147190.

The State Board for Educator Certification (the "board") received a request for a copy of certain ExCET exams and scores. You claim that the exams are excepted from disclosure under sections 552.110 and 552.122 of the Government Code. We assume, therefore, that the scores have been released. *See* Gov't Code §§ 552.301, .302. With regard to the exams, we have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. 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. *Open Records Decision No. 626 (1994)*. When answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122. *Id.* at 8; *Attorney General Opinion JM-640 at 3 (1987)*. Whether specific information falls within the section 552.122 exception must be determined on a case-by-case basis. *ORD 626 at 6 (1994)*.

Having reviewed the submitted information, we agree that the questions in Exhibit A are "test items" as contemplated by section 552.122(b). Therefore, you may withhold the

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

information in Exhibit A under section 552.122(b). With regard to the answer sheets in Exhibit B, we find that they do not reveal the questions themselves. Therefore, you may not withhold the information in Exhibit B under section 552.122(b).

You also claim that the requested information is protected from disclosure by section 552.110. Because we conclude that you may withhold the information in Exhibit A under section 552.122, we need not address whether section 552.110 applies to that information. With regard to the answer sheets in Exhibit B, you have failed to explain how the release of that information would cause harm to the board or how that information amounts to a trade secret. *See* Gov't Code § 552.110(b) (must show specific factual evidence that disclosure would cause substantial competitive harm); Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of 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). In addition, this office received comments from National Evaluation Systems, Inc. ("NES"), seeking to protect the requested information from disclosure under section 552.110. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released). NES also does not adequately explain how the release of the answer sheets in Exhibit B would cause it competitive harm or how that information amounts to a trade secret. Therefore, you must release the information in Exhibit B 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).

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 Hadassah Schloss at 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,



Stephen P. Agan
Assistant Attorney General
Open Records Division

SPA/seg

Ref: ID# 147190

Encl. Submitted documents

cc: Mr. Lyndon Schatz, Jr.
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