



March 5, 2002

Mr. Jesús Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla
Dallas, Texas 75201

OR2002-1076

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159698.

The City of Dallas (“the city”) received a request for nine categories of information relating to the November 2001 Senior Corporal promotional assessment process. You state that some of the requested information is being released to the requestor. You contend that a portion of the requested information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code.¹ You claim that the release of some of the requested information may implicate the privacy or proprietary rights of an interested third party, the Booth Research Group, Inc. (“Booth”). You state that Booth informed the city that the submitted information in Exhibit D is confidential. Information is not excepted from disclosure merely because it is furnished with the expectation that it will be kept confidential. *See, e.g.,* Open Records Decision No. 180 (1977). Although you raise no exception to disclosure of this information on behalf of the city, you indicate that you notified Booth of the request for information pursuant to section 552.305 of the Government Code. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542

¹Although you argue that a portion of the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code, you offer no independent bases as to why this information is protected under this exception to disclosure. Accordingly, we do not address your section 552.101 claim with respect to the submitted information.

(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 to disclosure in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information.² We have also considered comments submitted to this office by the requestor. Gov't Code §552.304.

You argue that the information submitted in Exhibits B and C is excepted from public disclosure under section 552.122(b) 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 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). Having reviewed the information at issue, we agree that some of the submitted questions are "test items" as contemplated by section 552.122(b). Therefore, you may withhold the marked questions and answers under section 552.122(b). We find that the remainder of the submitted information in Exhibits B and C does not test an individual's or group's knowledge or ability in a particular area. Therefore, the city may not withhold the remaining information in Exhibits B and C under section 552.122.

We next note that the submitted records in Exhibit D include information made public by section 552.022 of the Government Code. This section provides several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part this section reads

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(7) a description of an agency's central and field organizations. . . ;

...

(15) information regarded as open to the public under an agency's policies[.]

²We 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.

Gov't Code § 552.022(a)(7), (15). The organizational flow chart falls within the scope of subsection 552.022(a)(7), while the job description is subject to required release under section 552.022(a)(15). The submitted information which is within the ambit of section 552.022 is therefore subject to required public disclosure, except to the extent that any of this information is expressly confidential under other law. You do not argue, nor are we aware of, any law that would make this information confidential. Therefore, the information in Exhibit D which is within the scope of section 552.022(a) must be released to the requestor.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Booth has not submitted any arguments to our office with reasons explaining why the information at issue should not be released. Consequently, Booth has provided this office with no basis to conclude that its responsive information is excepted from disclosure. *See* Gov't Code § 552.110(b) (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); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We note, however, that the records in Exhibit D contain information that may be excepted from disclosure under section 552.117(2). Section 552.117(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members, regardless of whether the peace officer made an election under section 552.024 of the Government Code. Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. If the individual is a peace officer as defined by article 2.12 of the Code of Criminal Procedure, you must withhold the marked information under section 552.117(2). However, if the individual is not a peace officer as defined by article 2.12 of the Code of Criminal Procedure, then section 552.117(2) is not applicable. The remaining information in Exhibit D must be released to the requestor.

Finally, we observe that some of the materials at issue may be protected by copyright. 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). 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).

In summary, the city may withhold the marked questions and answers under section 552.122(b). The city must release the remainder of the submitted information, complying with copyright law where applicable.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

A handwritten signature in cursive script, appearing to read "Cindy Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 159698

Enc. Submitted documents

c: Ms. Rhonda Cates
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(w/o enclosures)