OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

April 16, 2002

Ms. Elizabeth West
Senior Personnel Attorney
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR2002-1911

Dear Ms. West:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 161467.

The Texas Natural Resource Conservation Commission (the "commission") received a request for access to "any and all records pertaining to the selection process to fill Job Posting Nos. 01425 and 02193." You state that you have provided the requestor with some information but claim that "the interview questions, model answers, interviewees' responses and the interviewers' handwritten notes regarding questions 2, 8, 9, 17, and 18" are excepted from disclosure under section 552.122 of the Government Code. We note, however, that you did not submit the interviewees' responses or the interviewers' handwritten notes. We therefore assume that you have released this information to the requestor. If not, you must do so at this time. *See* Gov't Code §§ 552.301(e) (governmental body must supply this office with copy or sample of specific information requested), .302 (failure to comply with section 552.301 creates presumption that information is public and must be released unless compelling reason to withhold is shown); Open Records Decision No. 630 at 8 (1994) (fact that information would be excepted under discretionary exception if governmental body had made timely request for open records decision does not alone constitute compelling reason to withhold). We have considered the exception you claim and reviewed the submitted information.

Section 552.122(b) of the Government Code 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). Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994).

Based on your arguments and our review of the submitted information, we agree that questions 9, 17, and 18 qualify as test items for the purpose of section 552.122(b) of the Government Code and may therefore be withheld. Furthermore, we find that the answers to these questions could reveal the questions and may likewise be withheld under section 552.122. However, we do not believe questions 2 and 8 test an individual's or group's knowledge or ability in a particular area but rather evaluate an applicant's experience and overall job suitability. You may therefore not withhold questions 2 and 8 or the model answers thereto under section 552.122(b).

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).

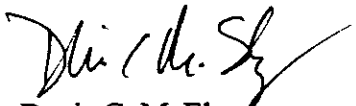
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 161467

Enc. Marked documents

c: Mr. Juan Rodriguez
Enforcement Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
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(w/o enclosures)