



October 16, 2002

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2002-5878

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170725.

The Texas Department of Transportation (the “department”) received a request for information about a particular job posting and the individuals who were interviewed for the position. You state that the department will release most of the requested information but claim that portions of the documents you have submitted to this office as Exhibit C are excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. You also assert that test questions and answers submitted as Exhibit B are excepted under section 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The two department employees whose information is at issue made requests for confidentiality under section 552.024 prior to the date that the request for this information was made. Because the employees timely elected to keep their personal information confidential, the department must withhold these employees’ social security numbers as well as their home addresses and telephone numbers and any information that reveals whether these employees have family members. We have marked the information that you must withhold.

Because the third applicant is not employed by the department, we address your contention that his social security number is confidential under federal law. Section 552.101 of the

Government Code excepts from disclosure "information considered confidential by other law, either constitutional, statutory, or by judicial decision." This section encompasses statutory confidentiality provisions such as the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* You assert that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 653a(b)(1)(A) requires the department to obtain and maintain the social security numbers of newly hired employees and that the social security numbers contained in the submitted applications are therefore confidential.

However, you have not informed us whether the third individual was ever hired by the department. We therefore conclude that the department has failed to demonstrate that his social security number was obtained for the purpose of complying with section 653a and therefore has not established that it was obtained "pursuant to" the federal provision. *See* 42 U.S.C. §§ 653a(b)(2) (requiring that information regarding newly hired employees be provided within specified period "after the date the employer *hires* the employee") (emphasis added), (a)(2)(A)(i) (term "employee" has same meaning assigned in Internal Revenue Code); 26 U.S.C. § 3401(c) (Internal Revenue Code definition of employee does not extend to applicants); *cf.* 3 U.S.C. § 401 (law extending rights and protections to presidential offices includes applicant for employment and former employee in definition of term employee). Thus, we have no basis for concluding that this social security number is confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing this social security number information, you should ensure that it was not obtained or is not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

Each of the submitted applications includes a Texas driver's license number. Section 552.130 of the Government Code excepts from disclosure information relating to "a motor vehicle operator's or driver's license or permit issued by an agency of this state." Gov't Code § 552.130(a)(1). Therefore, in accordance with this section, the department must withhold the marked driver's license information contained in the submitted applications.

Finally, you assert that the questions and answers submitted as Exhibit B should be withheld under section 552.122 of the Government Code. This section excepts from disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). 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. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a

case-by-case basis. *Id.* 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). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); Open Records Decision No. 626 at 8 (1994).

You assert that questions 4 and 5 test applicants' knowledge or ability in a particular area, that the actual and preferred answers to these questions tend to reveal the questions themselves, and that the department anticipates using these questions again in the future. You indicate that prior access to these questions and answers would compromise the effectiveness of the department's interview and hiring process. Having considered the department's arguments and reviewed the submitted information, we find that the department has demonstrated that the second part of interview question 4 constitutes a test item under section 552.122 of the Government Code. We also find that the actual and preferred responses to this question tend to reveal the question itself. Thus, section 552.122 is also applicable to those responses. The department has not shown that section 552.122 is applicable to any of the remaining information in Exhibit B, and it must be released.

In summary, pursuant to section 552.117, the department must withhold the information we have marked. The social security number of the applicant who was not employed by the department must be withheld only if obtained or maintained pursuant to a law enacted on or after October 1, 1990. The department may withhold the marked portion of test question 4 and the corresponding answers under section 552.122(b). All other information must be released.

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;

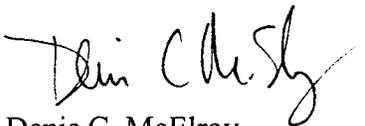
2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things 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#179725

Enc. Submitted documents

c: Ms. Catherine Hostetler
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(w/o enclosures)