



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2003

Mr. James M. Frazier III
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2003-8222

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191140.

The Texas Department of Criminal Justice (the "department") received a request for documents related to the selection process for a specified job posting. You claim that the requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.117 and 552.122 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. *See* 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. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. *See* 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. *See id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the substance of the questions themselves, the answers may be withheld from disclosure under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994). Based on our review of your arguments and the submitted information, we agree that all of the submitted questions constitute "test items" as contemplated by section 552.122(b). Accordingly, we conclude that the department may withhold these questions pursuant to

section 552.122(b). We also agree that the department may withhold the recommended and actual responses associated with these questions pursuant to section 552.122(b) of the Government Code, as they tend to reveal the substance of each of these test questions.

Next, we address your section 552.117 claim. We note that the 78th Legislature has amended section 552.117 to except from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of “a current or former employee of the [department] or of the predecessor in function of the department or any division of the department, regardless of whether the current or former employee complies with Section 552.1175.” Act of May 28, 2003, 78th Leg., R.S., S.B. 1388, § 1 (to be codified at Gov’t Code § 552.117(a)(3)); *see also* Act of May 28, 2003, 78th Leg., R.S., S.B. 1388, § 4 (providing for immediate effectiveness of bill on receipt of vote of two-thirds majority of all members elected to each house). Accordingly, we conclude that the department must withhold any social security numbers of current or former department employees that are contained within the remaining submitted information pursuant to section 552.117 of the Government Code.¹

We note, however, that the remaining submitted information may contain social security numbers of applicants for the specified position who are not current or former department employees. Any such social security numbers may be excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I).² These particular amendments make confidential social security numbers and related records that are obtained or 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* Open Records Decision No. 622 (1994). The department has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain these social security numbers. Therefore, we have no basis for concluding that they are confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the department, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing social security numbers, the department should ensure that they were not obtained or are not maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.³

¹ We note, however, that the requestor has an affirmative right of access to her own social security number. *See* Gov’t Code § 552.023.

² Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov’t Code § 552.101. Section 552.101 encompasses information protected by other statutes.

³ We note again, however, that the requestor has an affirmative right of access to her own social security number. *See* Gov’t Code § 552.023.

In summary, the department may withhold all of the submitted questions and the recommended and applicants' responses associated with these questions pursuant to section 552.122(b) of the Government Code. The department must withhold any social security numbers of current or former department employees that are contained within the remaining submitted information pursuant to section 552.117 of the Government Code, other than the social security number of the requestor which must be released to her. The social security numbers of applicants for the specified position who are not current or former department employees may be confidential under federal law, other than the social security number of the requestor. The department must release the remaining submitted information 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 Dep't of Pub. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 191140

Enc. Submitted documents

c: Ms. Charlotte Walters
511 Rost Road
McGregor, Texas 76657
(w/o enclosures)