



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 1, 2004

Ms. Jennifer Soldano
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Bldg.
125 E. 11th Street
Austin, Texas 78701-2483

OR2004-1540

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196906.

The Texas Department of Transportation (the "department") received a request for all applications and selection documents regarding the Dallas District Director of Transportation Planning and Development job vacancy notice. You claim that portions of the requested information are excepted from disclosure under sections 552.117, 552.122, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that you state that the department will withhold driver's license numbers included on the submitted applications for employment pursuant to a previous determination by this office issued to the department in Open Records Letter No. 2002-0465 (2002). *See* Gov't Code § 552.301(a), (f) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). You have bracketed 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 you believe should be withheld pursuant to that previous determination. However, please note that, in this case, section 552.130 of the Government Code makes only the driver's license *numbers* of driver's licenses issued by the State of Texas confidential. It does not make the state of issuance (*i.e.*, Texas), confidential. Further, section 552.130 does not protect driver's license information related to driver's licenses issued by other states. Therefore, the state of issuance and drivers license number related to any out-of-state driver's license must be released.

We will first consider your arguments that the submitted interview questions, preferred answers and responses are excepted from disclosure under section 552.122 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). 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).

After reviewing your arguments and the information, we agree that a number of the submitted interview questions test an individual's knowledge in a particular area and thus constitute "test items" as contemplated by section 552.122(b). Further, we find that the preferred and actual answers to those questions may reveal the questions themselves. Additionally, you state that the department anticipates using these identical interview questions for future job vacancies of this type. As such, we have marked those questions, as well as the preferred and actual answers, that the department may withhold pursuant to section 552.122(b) of the Government Code. The remaining questions and preferred and actual answers must be released to the requestor.

We next consider your claim under section 552.117 of the Government Code. Section 552.117(a)(1) excepts the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. You state that the applications contained in Exhibit C were all completed by current department employees who elected to keep this information confidential on department forms such as those provided in Exhibit D. In accordance with section 552.117(a)(1) of the Government Code, we agree that the department must withhold the home addresses and telephone numbers, social security numbers and family member information for the two department employees whose election forms you have provided in

Exhibit D. You must also withhold this information for other employees who elected to keep this information confidential prior to the date on which the request for information was received.² The home addresses and telephone numbers, social security numbers and family member information of current or former employees who did not timely elect to keep such information confidential cannot be withheld under 552.117(a)(1).

If a timely election was not made, we note that social security numbers must be withheld in some circumstances under 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).³ 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 inform us that the department maintains employees' social security numbers pursuant to provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 653a(a)(2)(B), (b)(1)(A). Under this federal law, an employer is required to furnish to the Directory of New Hires of the State in which a newly hired employee works, a report that includes the employee's social security number. 42 U.S.C. § 653a(b)(1)(A). Thus, we agree that the department must withhold the social security numbers of department employees whose numbers were collected pursuant to this law. For employees who were hired before this law was enacted, social security numbers were not obtained or maintained pursuant to that law and therefore, those numbers may not be withheld under section 552.101 and the federal law.⁴

We next address your argument that the personal e-mail addresses you have bracketed in Exhibit C are excepted from disclosure under section 552.137. Section 552.137 makes certain e-mail addresses confidential. That section provides:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating

² You have marked information on each employment application that is excepted under section 552.117(a)(1) in cases where the employee made a timely election to keep the information confidential. Further, we have marked family member information on each employment application that is also excepted under 552.117(a)(1) in cases where the employee or former employee made a timely election to keep the information confidential.

³Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

⁴Although you also note that section 158.203 of the Family Code constitutes a statute enacted after October 1, 1990 that requires the collection of certain employees' social security numbers, you have not argued that this provision of law is in fact applicable to current department employees. Accordingly, we do not address the applicability of section 158.203 in this instance.

electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. As we noted above, you state that the applications contained in Exhibit C were all completed by current department employees, and you have not bracketed the work e-mail addresses provided on several of the submitted applications. We agree that those e-mail addresses are not excepted from disclosure under 552.137. However, the e-mail addresses you have bracketed appear to be personal e-mail addresses of department employees who have opted to communicate with the department regarding their applications for the job vacancy via those personal e-mail addresses as opposed to their department e-mail addresses. Based on our review of Exhibit

C, we find that the e-mail addresses you have bracketed must be withheld from disclosure under section 552.137(a), unless the department has received affirmative consent for the release of these e-mail addresses.

In summary, the department may withhold the marked interview questions, the preferred answers and the corresponding responses, pursuant to section 552.122(b) of the Government Code. Further, pursuant to section 552.117(a)(1) of the Government Code, the department must withhold the home addresses and telephone numbers, social security numbers, and family member information of current or former employees who timely elected to keep this information confidential. Finally, the department must withhold the e-mail addresses you have bracketed in Exhibit C under section 552.137(a), unless the department has received affirmative consent for the release of those e-mail addresses. The remaining 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 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,

A handwritten signature in black ink, appearing to read "Cary Grace", written over a horizontal line.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/lmt

Ref: ID#196906

Enc. Submitted documents

c: Ms. Kim Carroll Limberg
1910 Cartwright
Irving, Texas 75062
(w/o enclosures)