



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 25, 2004

Mr. Mark G. Mann  
Assistant City Attorney  
City of Garland  
P. O. Box 469002  
Garland, Texas 75046-9002

OR2004-5213

Dear Mr. Mann:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 204248.

The City of Garland (the "city") received a request for information pertaining to the requestor's civil service testing. You inform us that the city has released most of the requested information but claim that other requested information is excepted from disclosure under section 552.122 of the Government Code. We also understand you to assert that the information you seek to withhold is excepted from disclosure under section 552.101. We have considered your arguments and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You contend that the information at issue is subject to "an implied right of confidentiality." In support of your contention you cite Open Records Decision No. 353 (1982) in which this office held that the City of College Station could withhold information from a master electrician's licensing exam on the theory that "the authority to conduct an examination 'necessarily includes the authority to maintain the confidentiality of the questions used to test the knowledge of the person examined.'" Open Records Decision No. 353 (1982) (quoting Open Records Decision No. 118 (1976); citing Attorney General Opinion H-242 (1974)).

However, in Open Records Decision No. 543 (1990), this office addressed a similar implied confidentiality argument regarding test items and concluded that "[t]he absence of a specific . . . statute or rule mandating confidentiality of . . . materials precludes a finding that the materials are excepted by [the predecessor to section 552.101.]" Open Records Decision No. 543 at 2; *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality

provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality). In that decision this office also concluded that Open Records Decision No. 353 was superceded by the adoption of an exception that explicitly applies to test items. *See* Open Records Decision No. 453 at 3 (noting that legislative intent in adopting predecessor to section 552.122 was to codify policy expressed in prior attorney general opinions); *see also* Open Records Decision No. 626 at 4-6 (1994) (fact that section 552.122 expressly excepts test items from disclosure removes need to address whether test items are made implicitly confidential). Therefore, the proper analysis in this instance is whether section 552.122 applies to the information at issue, and we will consider whether you have established the applicability of that exception.

Section 552.122 of the Government Code 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. Open Records Decision No. 626 at 6 (1994). 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) (construing statutory predecessor). 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); ORD 626 at 8.

You inform us that the city uses standardized testing as part of its hiring process and inform us that questions are reused. You contend that the submitted information “results in a key for the test” and that its release would undermine the effectiveness of the testing process. The information at issue in this instance consists of a four-part Scantron answer sheet. You have not submitted the corresponding questions. The Scantron sheets do not contain the questions or answers at issue and give no indication as to the nature of the questions or answers at issue. We therefore find that the submitted information does not consist of test items, and it may not be withheld under section 552.122. Because the claimed exception does not apply and the submitted information is not otherwise confidential by law, you must release the submitted records.

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).

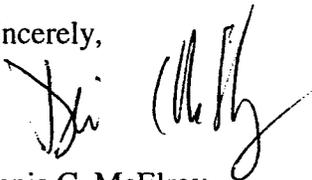
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/krl

Ref: ID# 204248

Enc. Submitted documents

c: Mr. Roger L. Bass  
1427 Glenwick Drive  
Rockwall, Texas 75032  
(w/o enclosures)