



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 23, 2004

Ms. Carol Longoria
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2004-6160

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205714.

The University of Texas System (the "university") received two requests for information related to promotions within the university's police departments. You state that you will provide the requestor with some of the requested information. You state that the university is withholding portions of the requested information pursuant to a previous determination issued to the university's police department in Open Records Letter No. 2002-0160 (2002). *See* Gov't Code § 552.301(a); *see also* Open Records Decision No. 673 at 6-9 (2001) (delineating instances in which attorney general decision constitutes previous determination under Gov't Code § 552.301). You claim, however, that the remaining requested information is excepted from disclosure under sections 552.101, 552.104, 552.108, 552.111, 552.117, 552.122 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted sample of information.¹

You contend that the Promotional Exam in Tab 9 is 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

¹ We 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.

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).

You state that “all police officers testing for promotion to captain would take this same exam.” You also state that “this particular exam is maintained by the [university] because it was used for the past two years.” You assert that the questions and answers are excepted from disclosure under section 552.122(b). Having considered your arguments and reviewed the information at issue in Tab 9, we agree that the submitted questions constitute “test items” as contemplated by section 552.122(b). We also find that the answers to these questions may reveal the questions themselves. Accordingly, the university may withhold these questions and answers in Tab 9 pursuant to section 552.122(b) of the Government Code.²

Second, you assert that a portion of the remaining submitted information is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts from public disclosure “information that, if released, would give advantage to a competitor or bidder.” Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). The information you have submitted does not pertain to a particular, on-going competitive bidding situation, but instead relates to employee promotions. Accordingly, we find that the university is not engaged in a competitive situation for the purposes of section 552.104 of the Government Code. *See* Open Records Decision Nos. 592 at 8 (1991), 541 at 5 (1990).

Section 552.104 also protects a governmental body’s interests in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the

² As we are able to make this determination, we need not address your remaining arguments against disclosure for this information.

marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. First, the governmental body must demonstrate that it has specific marketplace interests. *Id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *Id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *Id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You argue that the university has “a marketplace interest in protecting the time and training investment we make in our employees.” You also argue that “[i]f information regarding promotional rankings were to be released while this information was still in active use for internal promotion decisions, this could put [the university] at a disadvantage in the marketplace relative to other employers by disrupting its internal decision making process regarding promotions.” Having considered your arguments, we find that you have failed to establish that the university competes in a marketplace when promoting university employees. *See generally* Open Records Decision No. 604 (1992) (concluding, among other things, that State Bar could not avail itself of this aspect of Gov’t Code § 552.104 because its “guiding principles” were incompatible with an ethic of marketplace competition). We, therefore, conclude that the university may not withhold any portion of the remaining submitted information under section 552.104 of the Government Code.

You next contend that a portion of the remaining submitted information is excepted from disclosure under section 552.108(b) of the Government Code. This section provides:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

Gov’t Code § 552.108(b)(1). Generally, a governmental body claiming section 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You argue that disclosure of the requested documents “would interfere with law enforcement because they contain the results of promotional examinations administered to the [university] officers.” You also contend that “[p]remature disclosure of the responsive documents could interfere with law enforcement by undermining decision makers’ objectivity in choosing the most qualified candidates for promotion.” Upon careful review of your arguments and the

submitted information, we find that the university has failed to show that the release of the information at issue would interfere with law enforcement or crime prevention. *See* Gov't Code § 552.108(b)(1); *see also* *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet. h.), (Gov't Code 552.108(b)(1) exception intended to protect information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine law enforcement efforts), Open Records Decision No. 508 at 4 (1988). Therefore, the university may not withhold any of the submitted information under section 552.108 of the Government Code.

You also assert that portions of the remaining submitted information are excepted from disclosure under section 552.111 of the Government Code. This section excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

You state that the information in question “contains interagency and intra-agency communications utilized by key decision makers at the [university] and its component institutions regarding which applicants to consider for police officer promotion.” Upon review of this information, we find that it concerns purely internal administrative or personnel matters and does not reflect the policymaking processes of the university. Consequently, the university may not withhold any of the submitted information under section 552.111 of the Government Code.

Further, you contend that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(a)(2) excepts from disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of a peace officer regardless of

whether the officer requests confidentiality under section 552.024 or 552.1175.³ Gov't Code § 552.117(a)(2). Based on our review of the remaining submitted information, we conclude that the university must withhold the information that we have marked pursuant to section 552.117(a)(2) of the Government Code.⁴

Additionally, you claim that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Based on our review of the remaining submitted information, we conclude that the university must withhold the Texas motor vehicle information that we have marked pursuant to section 552.130 of the Government Code.

Finally, we note that portions of the remaining submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the common-law right to privacy. Information must be withheld from disclosure under the common-law right to privacy when it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683.

Prior decisions of this office have found that the following types of information are protected from disclosure under the common-law right to privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history); certain personal choices relating to financial transactions between the individual and the governmental body, *see* Open Records Decision No. 600 (1992) (designation of beneficiary of employee's retirement benefits and

³ "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

⁴ As we are able to make this determination, we need not address your arguments under section 552.1175 of the Government Code for this information.

optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care); information concerning the intimate relations between individuals and their family members, *see* Open Records Decision No. 470 (1987); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). Based on our review of the remaining submitted information, we find that portions of this information, which we have marked, are protected from disclosure under the common-law right to privacy and, thus, must be withheld pursuant to section 552.101 of the Government Code.

In summary, the university may withhold the questions and answers in Tab 9 pursuant to section 552.122(b) of the Government Code. The university must withhold the information that we have marked pursuant to sections 552.117(a)(2) and 552.130 of the Government Code. The university must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with the common-law right to privacy. The remaining information must be released 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,



Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/seg

Ref: ID# 205714

Enc. Submitted documents

c: Mr. Gregory B. Cagle
Cagle & McCumber
215 East Galveston Street
League City, Texas 77573
(w/o enclosures)