



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 22, 2005

Mr. Michael P. Mondville
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2005-02429

Dear Mr. Mondville:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 220503.

The Texas Department of Criminal Justice (the "department") received a request for interview questionnaires for nine separate postings of employment opportunities within the department. You claim that the requested information is excepted from disclosure under section 552.122 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the department's obligations under the Act. Under section 552.301(b), a governmental body that wishes to withhold information from public disclosure must request a ruling from this office not later than the tenth business day after the date of receiving the written request. Within fifteen days of receiving the request, the governmental body must submit to this office (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D).

You state that the department received the requestor's request for information on December 29, 2004. You also state, and provide documentation showing, that the department asked the requestor to clarify his request on January 6, 2005, with respect to four of the job postings that it could not otherwise identify. *See* Gov't Code § 552.222. Thus, the ten business day time period to request a decision from our office under section 552.301(b) with respect to these four job postings was tolled on the date you sought clarification from the requestor. *See* Gov't Code § 552.301(b); *see also* Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). You state that the department received clarification on January 12, 2004, and that the department was able to identify one additional job posting, 045109JH, as a result of the clarification. Accordingly, we conclude that the ten business day time period for requesting a decision from our office with respect to the clarified information resumed on January 13, 2005. Thus, the deadline for submitting a request to our office regarding this information was January 20, 2005. You submitted your request for decision to our office on January 21, 2005. Consequently, the department failed to comply with section 552.301 of the Government Code in requesting a decision from our office with respect to job posting number 045109JH.

A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or third party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.122 of the Government Code is a discretionary exception under the Act and does not demonstrate a compelling reason to withhold information from the public. *See* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Thus, the submitted information concerning job posting number 045109JH may not be withheld under section 552.122 of the Government Code.

Regarding the request for the three remaining job postings that the department has not been able to identify and for which it also sought clarification, you inform us that the department had not yet received a response to its request for clarification of these job postings as of the date you requested this ruling. Accordingly, we conclude that the department need not respond to the request for the interview questionnaires related to these three job postings until it receives the requestor's clarification. We note, however, that when the department does receive the clarification, it must seek a ruling from us before withholding from the requestor any information that may be responsive to this portion of the request. *See* Open Records Decision No. 663 (1999) (providing for tolling of ten business day deadline for requesting attorney general decision while governmental body awaits clarification).

Next, we note that the submitted information contains the applicants' social security numbers. This office recently issued Open Records Letter No. 2005-01067 (2005), which serves as a previous determination under section 552.301(a) of the Government Code for the department with respect to the social security numbers of living current or former department employees. Therefore, pursuant to that previous determination, the department must withhold the social security numbers of living current or former department employees under section 552.117(a)(3) of the Government Code. Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when elements of law, fact, and circumstances have not changed, decision concludes specific, clearly delineated category of information is exempted, and governmental body is explicitly informed it need not seek a decision from this office to withhold information in response to future requests).

The social security numbers individuals who are not current or former employees of the department may be confidential under federal law and therefore exempted from disclosure under section 552.101 of the Government Code.¹ Section 552.101 exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), 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 id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore exempted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

We now address your claim under section 552.122 with respect to the remaining submitted information. Section 552.122(b) of the Government Code exempts 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). Section 552.122 also protects

¹The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). Having considered your arguments and reviewed the submitted information, we find all of the interview questions related to job posting numbers 029339E2, 029339GR, 019099E1, and 019099CN, and questions 1, 2, and 3 of job posting number 029159NF qualify as test items under section 552.122(b). We therefore determine the department may withhold all questions related to job posting numbers 029339E2, 029339GR, 019099E1, and 019099CN, and questions 1, 2, and 3 of job posting number 029159NF, along with the recommended responses and applicants' responses, pursuant to section 552.122(b). The remainder of the submitted information does not qualify as test items and may not be withheld under section 552.122.

In summary, the department must withhold social security numbers of current and former department employees pursuant to section 552.117(a)(3) of the Government Code in accordance with the previous determination issued in Open Records Letter No. 2005-01067. The social security numbers individuals who are not current or former department employees may be confidential under federal law. The department may withhold all questions related to job posting numbers 029339E2, 029339GR, 019099E1, and 019099CN, and questions 1, 2, and 3 of job posting number 029159NF, along with the recommended responses and applicants' responses, pursuant to section 552.122(b). The remaining submitted 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 220503

Enc. Submitted documents

c: Mr. Morris D. Jones
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(w/o enclosures)