



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 21, 2005

Mr. Scott Kelly  
Deputy General Counsel  
Texas A&M University System  
200 Technology Way, Suite 2079  
College Station, Texas 77845-3424

OR2005-06528

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 229243.

Texas A&M University at Galveston (the "university") received a request for the personnel files of five named individuals, exams and syllabi used by two named professors during a specified period, and "2004 forms 4G for the [university] math faculty." You indicate that the requested syllabi will be released. You have not submitted the requested personnel files, nor do you indicate that the university seeks to withhold this information. We therefore assume that the university has released the requested personnel files, to the extent they exist. If not, you must release this information immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). You claim that the submitted exam 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. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that member of public may submit comments stating why information should or should not be released).

As a preliminary matter, the requestor indicates that the requested exam information has previously been publicly available. Thus, we understand the requestor to argue that the university has waived its claim under section 552.122 by previously releasing the requested information to the public. *See* Open Records Decision No. 463 (1987) (governmental body

can waive discretionary exceptions to disclosure by selective disclosure of information); *see also* Gov't Code § 552.007 (prohibiting selective disclosure of information). The university did not respond to the requestor's contention. We note that whether the specific exams at issue have previously been released to the public is a question of fact that this office cannot resolve in the open records ruling process. *See* Open Records Decision Nos. 554 (1990), 552 (1990). Under these circumstances, we must rule in the alternative: to the extent the university has previously released the specific exams at issue in the present request, the university may not withhold the exams under section 552.122 and must release them to the requestor. However, to the extent the exams have not previously been released, we will address the university's claim under section 552.122.

Section 552.122(b) of the Government Code 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). This office has generally found section 552.122 to apply in cases 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). Upon review, we agree that the submitted exam information consists of "test items" as contemplated in section 552.122. Accordingly, to the extent the submitted exam information has not previously been released to the public, it may be withheld at this time pursuant to section 552.122(b) of the Government Code.

In summary, to the extent the submitted exam information has not previously been released to the public, the department may withhold it at this time pursuant to section 552.122(b) of the Government Code. To the extent the submitted information has been released to the public, however, it is not excepted from disclosure under section 552.122 and must be released. The university must release the remainder of the requested 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, 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 ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

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Enc: Submitted documents

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(w/o enclosures)