



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 25, 2005

Ms. Stephanie Bergeron Perdue
Director, Environmental Law Division
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2005-06633

Dear Ms. Perdue:

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# 228704.

The Texas Commission on Environmental Quality (the "commission") received a request for the requestor's Wastewater III tests taken in May, 2004 and March, 2005, including the tests taken, answer sheet, and actual answers. You claim that the requested information is excepted from disclosure under section 552.122 of the Government Code.¹ We have considered the exception you claim and have reviewed the information you submitted.²

Section 552.122 of the Government Code excepts from public 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

¹Although you initially also raised section 552.101 of the Government Code, you have submitted no arguments in support of that exception. Accordingly, we do not address section 552.101. See Gov't Code § 552.301(e).

²To the extent that the submitted information is a representative sample of the requested information, this letter ruling assumes that the submitted information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the commission to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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. *Id.* at 6. 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 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).

You inform us that the submitted information consists of testing materials that are used on a recurring basis. You assert that the release of this information would compromise the licensing process. In support of your claim under section 552.122, you also point out that under section 37.007(d) of the Water Code, the commission has provided the requestor with an analysis of his performance on the examinations to which the submitted information pertains. Section 37.007(d) provides that

[i]f requested in writing by a person who fails a licensing examination administered under this chapter, the commission, within a reasonable time, shall provide the person with an analysis of the person’s performance on the examination. The commission shall ensure that an examination analysis does not compromise the fair and impartial administration of future examinations.

Water Code § 37.007(d). You further state that, therefore, release of the requested answer sheets “would be contrary to [Water Code s]ection 37.007(d).” We note, however, that information may not be withheld from the public by negative implication simply because a statute designates other specific information as being public information. *See* Open Records Decision No. 525 at 4 (1989). Thus, the commission must also release the requested tests taken, answer sheet, and actual answers unless an exception to disclosure is shown to be applicable. Having considered all of your arguments and reviewed the submitted information, we find that the examination questions qualify as test items under section 552.122(b). We therefore conclude that the commission may withhold the examination questions under section 552.122 of the Government Code. We otherwise note that the remaining information consists of Scantron answer sheets and the corresponding answer key. These documents neither contain the examination questions and answers nor provide any indication of the nature or content of the examination questions and answers. We therefore conclude that the commission may not withhold any of the information contained in the answer sheets or the answer key under section 552.122.

We also note, however, that the answer sheets appear to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not

required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary: (1) the commission may withhold the examination questions under section 552.122 of the Government Code; (2) the rest of the submitted information must be released; and (3) information that is protected by copyright must be released in accordance with copyright law.³

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).

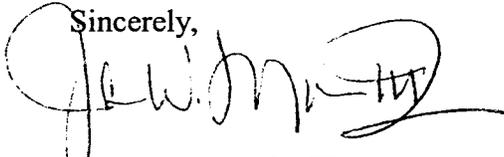
³We note that the commission would be required to withhold some of the remaining information from the public. In this instance, however, the requestor has a special right of access to the information in question under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a). Should the commission receive another request for this information from a person who would not have a right of access, the commission should resubmit this same information and request another ruling. *See id.* §§ 552.301(a), .302.

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,

A handwritten signature in black ink, appearing to read 'J.W. Morris III', written over a large, faint circular stamp or watermark.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 228704

Enc: Submitted documents

c: Mr. Marshall W. Crow
6457 Old Buena Vista Road
Waxahachie, Texas 75167
(w/o enclosures)