



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 28, 2008

Mr. Frank DiTucci  
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OR2008-05702

Dear Mr. DiTucci and Ms. Juarez:

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# 307205.

The Polygraph Examiners Board (the "board") received a request from the Texas Department of Public Safety ("DPS") for all documents related to the scenario test portion of the State licensing exam for the last five years, including exam instructions, exams, grading sheets, grading criteria, and correspondence relating to the exams. You claim that the submitted information is excepted from disclosure under sections 552.117, 552.1175, 552.119, 552.122, 552.130, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>1</sup> We have also considered comments submitted by DPS. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address the board's obligations under the Act. Pursuant to section 552.301(b), a governmental body that receives a request for information that it wishes to withhold must ask for an attorney general's decision and state the exceptions that apply

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<sup>1</sup>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.

within ten business days of receiving the request. *See* Gov't Code § 552.301(a), (b). Under section 552.301(e), a governmental body receiving a request for information that the governmental body wishes to withhold pursuant to an exception to disclosure under the Act is required to submit to this office within fifteen business days of receiving the request (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. *Id.* § 552.301(e).

The board acknowledges it received this request on September 25, 2007. Thus, if the board sought to withhold the requested information from public disclosure, it was required to seek a ruling from this office by October 9, 2007. Instead, by letter to DPS dated October 10, 2007, the board unilaterally denied the request for information without seeking a ruling from this office. Although it appears from correspondence that the board and DPS continued to discuss the request, the board did not provide the requestor with any documents. Accordingly, if the board sought to withhold the requested information from public disclosure, it was required to seek a ruling from this office within ten business days of receiving the request unless this office had issued a previous determination allowing the requested information to be withheld without the necessity of requesting a decision. Gov't Code § 552.301(a), (b).

The board asserts that this office, in Attorney General Opinion JM-640 (1987), issued a previous determination allowing it to withhold the information that is has marked, which includes portions of the test instructions, written questions, answer sheets, scenarios, and grading comments, among other things, without the necessity of requesting a decision from this office. Accordingly, we must determine whether Attorney General Opinion JM-640 constitutes a previous determination to the board.

In Open Records Decision No. 673 (2001), we set forth the circumstances under which, pursuant to section 552.301(a) of the Government Code, a governmental body could rely on a ruling from this office as a previous determination. Open Records Decision No. 673 clarified the two types of previous determinations. Based on the board's arguments and our review, we understand the board to argue that Attorney General Opinion JM-640 is the second type of previous determination. The second type of previous determination requires that all of the following criteria be met:

1. the information at issue falls within a specific, clearly delineated category of information about which this office has previously rendered a decision;
2. the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested;

3. the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act;
4. the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required disclosure; and
5. the previous decision explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office.

Open Records Decision No. 673 at 7-8 (2001). This office does not consider "test items" to be a clearly delineated category of information. Because of the breadth of information that can be considered a "test item," this office determines on a case-by-case basis whether or not specific information is a "test item." See Open Records Decision No. 626 (1994). In addition, Attorney General Opinion JM-640, discusses whether the board could withhold questions and answers to its oral examination questions. Thus, the specific information considered in Attorney General Opinion JM-640 was the board's oral examination questions and answers, not all of the board's examinations. In this instance, the board seeks to withhold portions of the test instructions, written questions, answer sheets, scenarios, grading comments, and other information it has marked as "test items." Thus, not only did Attorney General Opinion JM-640 discuss different information, but the board is applying the opinion to a much broader scope of information which it now seeks to withhold. Therefore, neither the first nor third criterion for a previous determination of the second type was met in Attorney General Opinion JM-640. Finally, as Attorney General Opinion JM-640 did not explicitly provide that the board may withhold the information without the necessity of again seeking a decision from this office, we conclude that the fifth criterion for a previous determination of the second type was not met in Attorney General Opinion JM-640. Therefore, Attorney General Opinion JM-640 does not constitute a previous determination to the board to withhold test items without the necessity of requesting a ruling from this office.

However, even if Attorney General Opinion JM-640 was a previous determination at the time it was issued, criterion number four of Open Records Decision No. 673 clearly states that a previous determination can only be relied upon if the elements of law, fact, and circumstances supporting the decision's conclusion that the information is or is not excepted from required disclosure have not changed. ORD 673 at 7-8. Attorney General Opinion JM-640 was issued on February 27, 1987. Although this decision provides no legal basis to withhold the test items, it appears that the opinion followed prior rulings that test items were confidential under the predecessor to section 552.101 of the Government Code as information that was implicitly confidential by law. See, e.g. Attorney General Opinions JM-640; H-242 at 5 (1974) (holding that the Board of Vocational Nurse Examiners could withhold under section 552.101 examinations it was statutorily required to administer to applicants for licensure); Open Records Decision Nos. 353 (1982) (holding that a city ordinance requiring any person "desiring to qualify for a 'master electrician's license'" to

take and pass a particular examination implied the authority to withhold the examination questions from public disclosure); 118 (1976) (applying the policy of "implied confidentiality" to bring Merit System Council competitive examinations within the protection of section 552.101). In fact, at the time of the issuance of Attorney General Opinion JM-640, there was no statutory exception for test items. On June 20, 1987, the Legislature enacted section 3(a)(21), article 6252-17a, V.T.C.S., (which was later renumbered as section 3(a)(22) and is now codified as section 552.122) to the Act. Section 552.122(a) of the Government Code, which contains the original enactment of the test items exception, states "a test item developed by an educational institution that is funded wholly or in part by state revenue is excepted from the requirements of [public disclosure]." Gov't Code § 552.122(a). This original provision only applied to state educational institutions. However, in 1989, the Legislature amended the predecessor to section 552.122 of the Government Code, to add an exception for "a test item developed by a licensing agency or governmental body." Gov't Code § 552.122(b). By enacting section 552.122, the Legislature clearly intended to do away with this office's implied confidentiality determinations and to expressly except test items from required public disclosure. Therefore, the implied confidentiality determination upon which the oral examinations were withheld in Attorney General Decision JM-640 is no longer the law with respect to test items. As such, even if Attorney General Opinion JM-640 was a previous determination at the time it was issued, criterion four for a previous determination of the second type is not met in this instance.

Because we determined Attorney General Opinion JM-640 is not a previous determination, if the board sought to withhold any requested information, it was required to seek an attorney general's decision and state the exceptions that apply within ten business days after receiving the requests. *See* Gov't Code § 552.301(a), (b). As previously stated, the board received the original request for information on September 25, 2007. Accordingly, the board was required to request a ruling on all of the information within ten business days of receiving that request. However, the board withheld all of the requested information from DPS and did not request a ruling from this office until February 7, 2008. Thus, we find that the board failed to comply with the requirements mandated by section 552.301.<sup>2</sup>

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body

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<sup>2</sup>DPS sent a complaint letter to this office dated December 3, 2007, which it copied to the board's executive director and legal counsel, both of whom were familiar with the request. In the complaint letter DPS states, "we seek [this office's] assistance in compelling the immediate production of all records sought in the original [DPS] request." However, the board contends that DPS withdrew its request for the test questions and scenarios and did not re-assert its request for this information until its January 28, 2008, letter to the board. We disagree. However, we need not address this issue because we have already determined that the board violated section 552.301 with respect to the request for information.

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). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Section 552.122 of the Government Code is discretionary in nature; it serves only to protect a governmental body's interests and may be waived. *See Gov't Code* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000), 663 at 5 (1999). As such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. Therefore, the board may not withhold any of the requested information under section 552.122 of the Government Code. However, we will address the board's claims under sections 552.117, 552.1175, 552.119, and 552.137 of the Government Code which can provide compelling reasons for non-disclosure under section 552.302.<sup>3</sup>

We note that some of the submitted information is subject to section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>4</sup> *Gov't Code* § 552.101. This section encompasses information made confidential by other statutes, such as Chapter 560 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See Gov't Code* §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the board must withhold the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security number, and family member information of a peace officer, regardless of whether the officer elected under section 552.024 or section 552.1175

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<sup>3</sup>By letter dated February 13, 2008, DPS informed this office that it no longer sought social security numbers, driver's license numbers, home addresses, and family information of the interns applying to take the examinations. Therefore, social security numbers, driver's license numbers, home addresses, and family information are not responsive to the request. Because DPS excluded information subject to sections 552.130 and 552.147 of the Government Code, we do not consider these exceptions. However, because the board seeks to exclude more information than home addresses and family member information under sections 552.117 and 552.1175 of the Government Code, we will consider the board's arguments as to this information.

<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Open Records Decision* Nos. 481 (1987), 480 (1987), 470 (1987).

of the Government Code to keep such information confidential. *See* Gov't Code § 552.117(a)(2). As we discussed above, the requestor excluded social security numbers, home addresses, and family member information from the request. We note, however, that the post office box numbers you have marked do not constitute "home addresses" for purposes of section 552.117 or section 552.1175, and must be released.<sup>5</sup> The only remaining responsive information subject to section 552.117 are home telephone numbers. We note that the protection of section 552.117 is applicable only to information that a governmental body holds in its capacity as an employer. *See id.* § 552.117 (providing that employees of governmental entities may protect certain personal information held by their employers); *see also id.* § 552.024 (establishing procedure for the election of personal information by employees and officials). In this instance, it does not appear that the interns applying to take the examinations are employed by the board. Additionally, even if some of the interns were employees of the board at the time of their application to take the examination, the board is holding the intern application files in its capacity as a licensing entity, not an employer. Accordingly, the board may not withhold the information you have marked on the basis of section 552.117(a)(2) of the Government Code.

The board may be required, however, to withhold the home telephone numbers contained in the intern application files of peace officers under section 552.1175 of the Government Code. This section is applicable to "peace officers as defined by Article 2.12, Code of Criminal Procedure." *Id.* § 552.1175(a)(1). Section 552.1175(b) provides as follows:

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

*Id.* § 552.1175(b). As we discussed above, the only remaining responsive information subject to section 552.1175 are home telephone numbers. The board must withhold the home telephone numbers to the extent that the telephone numbers belong to currently licensed peace officers who elect to restrict access to this information in accordance with

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<sup>5</sup>*See generally*, Open Records Decision No. 622 at 4 (1994) (purpose of confidentiality provision excepting public employee's personal information from required disclosure is to protect them from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)).

section 552.1175(b). If the board does not receive the appropriate elections, the home telephone numbers of these peace officers must be released.

Next, we consider your assertion that the photographs of police officers contained in your intern application files are excepted from disclosure under section 552.119 of the Government Code. Section 552.119 provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph excepted from disclosure under Subsection (a) may be made public only if the peace officer gives written consent to the disclosure.

Gov't Code § 552.119. Under section 552.119, a governmental body must demonstrate that release of the photograph would endanger the life or physical safety of a peace officer. Although you assert that many of the intern application files contain photographs of peace officers as defined by Article 2.12, you have not submitted any arguments explaining how release of the photographs would endanger the depicted peace officers. We therefore determine that the board may not withhold the photographs under section 552.119 of the Government Code.

Finally, section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address contained in the submitted documents, which we have marked, is not specifically excluded by section 552.137(c). Therefore, unless the individual whose e-mail address is at issue consented to release of his e-mail address, the board must withhold it in accordance with section 552.137 of the Government Code.

In summary, the board must withhold 1) the fingerprints we have marked under section 552.101 in conjunction with section 560.003 of the Government Code; 2) the home telephone numbers to the extent that the telephone numbers belong to currently licensed

peace officers who elect to restrict access to this information in accordance with section 552.1175(b) of the Government Code; and 3) the e-mail address we have marked under section 552.137 of the Government Code, unless the individual whose e-mail address is at issue consented to its release. The remaining responsive information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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 Office of the Attorney General 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. 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,



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LER/jb

Ref: ID# 307205

Enc. Submitted documents

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