



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 15, 2010

Mr. Hyattye O. Simmons
General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2010-03647

Dear Mr. Simmons:

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# 373896 (ORR DART #7112).

Dallas Area Rapid Transit ("DART") received a request for all documentation of the interviewed candidates for two specified positions, including interviews, evaluations, and e-mails. You claim that the submitted information is excepted from disclosure under section 552.122 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Section 552.122(a) excepts from disclosure "[a] test item developed by an educational institution that is funded wholly or in part by state revenue[.]" Gov't Code § 552.122(a). Section 552.122(b) excepts from disclosure "[a] test item developed by a . . . governmental body[.]" *Id.* § 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. *Id.* at 6. The

¹We 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.

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); ORD 626 at 8.

You seek to withhold interview questions and answers, the inbox assessment/in-tray assessment exercises, and candidate selection summaries under section 552.122. You contend that the release of this information would cause DART to become disadvantaged in retaining qualified employees by disclosing its methodology for testing. You also assert that the release of this information would be detrimental to future interview processes because the questions and answers would provide an unfair advantage to future applicants and would impair DART’s ability to evaluate a qualified applicant. Because you acknowledge that DART is a governmental unit operating a regional public transit system, and not “an educational institution . . . funded wholly or in part by state revenue,” we find that section 552.122(a) is not applicable to any of the information at issue. Having reviewed the submitted information, we find that the inbox assessment/in-tray assessment exercises, which we have marked, evaluate the applicant’s specific knowledge or ability in a particular area, thus qualifying as “test items” under section 552.122(b) of the Government Code. We also find that release of the answers to these test items would tend to reveal the questions themselves. Therefore, DART may withhold this information pursuant to section 552.122(b). However, we find the remaining information consists of general questions and information evaluating an applicant’s individual abilities, personal opinions, and subjective ability to respond to particular situations, and does not test any specific knowledge of an applicant. Accordingly, the remaining information is not excepted from disclosure under section 552.122 of the Government Code.

We note the remaining information includes an application that contains an e-mail address, which we have marked. Section 552.137 of the Government Code 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). Gov’t Code § 552.137(a)-(c). The e-mail address we have marked is not specifically excluded by section 552.137(c). Therefore, unless the owner of the e-mail address has consented to its release, DART must withhold the e-mail address we have marked under section 552.137.²

²We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Finally, we note the submitted application is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person 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 (1990). Thus, any copyrighted information may only be released in accordance with copyright law.

In summary, DART may withhold the questions we have marked, as well as the model and actual answers to these questions, under section 552.122(b) of the Government Code. Unless it has received consent for its release, DART must withhold the e-mail address we have marked under section 552.137. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/dls

Ref: ID# 373896

Enc. Submitted documents

c: Requestor
(w/o enclosures)