



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2010

Mr. Charles Wallace
Assistant City Attorney
City of New Braunfels
P.O. Box 311747
New Braunfels, Texas 78130

OR2010-05604

Dear Mr. Wallace:

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# 376404.

The City of New Braunfels (the "city") received a request for 1) a list of personnel promoted within the city's police department since June 2007, including the dates of the promotion and testing scores, and 2) a copy of the testing and scoring criteria for four specified police department positions. You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.111 and 552.122 of the Government Code. You state release of the information may implicate the proprietary interests of a third party. Accordingly, you provide documentation showing that you notified Goad & Associates ("Goad"), the interested third party, of the city's receipt of the request for information and of the company's right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Goad. We have considered the submitted arguments and reviewed the submitted information.¹

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.

Initially, you contend that the information you have submitted for our review may not be responsive to the instant request because “the city is in possession of no documentation which directly addresses the criteria used in developing the tests and scoring the tests administered [to people in the city’s police department.]”² The Act does not require a governmental body to make available information that did not exist when the request was received nor does it require a governmental body to compile information or prepare new information. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.— San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). However, a governmental body is required to make a good-faith effort to relate a request to information that it holds. See Open Records Decision No. 561 at 8 (1990) (construing statutory predecessor). The submitted multiple choice exam, assessment centers, and presentation exercises appear to relate to the request for “testing and scoring criteria.” Thus, because you have submitted this information for our review and submitted arguments against the disclosure of these documents, we consider the city to have made a good faith effort to identify information that is responsive to the request. Therefore, we will consider the arguments regarding the submitted information.

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. ORD 626 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 answer might reveal the questions themselves. See Attorney General Opinion JM-640 at 3 (1987); ORD 626 at 8.

You seek to withhold the information at issue in its entirety under section 552.122 of the Government Code. You explain the city expended “substantial expense” in the development of the tests and exercises at issue. You argue that the release of this information would compromise the effectiveness of future examinations. You also state that the city reuses the tests and exercises at issue. Having considered your arguments and reviewed the submitted information, we find the information we have marked qualifies as test items, and the city may withhold this information under section 552.122(b).³ However, we find the remaining

²We note that in the future, if the city receives a request that it considers overly broad or ambiguous, then the city should ask the requestor to clarify or narrow the request. See Gov’t Code § 552.222(b).

³As our ruling for this information is dispositive, we need not address the remaining arguments against its disclosure.

information consists of general questions and information evaluating an applicant's individual abilities, personal opinions, and subjective ability to respond to particular situations, and overall suitability for employment 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.

You also argue the remaining information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App. — San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

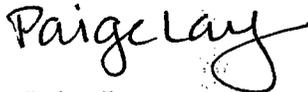
In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.— Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982). Upon review of your arguments and the remaining information, we find you have failed to demonstrate, and the information does not reflect on its face, that this information consists of advice, recommendations, or opinions that pertain to policymaking. Accordingly, we find that none of the remaining information is excepted from disclosure under section 552.111, and it may not be withheld on that basis.

In summary, the city may withhold the information we have marked under section 552.122 of the Government Code. The remaining information must be released.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 374606

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

cc: Janet Goad
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(w/o enclosures)