



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 15, 2010

Mr. Dennis J. Eichelbaum
Schwartz & Eichelbaum
5300 Democracy Drive, Suite 200
Plano, Texas 75024

OR2010-10534

Dear Mr. Eichelbaum:

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# 386752.

The Lovejoy Independent School District (the "district"), which you represent, received a request for documents containing scores, scoring criteria, and responses for pre-screening questionnaires and telephone interviews used in hiring a district physics teacher during a specified period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

You assert the submitted pre-screening and telephone interview questions and their corresponding model answers are excepted from disclosure under section 552.122 of the Government Code. This section excepts from 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" 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. *Id.* at 6. Section 552.122 also protects the answers to test questions when the answers

¹We assume 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.

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

You state the interview questions are administered to district teaching applicants to "determine their teaching judgment." Upon review, the submitted interview questions evaluate applicants' individual abilities, personal opinions, and subjective ability to respond to a particular situation. They do not, however, test any specific knowledge of an applicant. Accordingly, the submitted interview questions and their corresponding model answers may not be withheld from disclosure under section 552.122 of the Government Code.

You also claim the interview questions and model answers are excepted under 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." This section encompasses information protected by other statutes. This section encompasses section 21.355 of the Education Code, which provides, "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.*

You contend the submitted interview questions and model answers are used to evaluate applicants for a teaching position to determine their suitability for employment. You argue that, because section 21.355 does not explicitly state teachers' evaluations must evaluate the classroom performance of current employees, the submitted interview questions and model answers are confidential under that section. However, based on the reasoning set out in Open Records Decision No. 643, the plain language of subchapter H of chapter 21 of the Education Code, and this office's consistent interpretation of section 21.355, we find the part of section 21.355 directed at teachers is designed to protect documents that evaluate the performance of teachers *as teachers*. *See* ORD 643 at 5; *cf.* Educ. Code §§ 21.351 (criteria on which to appraise the performance of teachers must be based on observable, job-related behavior), .353 (teachers shall be appraised only on basis of classroom teaching performance and not in connection with extracurricular activities). Consequently, because the submitted interview questions and model answers are used to screen job applicants and not to evaluate teachers' performance while teaching, we conclude the submitted information is not confidential under section 21.355 of the Education Code. Thus, this information may not be withheld under section 552.101 of the Government Code.

Finally, you claim the submitted information is excepted under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in certain

competitive situations. See Open Records Decision No. 609 at 2 (1992); 592 at 8 (1991). You claim the submitted information relates to a competitive situation because interviewed applicants are competing for a limited number of teaching positions. However, this office has consistently interpreted section 552.104 to apply in competitive bidding and procurement situations. See, e.g., Open Records Decision Nos. 604 at 1 (1992), 593 at 1 (1991) (statutory predecessor to section 552.104 "designed to protect governmental interests in commercial transactions"), 592 at 5 (1991), 583 at 3 (1990) (statutory predecessor to section 552.104 did not restrict access to information because it might be commercially useful to requestor), 568 at 2 (1990), 541 at 3 (1990), 514 at 1 (1988) (statutory predecessor to section 552.104 protects governmental purchasing interests), 463 at 1-2 (1987) (statutory predecessor to section 552.104 "has been construed to protect the sealed bid process"), 231 (1979) (statutory predecessor not applicable to feasibility study where no actual bidding process was under way). Therefore, in light of this office's prior interpretations of section 552.104, we are not persuaded that a competition among applicants for a position of public employment is a competitive situation contemplated by section 552.104. Cf. ORD 463 at 2 (stating, by analogy, that "competition" between two job applicants seeking one job offered by the state is not a process the statutory predecessor to section 552.104 was intended to protect). Accordingly, we conclude you have failed to demonstrate the applicability of section 552.104 of the Government Code in this instance, and no information may be withheld pursuant to that section. As you raise no further exceptions to disclosure, the submitted information must be released in its entirety.

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/eeg

Ref: ID# 386752

Enc. Submitted documents

cc: Requestor
(w/o enclosures)