



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 8, 2011

Ms. Evelyn W. Njuguna
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2011-16440

Dear Ms. Njuguna:

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# 435562 (GC Nos. 18874, 18875, and 18876).

The City of Houston (the "city") received requests for the following information: (1) copies of all applications, resumes, and interview questions and responses for five specified positions, as well as the 201 forms pertaining to the successful candidates for those positions; (2) the date when the Community Development Block Grant (the "grant") was awarded; and (3) the names of all employees within the Neighborhood Services Department and Public Services Division whose salary is funded by the grant, the dates that such employees' classifications commenced, and the notice received by these employees of this funding. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released.)

Initially, you inform us that the Human Resources Department (the "department") "is not the custodian of records for a portion of the requested information."² It is not clear from your

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.

²We note your brief does not specify what information is at issue in the department's statement.

statement whether you are informing us that the *city* does not maintain the information at issue, or merely whether the *department*, as opposed to some other part of the city, does not maintain it. We note that the Act does not require the city to answer factual questions, conduct legal research, or create responsive information. Likewise, the Act does not require a governmental body to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds the information on behalf of the governmental body that receives the request. *See id.* § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). Moreover, administrative inconvenience in responding to a request for information under the Act is not grounds for refusing to comply with the request. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976).

Here, the request at issue was received by the city and was not expressly limited to department records. The fact that the requested information might be maintained by a different department or division within the city than the one that received the request does not mean that the request may be dismissed. *Cf.* Attorney General Opinion JM-266 at 3 (1984) (fact that a request for public records might be more appropriately directed to a different governmental body does not mean that it can be dismissed by a governmental body to which it is properly directed). Thus, since you have not provided any information responsive to a portion of the request for review, the city must release such information at this time to the extent such information existed and was maintained by the city on the date the city received the request. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, the requestor asserts he was not timely notified of the city's request for a ruling from this office as required by section 552.301(d) of the Government Code. *See* Gov't Code § 552.301(d) (governmental body must provide requestor with copy of governmental body's written communication to attorney general asking for decision). Pursuant to section 552.302, a governmental body's failure to timely provide the requestor with a copy of its written communication to this office results in the presumption that the information is public. We note the city's request for a decision to the office was timely submitted and shows it was copied to the requestor. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Based on the submitted information, we find the city complied with the procedural requirements of section 552.301(d) in copying the requestor on the correspondence requesting this ruling.

We now turn to your argument under section 552.103 of the Government Code, which provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

This office has long held that for purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982).* Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (1982) (concerning hearing before Public Utilities Commission).* In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See ORD 588.*

You argue the submitted information, which consists of job applications, resumes, interview questions and answers, relates to litigation of a civil nature to which the city is a party. You explain the requestor was laid off from his position with the city, and he has appealed his layoff. You state that, pursuant to section 14-144 of the city's Code of Ordinances, the city's Civil Service Commission (the "commission") is "charged with reviewing the layoff process

that causes the layoff of any permanent employee.” You further explain that under section 14-191 of the city’s Code of Ordinances the commission has the power to administer oaths, subpoena, require the attendance of witnesses, and require the production of certain items, and examine witnesses under oath. However, you also inform this office that section 14-144 provides that the layoffs reviewed and sustained by the commission are final and not subject to any other administrative recourse, review, or appeal process. Furthermore, the supporting documents you provided do not reflect the grievant has the opportunity to appeal the commission’s decision to any higher adjudicative authority, such as a district court. Consequently, we find you have failed to demonstrate the city’s administrative procedure is conducted in a judicial or quasi-judicial forum, and thus, we find such hearings do not constitute litigation for purposes of section 552.103. Therefore, none of the submitted information may be withheld under section 552.103 of the Government Code.

Section 552.122 of the Government Code exempts from required 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 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. Open Records Decision No. 626 at 6 (1994). 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); ORD 626 at 8.

You seek to withhold the submitted interview questions under section 552.122 of the Government Code. Having considered your arguments and reviewed the submitted information, we find the interview questions we have marked qualify as test items under section 552.122(b). Therefore, the city may withhold the interview questions we have marked under section 552.122 of the Government Code. We find, however, that the remaining interview questions are general questions evaluating an applicant’s individual abilities, personal opinions, and subjective ability to respond to particular situations, and do not test any specific knowledge of an applicant. Thus, none of the remaining interview questions may be withheld under section 552.122 of the Government Code.

We note some of the submitted information is subject to section 552.102(a) of the Government Code, which exempts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”³ Gov’t Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a)

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Upon review, we conclude the city must withhold the dates of birth we have marked under section 552.102(a) of the Government Code.⁴

Next, section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code.⁵ Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(1)). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. To the extent the employees at issue timely elected confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code.⁶

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state or another state or country is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130(a)(1)). The city must withhold the information we have marked under section 552.130.

Next, 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). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The e-mail addresses we have marked do not appear to be of

⁴We note all of the applicants whose information the city has submitted to this office were already employed by the city when they applied for other positions.

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁶We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147. Therefore, even if section 552.117 does not apply to the social security numbers at issue, the city may withhold these social security numbers under section 552.147.

a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the marked e-mail addresses under section 552.137, unless the owners of the addresses affirmatively consent to their release. *See id.* § 552.137(b).

In summary, the city may withhold the interview questions we have marked under section 552.122 of the Government Code. The city must withhold the information we have marked under section 552.102(a) of the Government Code. To the extent the employees at issue timely elected confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city must withhold the information we have marked under section 552.130 of the Government Code and section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. The city must release the remaining information.

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,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/ag

Ref: ID# 435562

Enc. Submitted documents

c: Requestor
(w/o enclosures)