



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2011

Mr. Robert E. Reyna
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2011-16804

Dear Mr. Reyna:

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# 434781 (COSA ORR# W002976).

The City of San Antonio (the "city") received a request for the requestor's Assessment Center, including his test and test answers, the correct answers, and the name and page of the study material that each question was selected. You claim the submitted information is excepted from disclosure under section 552.122 of the Government Code. You also state release of the submitted information would implicate the proprietary interests of the Booth Research Group, Inc. ("Booth"). Accordingly, the city notified Booth of the request for information and of its 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 Booth. We have considered the submitted arguments and reviewed the submitted information. We have also considered comments submitted by the requestor's attorney. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor has asked the city to answer questions. In responding to a request for information under the Act, a governmental body is not required to answer factual questions, conduct legal research, or disclose information that did not exist at the time the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266

(Tex. Civ. App.—San Antonio 1978, writ *dism'd*); Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). We assume the city has made a good-faith effort to do so.

Next, we note you did not submit information responsive to the portion of the request seeking the correct answers to the Assessment Center and the name and page of the study material that each question was selected. To the extent the information responsive to this portion of the request existed and was maintained by the city on the date the city received the request for information, we presume the city has released it. If not, the city must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

You inform us some or all of the submitted information was previously released through discovery. We note the Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). This office has held, however, an exchange of information among litigants in “informal” discovery is not a “voluntary” release of information for purposes of section 552.007. *See* Open Records Decision No. 579 (1990) (addressing statutory predecessor); *see also* Open Records Decision No. 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to Gov't Code § 552.108). Accordingly, we find the disclosure of the submitted information in the course of discovery was not a voluntary disclosure of information to a member of the public under the Act.

Next, the requestor's attorney contends the city failed to comply with the procedural requirements of the Act by failing to timely provide the requisite information to his client pursuant to subsections 552.301(d) and 552.301(e-1) of the Government Code. Pursuant to section 552.301(d), a governmental body must provide the requestor with (1) a written statement the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general within ten business days of receiving the request for information. Gov't Code § 552.301(d). Section 552.301(e-1) requires a governmental body that submits written comments to the attorney general under subsection (e)(1)(A) to send a copy of those comments to the person who requested the information from the governmental body within fifteen business days of receiving the request for information. *Id.* § 552.301(e-1). The city received the present request for information on August 15, 2011. Thus, the city's ten and fifteen-business-day deadlines to provide information to the requestor pursuant to subsections 552.301(d) and 552.301(e-1) were August 29, 2011, and September 6, 2011, respectively. The city informs us a copy of its ten day letter was mailed

to the requestor on August 26, 2011, and a copy of its fifteen day letter was mailed to the requestor on September 2, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). The determination of whether or when a governmental body mailed its notice of the request for a decision or a copy of the written comments to the requestor is a question of fact. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue is not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Thus, based on the city's representations, we conclude the city complied with the requirements of section 552.301 of the Government Code. Therefore, we will consider the arguments against disclosure of the submitted information.

Section 552.122(b) of the Government Code 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 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. ORD 626 at 6. 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 Assessment Center, as well as the scoring sheets, under section 552.122 of the Government Code. You state the Assessment Center is intended to test applicants' skills and abilities specific to the rank of District Chief. You further state the Assessment Center's components test the applicants' knowledge of departmental practices, policies, and procedures. Additionally, you assert "[t]he questions and scenarios presented [in the Assessment Center] may be reused in future promotional processes." Based on your representations and our review, we find the submitted Assessment Center, which we have marked, qualifies as a test item under section 552.122(b) of the Government Code. Accordingly, the city may generally withhold this marked information under section 552.122(b).¹ However, we conclude you have not demonstrated the remaining information, which consists of the scoring sheets, qualifies as a test item under section 552.122(b). Accordingly, the scoring sheets may not be withheld on that basis.

Booth argues the remaining information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of third parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and (2) "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that

¹As our ruling is dispositive, we need not address the submitted third party arguments as to this information.

disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” *See* Gov’t Code § 552.110(a)-(b). We note section 552.110 protects the interests of third parties, not governmental bodies. *See* Open Record Decision No. 319 (1982) (statutory predecessor to section 552.110 designed to protect third-party interests that have been recognized by the courts). You acknowledge the city and Booth entered into a Professional Services Agreement (the “agreement”) for the development of the city’s written promotional examination and Assessment Center. Section 5.1 of article V of the agreement states, “[a]ny and all writings, documents or information in whatsoever form and character produced by [Booth] pursuant to the provisions of this [a]greement is the exclusive property of [the c]ity; and no such writing, document or information shall be the subject of any copyright or proprietary claim by [Booth].” *See* Agreement art. V, § 5.1. Further, section 5.2 of the agreement states the city is the exclusive owner of the information and grants the city the “right to use all such writings, documents and information as [c]ity desires, without restriction.” *See id.* art. V, § 5.2. Accordingly, we conclude Booth does not have a proprietary interest in the remaining information and none of it may be withheld under section 552.110.

The requestor’s attorney contends his client, as a participant in the promotional examination for the rank of District Chief, has a right of access to the Assessment Center pursuant to section 143.034 of the Local Government Code. Chapter 143 of the Local Government Code applies to a civil service city. We understand the city is a civil service city under chapter 143. Section 143.034 provides in relevant part:

(a) On request, each eligible promotional candidate from the fire or police department is entitled to examine the person’s promotional examination and answers, the examination grading, and the source material for the examination.

Local Gov’t Code § 143.034(a); *see also id.* § 143.034(b) (prohibiting eligible promotional candidate from removing examination or copying examination questions). Section 143.032 sets out the procedures for a promotional examination under chapter 143, and subsection (c) states, “[t]he examination must be entirely in writing and may not in any part consist of an oral interview.” *See id.* § 143.032. The Collective Bargaining Agreement (the “CBA”) between the city and the Local 624 International Association of Fire Fighters states the promotional examination for the position of District Chief is comprised of two parts: (1) a written examination and (2) an Assessment Center. *See* CBA art. 32, § 4; *see* Local Gov’t Code § 174.001 *et. seq.* (granting fire fighters and police officers right to organize for collective bargaining). We understand the Assessment Center is an oral examination. Thus, because a promotional examination under chapter 143 must be in writing and the Assessment Center is an oral examination, we find section 143.034 is inapplicable to the Assessment Center. *See* Local Gov’t Code § 174.006 (stating state civil service provision prevails over collective bargaining contract unless contract specifically provides otherwise); *see also* CBA art. 32, § 5 (stating article 32, Promotions, applies notwithstanding contrary provisions in Chapter 143). Accordingly, we find the requestor does not have a right of access to the Assessment Center under section 143.034.

Finally, we note the submitted information is protected by copyright. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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 copyright law and the risk of a copyright infringement suit.

In summary, the city may withhold the Assessment Center, which we have marked, under section 552.122 of the Government Code. The remaining information must be released, but any information that is protected by copyright 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,



Kirsten Brew
Assistant Attorney General
Open Records Division

KB/em

Ref: ID# 434781

Enc. Submitted documents

c: Requestor
(w/o enclosures)