



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 30, 2012

Ms. Barbara H. Owens
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2012-19246

Dear Ms. Owens:

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# 472523 (DSHS File No. 20819/2012).

The Texas Department of State Health Services (the "department") received a request for all documents related to the proposals received by the department in response to the request for proposals for the privatization of a state mental health hospital, including the matrices used to evaluate the proposals. You state you have released or will release some of the requested information to the requestor. You also state the release of some of the requested information may implicate the proprietary interests of GEO Care, Inc. ("GEO Care"). Accordingly, you inform us, and provide documentation showing, you notified GEO Care of the request and of the company's right to submit comments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from an attorney for GEO Care. Further, you claim the submitted information is excepted from disclosure under section 552.122 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state a portion of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-16569 (2012). In this ruling, we determined the department must release the information at issue, but any information subject to copyright may only be released in

accordance with copyright law. In response to our ruling, GEO Care has filed a lawsuit against our office. See *The GEO GROUP, Inc. v. Greg Abbott, Attorney General of the State of Texas and The Texas Department of State Health Services*, No. D-1-GN-12-003379 (53rd Dist. Ct., Travis County, Tex.). Accordingly, we will allow the trial court to resolve the issue of whether GEO Care's information at issue in the pending litigation must be released to the public. With respect to the remaining information at issue in Open Records Letter No. 2012-16569, we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, for the remaining information that is at issue in Open Records Letter No. 2012-16569 and is not at issue in the pending lawsuit, we conclude the department must rely on Open Records Letter No. 2012-16569 as a previous determination and release the identical information in accordance with that ruling.¹ See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Section 552.122 of the Government Code exempts 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" 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 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.

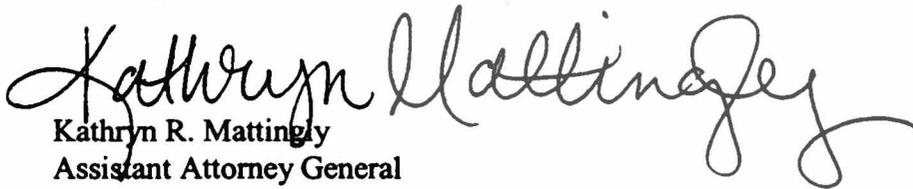
You seek to withhold the submitted information and state it consists of a "scoring tool developed by the [d]epartment for the evaluation of any responses submitted in response" to the RFP at issue. You assert the scoring tool is a test item because "it was developed by the [d]epartment specifically for the purpose of evaluating the ability of any entity submitting a proposal in response to the RFP." However, upon review, we find the department has failed to demonstrate the submitted information constitutes or consists of test items under section 552.122(b). Accordingly, the department may not withhold any of the submitted information under section 552.122 of the Government Code. As you raise no further exceptions to disclosure, the submitted information must be released.

¹As our ruling is dispositive, we need not address GEO Care's arguments against disclosure.

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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/dls

Ref: ID# 472523

Enc. Submitted documents

c: Requestor
(w/o enclosures)

GEO Care, Inc.
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Austin, Texas 78746
(w/o enclosures)