



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2013

Ms. Danielle R. Folsom
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2013-20147

Dear Ms. Folsom:

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# 506209 (GC No. 20816).

The Houston Fire Department (the "department") received a request for information regarding a named firefighter, specifically (1) any and all videos of the named firefighter's assessment on April 27, 2013; (2) any and all videos of other senior captain candidates who were assessed on April 27, 2013; (3) the names of the individuals who were responsible for the grading of the assessment video and any documentation reflecting the same; (4) a list of specific candidates who were assessed by each team; (5) the criteria that each team utilized in performing the assessment; (6) tools that were utilized to assure that each and every assessment grader and/or team were rendering same or similar scores for similar responses; and (7) any and all graded assessment sheets or notes used by the assessors in grading the named firefighter's assessment taken on April 27, 2013. You inform us the department has no information responsive to item 4 of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code. You also state release of a portion of the requested information may implicate the proprietary interest of Morris & McDaniel, Inc. ("Morris & McDaniel"). Accordingly, you notified

¹We note the Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 534 at 2-3 (1989), 518 at 3 (1989), 452 at 3 (1986), 362 at 2 (1983).

Morris & McDaniel of the request and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 143.032 of the Local Government Code. Section 143.032 provides, in relevant part,

(a) The [Fire Fighters' and Police Officers' Civil Service Commission] shall adopt rules governing promotions and shall hold promotional examinations to provide eligibility lists for each classification in the fire and police departments. Unless a different procedure is adopted under an alternate promotional system as provided by Section 143.035, the examinations shall be held substantially as prescribed by this section.

(b)(1) Each eligible promotional candidate shall be given an identical examination in the presence of the other eligible promotional candidates[.]

...

(c) The examination must be entirely in writing and may not in any part consist of an oral interview.

...

(h) A person commits an offense if the person knowingly or intentionally:

(1) reveals a part of a promotional examination to an unauthorized person; or

(2) receives from an authorized or unauthorized person a part of a promotional examination for unfair personal gain or advantage.

²We 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 those records contain substantially different types of information than that submitted to this office.

Local Gov't Code § 143.032. We agree the clear language of section 143.032 makes the department's promotional examination questions and answer sheets, as "part of a promotional examination," confidential and permits their disclosure only to an authorized person. *Cf.* Open Records Decision No. 584 (1991) (statute making release of information criminal offense deems information confidential by law for purposes of section 552.101). We note section 143.035 allows a police department to adopt a different procedure under an alternate promotional system. *Id.* § 143.035. Section 143.035 applies only to police departments, and thus the department's promotional examinations shall be held substantially as prescribed by section 143.032. *Id.* § 143.032(a).

You argue the submitted information is made confidential in its entirety by section 143.032 of the Local Government Code. You inform us the submitted information relates to a promotional examination for the position of senior captain within the department. We note the submitted information relates to a firefighter's video recorded performance on an oral tactical exercise. The submitted assessment consists of an oral examination. As noted above, a promotional examination under chapter 143 must be entirely in writing and may not in any part consist of an oral interview. *Id.* § 143.032(c). Because the assessment at issue consists of an oral examination that is not in writing, we find section 143.032 is inapplicable to the submitted information. Accordingly, no portion of the submitted information may be withheld under section 552.101 of the Government Code on that basis.

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 information under section 552.122 of the Government Code. You state the submitted information is intended to test the knowledge, ability, and skills of individual candidates to help determine candidates' suitability for promotion to the position of senior captain. We note portions of the submitted video recordings contain spoken versions of the test questions you seek to withhold. Upon review, we find some of the submitted information consists of "test items" under section 552.122(b) of the Government Code. We further find the associated answers to the questions we have marked and indicated, as well as the submitted assessors' grading criteria, reveal the substance of the questions themselves. Therefore, the department may withhold this information, which we have marked and indicated, under section 552.122(b). However, we find the remaining questions at issue do not evaluate an individual's or group's knowledge or ability in a particular area. Rather, the information at issue reveals questions that evaluate an applicant's individual abilities, personal opinions, and subjective ability to respond to a particular

situation. We further find the completed rating forms do not reveal the substance of test items for purposes of section 552.122. Accordingly, the department may not withhold any portion of the remaining information under section 552.122 of the Government Code.

Next, an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Morris & McDaniel explaining why any part of the submitted information should not be released. Therefore, we have no basis to conclude Morris & McDaniel has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the department may not withhold the submitted information on the basis of any proprietary interest Morris & McDaniel may have in the information.

In summary, the department may withhold the information we marked and indicated under section 552.122(b) of the Government Code. The department 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 506209

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Judge Roger McMillin
Vice President of Operations
Morris & McDaniel
117 South Saint Asaph Street
Alexandria, Virginia 22314
(w/o enclosures)

COPY

Filed in The District Court
of Travis County, Texas

FEB 26 2015

At 4:29 P M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GV-13-001364

THE CITY OF HOUSTON, TEXAS
Plaintiffs.

v.

GREG ABBOTT
ATTORNEY GENERAL OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT
§
§ OF TRAVIS COUNTY, TEXAS
§
§
§
§
§ 261ST JUDICIAL DISTRICT

ORDER

Pending before the Court is Plaintiff's Motion for Summary Judgment. After consideration of the motions, responses, and arguments of counsel it the opinion of this Court that the motion should in all things be **GRANTED**.

It is, therefore, **ORDERED**, that the Plaintiff shall be entitled to withhold from disclosure the following items:

1. The video recording of each candidate's Subordinate/Organizational problem assessment exercise from the City of Houston Fire Department 2013 promotional examination for the rank of Senior Captain.

2. The rating form for each candidate's assessment exercises including both Oral Tactical exercise ("OT") and Subordinate/Organizational Problem exercise ("SP") from the City of Houston Fire Department 2013 promotional examination for the rank of Senior Captain.

3. The list of names of individuals responsible for grading of the video responses from the assessment portion of the City of Houston Fire Department 2013 promotional examination for the rank of Senior Captain.

Signed on the 25 day of February, 2015.


PRESIDING JUDGE
98th Dist. Ct.
by assignment

COPY

Filed in The District Court
of Travis County, Texas

Cause No. D-1-GV-13-001364

FEB 26 2015
At 4:29 P.M.
Velva L. Price, District Clerk

THE CITY OF HOUSTON, TEXAS,	§	IN THE DISTRICT COURT OF
<i>Plaintiff,</i>	§	
	§	
v.	§	261st JUDICIAL DISTRICT
	§	
GREG ABBOTT, ATTORNEY	§	
GENERAL OF TEXAS,	§	
<i>Defendant.</i>	§	TRAVIS COUNTY, TEXAS

**ORDER SEALING INFORMATION AT ISSUE
FOR IN CAMERA INSPECTION**

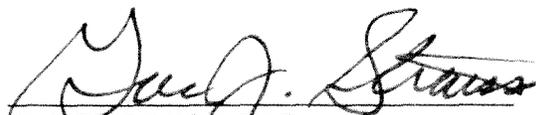
This is an open records lawsuit brought under the Public Information Act (PIA), Tex. Gov't Code ch. 552. This order is entered pursuant to Tex. Gov't Code § 552.3221. On this 18 day of February, 2015, at 3:00 p.m., the parties filed with the Court for in camera inspection the information at issue.

IT IS ORDERED that the clerk shall file the information under seal as "Information at Issue"; append a copy of this order to the information; maintain the information at issue in a sealed envelope or in a manner that precludes disclosure; and transmit the information at issue to any court of appeals as part of the clerk's record.

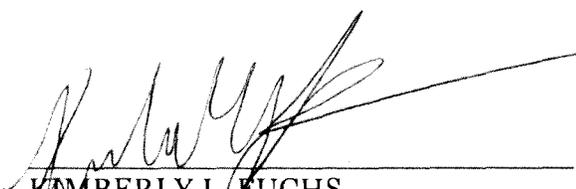
IT IS ORDERED that the information at issue shall not be made available by the clerk or any custodian of records for public inspection.

IT IS FURTHER ORDERED THAT THE INFORMATION AT ISSUE SHALL NOT BE RELEASED OR ACCESSED BY ANY PERSON OTHER THAN THE COURT, A REVIEWING COURT OF APPEALS, OR PARTIES PERMITTED TO INSPECT THE INFORMATION PURSUANT TO A PROTECTIVE ORDER.

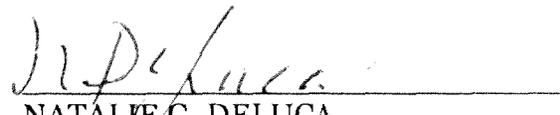
Signed this 18 day of February, 2015.


JUDGE PRESIDING

AGREED:


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ATTORNEY FOR INTERVENOR
CAPTAIN EDWIN SCOTT HILBURN

No. 07-15-00158-CV

Captain Edwin Scott Hilburn Appellant	§	From the 261st District Court of Travis County
	§	
v.		January 21, 2016
	§	
The City of Houston, Texas; and Ken Paxton, Attorney General of Texas Appellees	§	Opinion by Justice Hancock

J U D G M E N T

Pursuant to the opinion of the Court dated January 21, 2016, it is ordered, adjudged and decreed that the portion of the trial court's judgment that excepted the release of the rating forms is reversed, and judgment is rendered that the City of Houston must produce the rating forms. In all other respects, the judgment of the trial court is affirmed.

It is further ordered, adjudged and decreed that appellant pay all costs in this behalf expended for which let execution issue.

It is further ordered that this decision be certified below for observance.

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