



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 8, 2014

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2014-11679

Dear Mr. Smith:

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# 528319.

The Texas Health and Human Services Commission (the "commission") received a request for information pertaining to the individual who was selected for a specified job posting and the same information pertaining to the requestor. You state some information was released to the requestor. You claim the submitted information is excepted from disclosure under section 552.122 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we note the requestor only seeks information pertaining to the individual selected for a specified job posting and the same information pertaining to the requestor. Thus, any information beyond this information is not responsive to the request. This ruling does not address the public availability of any information that is not responsive to the request and the commission is not required to release such information in response to this request.

Next, we must address the commission's procedural obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow

¹We assume the "representative sample" of information 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 those submitted to this office.

in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). We note the commission received a previous identical request for the requested information on March 24, 2014. In response to that request, the commission explained it had not selected an individual and suggested the requestor make her request at a future date. We note, however, the March 24, 2014, request sought information pertaining to the requestor's application and interview packet as well as the individual who was selected. The commission's response to the March 24, 2014, request did not address the portion of the request pertaining to the requestor's information. Thus, with respect to this information including the requested test questions, we find the commission's ten business day deadline was April 7, 2014, and its fifteen business day deadline was April 14, 2014. Thus, because the envelope containing your request for a ruling from this office and the information at issue was deposited in the interagency mail on April 29, 2014, and May 6, 2014, respectively, we find the commission failed to comply with the procedural requirements mandated by section 552.301 for the submitted test questions as well as the requestor's responses to those questions.

A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Although you raise section 552.122 of the Government Code, section 552.122 is a discretionary exception to disclosure that protects only a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.122 of the Government Code does not provide a compelling reason to withhold information for purposes of section 552.302. Accordingly, the commission may not withhold the submitted test questions or the requestor's responses to those questions under section 552.122 of the Government Code. We will address the applicability of section 552.122 to the remaining information, which consists of the selected applicant's responses to the test questions.

Section 552.122 of the Government Code exempts from 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.” ORD 626 at 6. The question of whether specific information falls within the scope of section 552.122(a) must be determined on a case-by-case basis. *Id.* at 7. Traditionally, this office has applied section 552.122 where release of “test items” might compromise the effectiveness of future examinations. *See* Open Records Decision No. 118 (1976); *see generally* ORD 626 at 4-5. 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).

You seek to withhold the remaining responsive information under section 552.122. You state the release of the information at issue would compromise the effectiveness of the commission’s interview and hiring process. We note the remaining information consists only of the selected applicant’s responses to the interview questions. As stated above, answers to test questions can be withheld when the answers withheld might reveal the questions themselves. However, in this instance, the submitted test questions are not being withheld because the commission did not comply with section 552.301. Accordingly, the remaining responses also may not be withheld under section 552.122. Therefore, as no other exceptions to disclosure are raised, the responsive information must be released.

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,


Lauren Dahlstein
Assistant Attorney General
Open Records Division

LMD/eb

Ref: ID# 528319

Enc. Submitted documents

c: Requestor
(w/o enclosures)