



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2014

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

OR2014-18334

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# 539269 (GC No. 21618).

The Houston Fire Department (the "department") received a request for information related to the requestor's senior captain exam administered on specified dates, including the requestor's video tape, as well as the grading criteria sheet, all answers, all possible answers, and the requestor's answers. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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.

Local Gov't Code § 143.032(a), (b)(1), (c), (h). Thus, the clear language of section 143.032 makes the department's promotional examination confidential and permits its 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). Generally, a promotional examination under chapter 143 must be entirely in writing and may not in any part consist of an oral interview. *See* Local Gov't Code § 143.032(c). We note the information at issue consists of video recordings of an oral examination. Because the examination at issue consists of an oral examination that is not in writing, we find section 143.032 is generally inapplicable to the information at issue.

Section 174.006 of the Local Government Code permits the city and a labor association to agree to alter the terms of state civil service provisions in a collective bargaining contract ("CBC"). *See id.* § 174.006(a) (state or local civil service provision prevails over CBC under chapter 174 of Local Government Code unless CBC specifically provides otherwise). You have submitted documentation demonstrating in 2012, pursuant to the court's judgment in *Bazile v. City of Houston*, 858 F.Supp.2d 718 (S.D. Texas 2012), the City of Houston and the Houston Professional Firefighters' Association altered the terms of section 143.032 in a collective bargaining agreement (the "CBA"). Specifically, the CBA provides the examination for promotion to captain and senior captain shall consist of a written job knowledge examination, a situational judgment examination, and assessment center exercises. *See* CBA § 6(b). The requirement of assessment center exercises as part of a promotional examination was approved by the court in *Bazile*, 858 F.Supp.2d at 776, which stated an assessment center consists of "multiple exercises simulating job activities that are designed to allow trained observers, or assessors, to make judgments about candidates' behaviors as related to job performance," and may include "role play." *Id.* at 734. The CBA provides assessment center exercises shall be recorded in video format. *See* CBA § (7)(e). Further, the CBA provides, "To the extent that any provision of [the CBA] conflicts with or changes any provision in [chapter 143 of the Local Government Code, including section 143.032, the CBA] shall supersede such provisions, as authorized by [sections] 174.005 and 174.006 of the [Local Government Code]." *Id.* § 12. Therefore, we

agree the CBA, in conjunction with the court's holding in *Bazile*, supersedes section 143.032(c) of the Local Government Code, and permits the department's promotional examination to consist, in part, of oral assessment center exercises. Upon review, therefore, we agree the submitted video recordings of an oral examination are part of a promotional examination that is confidential pursuant to section 143.032 of the Local Government Code, and the department must generally withhold such information under section 552.101 of the Government Code on that basis. However, we find the submitted blank Assessor Packet and Senior Captain Oral Tactical Exercise Assessor Sheet are not part of a promotional examination for purposes of section 143.032 of the Local Government Code, and the department may not withhold such information under section 552.101 of the Government Code on that basis.

We note section 143.034 of the Local Government Code entitles eligible promotional candidates from fire or police departments to inspect their own promotional examination and answers, the examination grading, and the source material for the examination. *See* Local Gov't Code § 143.034(a). In this instance, the requestor took the promotional examination at issue. Therefore, pursuant to section 143.034(a), the requestor is authorized to inspect his own promotional examination and answers, examination grading, and source material for the examination. Although you seek to withhold the submitted video recordings of the promotional examination under section 552.122 of the Government Code, we note a statutory right of access generally prevails over the exceptions to public disclosure under the Act. *See, e.g.,* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exception to disclosure under the Act). Accordingly, the department must allow the requestor to inspect his own promotional examination, consisting of the submitted video recordings. However, the requestor may not remove his examination or copy the questions. *See* Local Gov't Code § 143.034(b) (prohibiting eligible promotional candidate from removing examination or copying examination questions).

Section 552.122(a) of the Government Code excepts from disclosure "[a] test item developed by an educational institution that is funded wholly or in part by state revenue[.]" Gov't Code § 552.122(a). 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 argue the submitted blank Assessor Packet and Senior Captain Oral Tactical Exercise Assessor Sheet constitute questions and answers that are protected under section 552.122 of the Government Code. You assert the questions test the knowledge and abilities of applicants in a particular area. Based on your representations and our review, we find the

requested information includes "test items" under section 552.122(b) of the Government Code. Furthermore, we find release of the model answers to the questions would reveal the questions themselves. Therefore, the department may withhold the Assessor Packet and Senior Captain Oral Tactical Exercise Assessor Sheet, which we have marked, under section 552.122(b) of the Government Code.

In summary, the submitted video recordings of an oral examination consist of a promotional examination that is confidential pursuant to section 143.032 of the Local Government Code and must generally be withheld under section 552.101 of the Government Code; however, pursuant to section 143.034(a) of the Local Government Code, the department must allow the requestor to inspect his own promotional examination. The department may withhold the Assessor Packet and Senior Captain Oral Tactical Exercise Assessor Sheet, which we have marked, under section 552.122(b) of the Government Code.

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# 539269

Enc. Submitted documents

c: Requestor
(w/o enclosures)