



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 22, 1994

Mr. Jimmy Alan Hall
Scanlan & Buckle, P.C.
Attorneys at Law
602 West 11th Street
Austin, Texas 78701-2099

OR94-462

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), Government Code chapter 552.¹ We assigned your request ID# 23319.

The City of Sunset Valley (the "city"), which you represent, has received, through its police department, a request for information regarding the requestor's application for employment with the police department. Specifically, the requestor seeks "any, and all, information concerning my application for employment," including "written test results & ranking (by names), physical fitness results & rankings, and over-all ranking by name." You do not object to release of some of the requested information. You claim, however, that sections 552.101, 552.102, 552.111, and 552.122 of the Government Code except the remainder of the requested information from required public disclosure.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert section 552.101 in conjunction with the privacy interests of third parties. You also assert section 552.102, which excepts "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 protects information only if its release would cause an invasion of privacy under the test articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). See *Hubert v. Harte-Hanks Tex.*

¹We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

Newspapers, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. Generally, the public has a legitimate interest in the job qualifications of public employees. Open Records Decision Nos. 470, 467 (1987). Information previously held by this office not to be protected by common-law privacy interests includes, for example, applicants' and employees' educational training, names and addresses of former employers, dates of employment, kind of work, salary, and reasons for leaving, names, occupations, addresses and phone numbers of character references, job performance or ability, birth dates, height, weight, marital status, and social security numbers. See Open Records Decision No. 455 (1987); see also Open Records Decision Nos. 470, 467; 444 (1986); 421 (1984); 405 (1983). But see Open Records Decision No. 622 (1994) (regarding the availability of social security numbers under federal law). We have examined the information submitted to us for review. We conclude that it does not contain any information that is intimate or embarrassing. Accordingly, the submitted information may not be withheld from required public disclosure under sections 552.101 and 552.102 of the Government Code.²

We note that the submitted materials appear to include criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC"). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). Any criminal history record information data that was generated by the federal government or another state may not be made available to the requestor by the city except in accordance with federal regulations. See Open Records Decision No. 565. The city must therefore withhold the CHRI generated by the NCIC.

You also claim that some of the requested information is excepted from required public disclosure by section 552.111 of the Government Code, which excepts information that constitutes an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined section 552.111 and held that it excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6. As the information submitted to us for review relates to an internal administrative and personnel matter, we conclude that section 552.111 does not except it from required public disclosure.

²You also assert section 552.101 with respect to information obtained from third parties in conjunction with an "understanding that any information disclosed would be held confidential." We note, however, that information is not confidential under section 552.101 merely because the party submitting it anticipates or requests that it be kept confidential. Open Records Decision Nos. 479 (1987); 180 (1977).

You also seek to withhold the test results and rankings of the applicants other than the requestor and a scoring key for a written exam under section 552.122 of the Government Code. Section 552.122 excepts:

(a) A curriculum objective or test item developed by an educational institution that is funded wholly or in part by state revenue

(b) A test item developed by a licensing agency or governmental body.

Gov't Code § 552.122.³ In Open Records Decision No. 537 (1990), this office determined that section 552.122 excepts the answer keys of a school district's exam questions. 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. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6. Section 552.122 may apply where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976).

We have examined the information for which you seek section 552.122 protection. We conclude that some of this information, namely the test results and rankings of applicants other than the requestor, encompasses evaluations of applicants' *suitability for employment and does not fall within the section 552.122 exception.* Accordingly, the test results and rankings of the applicants may not be withheld under section 552.122 of the Government Code. Release of the submitted scoring key, however, might compromise the effectiveness of future examinations and thus may be withheld from required public disclosure under section 552.122.

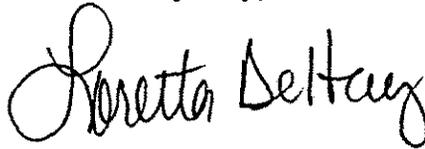
Finally, you ask whether an agreement between the city and the requestor may prohibit the requestor from gaining access to information under the act. This office has on numerous occasions held that a governmental body may not enter into agreements to keep information confidential except where specifically authorized to do so by statute. Open Records Decision No. 444, 437 (1986); 425 (1985); 414 (1984). The agreement to which you refer us provides that the requestor "waive any right whatsoever to the background investigation report developed through this waiver." Although this agreement does not expressly make the requested information confidential, its effect is to deny the requestor access to information to which he has a right, without denying access

³The Seventy-third Legislature deleted the reference to "curriculum objectives" in former section 3(a)(22), V.T.C.S. article 6252-17a. *See* Acts 1993, 73d Leg., ch. 347, § 8.30, at 1557. This amendment is not reflected in the codification of former section 3(a)(22) as section 552.122 of the Government Code.

to such information to other members of the public. Such constitutes "selective disclosure," a practice specifically prohibited by the act. Gov't Code § 552.007; Open Records Decision Nos. 490 (1988); 464, 463 (1987). As we are not aware of any statute that specifically authorizes the waiver, we conclude that you may not withhold the requested information on the basis of the waiver agreement. Except as noted above, the requested information must be released in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/rho

Ref.: ID# 23319

Enclosures: Submitted documents
Open Records Decision No. 626

cc: Mr. Thomas Retzlaff
5433 Loop 205-230
Temple, Texas 76504
(w/o enclosures)

Mr. Scott Kniffen
Chief of Police
Sunset Valley Police Department
2 Lone Oak Trail
Austin, Texas 78745
(w/o enclosures)