



March 9, 2000

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2000-0942

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133854.

The Texas Department of Criminal Justice ("TDCJ") received a request for the questions used on a selection board for the position of Industrial Specialist III, conducted on December 1, 1999. You claim that the requested information is excepted from disclosure under section 552.122 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. 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 (1994). 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).

After careful review, we agree that the sampled examination questions are protected "test items" that "measure the skill, knowledge, intelligence, capacities, or aptitudes of an individual" and are a "standard means by which an individual's or group's knowledge or ability in a particular area is evaluated." Open Records Decision No. 626 at 6 (1994). Thus, TDCJ may withhold the examination questions and recommended answers under section 552.122(b).

We are also in receipt of a letter from the requestor in which he expresses concern that test questions with only a subjective and arbitrary "best" answer (and no objective "correct" answer) might be confidential. Section 552.122 does not establish confidentiality; it merely

affords the governmental body in possession of the requested information the option of withholding the information from public disclosure under the Public Information Act.¹ See Gov't Code § 552.007. That is, section 552.122 is an exception to the general rule providing for disclosure. Section 552.001 of the Government Code "forcefully articulates a policy of open government," *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 675 (Tex. 1995), and provides that chapter 552 "shall be liberally construed in favor of granting a request for information," Gov't Code § 552.001(b). Based on this presumption in favor of openness, this office has required express language making information confidential when construing statutory provisions. Open Records Decision Nos. 644 at 4 (1996), 478 at 2 (1987).

The requestor also expresses concern that disclosure of the test questions to another TDCJ employee might constitute the improper disclosure of confidential information. We first note that under the Act a governmental body may not release confidential information to the public. Gov't Code § 552.352. However, a release of information from one governmental employee to another does not constitute, in and of itself, a release to the public. A governmental body may nonetheless establish rules and procedures for the restriction and transfer of information in its possession to and between its own employees. Furthermore, the requestor, as a member of the public, may seek information under the Act.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

¹We note that the department must enforce its optional policies of non-disclosure under section 552.122 uniformly. That is, the option to withhold these questions and answers from release must apply equally to all requests and all requestors.

body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Don Ballard
Assistant Attorney General
Deputy Chief, Open Records Division

JDB/CHS/ljp

Ref: ID# 133854

Encl. Submitted documents

cc: Mr. Michael Campbell
P.O. Box 1198
Yorktown, Texas 78164
(w/o enclosures)