



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 25, 2004

Mr. Jesus Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
Office of the City Attorney
City Hall
Dallas, Texas 75201

OR2004-4225

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202286.

The City of Dallas (the "city") received a request for seven categories of information pertaining to the assessment of certain individuals for a specified position with the city. You state that the city will provide the requestor with some of the requested information. You also state that the city does not possess some of the requested information.¹ You claim that the remaining requested information is excepted from disclosure pursuant to section 552.122 of the Government Code. We have considered the exception you claim and have reviewed

¹ We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975); *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

the submitted representative sample documents.² We have also considered comments submitted to us by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we note that the requestor asserts that the city possesses the information that it says it does not possess. Whether the city does, indeed, possess this particular information presents us with a question of fact. We note that this office cannot resolve factual disputes in the open records opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a question of fact cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion or upon those facts that are discernible from the documents that are submitted to us for our review. *See* Open Records Decision No. 552 at 4 (1990). Accordingly, we must rely upon the representations given to us by the city regarding this issue.

We now address the city's section 552.122(b) claim with regard to the submitted information. Section 552.122(b) of the Government Code excepts from disclosure test items developed by a licensing agency or governmental body. *See* Gov't Code § 552.122(b). 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. *See* Open Records Decision No. 626 at 6 (1994). This office has generally found section 552.122 to apply in cases where release of "test items" might compromise the effectiveness of future examinations. *See id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Additionally, when answers to test questions might reveal the questions themselves, the answers may be withheld under section 552.122(b). *See* Open Records Decision No. 626 at 8 (1994).

Based on your arguments and our review of the submitted information, we find that the information that you submitted to us as Exhibits C, D, and E reveals information that tests an individual's knowledge or ability in a particular area. Accordingly, we conclude that the city may withhold Exhibits C, D, and E pursuant to section 552.122(b) of the Government Code. We find, however, that Exhibit B does not test an individual's knowledge or ability in a particular area and does not reveal information that would test an individual's knowledge or ability in a particular area. Accordingly, we also conclude that the city may not withhold any portion of Exhibit B under section 552.122(b) of the Government Code.

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

In summary, the city may withhold Exhibits C, D, and E pursuant to section 552.122(b) of the Government Code. The city must release Exhibit B to the requestor.

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 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 Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 202286

Enc. Submitted documents

c: Mr. Danny Miller
1381 W. Oaklawn Drive
Terrell, Texas 75160
(w/o enclosures)