



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 24, 2007

Ms. Patricia Fleming
Assistant General Counsel
Texas Department of Criminal Justice
Office of the General Counsel
P. O. Box 4004
Huntsville, Texas 77342-4004

OR2007-00784

Dear Ms. Fleming:

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# 269715.

The Texas Department of Criminal Justice (the "department") received a request for all information concerning job posting #029358MV Mountain View Mailroom Clerk II job #070563, including the reasons why the requestor was rejected. You claim that the requested information is excepted from disclosure under sections 552.101, 552.122, 552.134, 552.137, and 552.140 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Section 552.122 of the Government Code excepts from required 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 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

¹We note that in your letter dated November 21, 2006, you withdrew your claims under sections 552.107, 552.108, and 552.111 of the Government Code.

job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* 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). 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); Open Records Decision No. 626 at 8 (1994).

The department states that the submitted interview questions are “intended to display the technical expertise of the applicant” and that the department prefers to use similar questions from one position selection to the next. Further, the department has explained how release of the information at issue could compromise future interviews. After reviewing the submitted information and your arguments, we agree that the submitted questions test an individual’s knowledge in a particular area and thus constitute “test items” as contemplated by section 552.122(b). Furthermore, we find that the answers to these questions reveal the questions themselves. Therefore, pursuant to section 552.122 of the Government Code, the department may withhold the submitted interview questions, as well as the corresponding preferred and actual answers.

You claim that some of the submitted information is excepted from disclosure under section 552.134 of the Government Code. This section relates to inmates of the department and provides in relevant part as follows:

(a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov’t Code § 552.134(a). You state, and the submitted information reflects, that some of the documents at issue contain information about inmates confined in a department facility. Thus, we agree that section 552.134 is applicable to this information. We also find that section 552.029 is not applicable. Therefore, you must withhold the information that we have marked pursuant to section 552.134.²

Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection(c). *See id.* § 552.137(a)-(c). Section 552.137 does not apply to a business’ e-mail address. The e-mail addresses contained in the submitted

²Because our conclusion under section 552.134 of the Government Code is dispositive for this information, we need not address your arguments concerning section 552.101 of the Government Code.

information, which we have marked, are not the type specifically excluded by section 552.137(c). Therefore, unless the individuals whose e-mail addresses are at issue consented to release of their e-mail addresses, the department must withhold them in accordance with section 552.137 of the Government Code.

Section 552.140 of the Government Code provides in relevant part:

(a) This section applies only to a military veteran's Department of Defense Form DD-214 or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003.

Gov't Code § 552.140(a). Section 552.140 provides that a military veteran's DD-214 form or other military discharge record that is first recorded with or that otherwise first comes into the possession of a governmental body on or after September 1, 2003 is confidential for a period of seventy-five years and may only be disclosed in accordance with section 552.140 or in accordance with a court order. *See id.* § 552.140(a), (b). Upon review, we find that the department first came into possession of the submitted DD-214 forms and the other military discharge record on or after September 1, 2003. Thus, we conclude that the department must withhold this information, which you have marked, under section 552.140.

We note that some of the submitted documents contain information that is excepted from disclosure under sections 552.101, 552.117, 552.130, and 552.147 of the Government Code.³ 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." Section 552.101 encompasses chapter 560 of the Government Code. Fingerprint information is governed by sections 560.001, 560.002, and 560.003 of the Government Code, which provide:

Sec. 560.001. DEFINITIONS. In this chapter

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

³The Office of the Attorney General will raise mandatory exceptions like sections 552.101, 552.117, 552.130, and 552.147 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Sec. 560.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 560.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 560.001-.003. Thus, pursuant to section 552.101 in conjunction with section 560.003, the department must withhold the fingerprint information we have marked.

Section 552.101 also encompasses the common law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, Open Records Decision No. 600 (1992), some kinds of medical information or information indicating disabilities or specific illnesses, Open Records Decision Nos. 470 (1987), 455 (1987), and identities of victims of sexual abuse, Open Records Decision No. 440 (1986). We have marked the information that must be withheld under section 552.101 in conjunction with common law privacy.

Section 552.117(a)(3) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department, regardless of whether the current or former employee complies with section 552.1175.⁴ Thus, you must withhold the information we have marked under section 552.117(a)(3).

Section 552.130 of the Government Code excepts from disclosure information that “relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” *Id.* § 552.130. In accordance with section 552.130 of the Government Code, the department must withhold the Texas driver’s license information we have marked.

Section 552.147 provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147. Pursuant to section 552.147 of the Government Code, the department must withhold the social security numbers we have marked.

In summary, the department may withhold the submitted interview questions, as well as the corresponding answers, pursuant to section 552.122 of the Government Code. The department must withhold the information we have marked pursuant to section 552.134. The department must withhold the e-mail addresses we have marked pursuant to section 552.137. The department must withhold the DD-214 forms and the other military discharge record you have marked pursuant to section 552.140. The department must withhold the fingerprints we have marked pursuant to section 560.003 in conjunction with section 552.101. The department must withhold the information we have marked under common law privacy in conjunction with section 552.101. The department must withhold the information we have marked pursuant to section 552.117. The department must withhold the Texas driver’s license information we have marked pursuant to section 552.130. The department must withhold the social security numbers we have marked pursuant to section 552.147. The remaining information must be released.

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.

⁴We note that in Open Records Letter No. 2005-01067 (2005), this office issued a previous determination that authorizes the department to withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former employees of the department under section 552.117(a)(3), regardless of whether the current or former employee complies with section 552.1175, unless the requestor has a right of access to the information or the current or former employee is deceased. *See* Gov’t Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a)).

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), ©. 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).

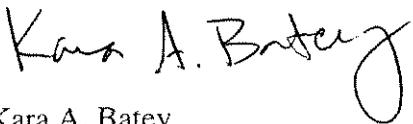
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/krl

Ref: ID# 269715

Enc. Submitted documents

c: Ms. Donna S. Watts
119 North 30th Street
Gatesville, Texas 76528
(w/o enclosures)