



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 7, 2008

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2008-03139

Dear Mr. Meitler:

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# 304109.

The Texas Education Agency (the "agency") received a request for "the list of test-takers that sign up to [take] the state assessments TexES/ExCET throughout the year" including each candidate's name, home address, e-mail address, registered assessment title, and exam date. You claim that portions of the requested information are excepted from disclosure under sections 552.101 and 552.137 of the Government Code. You also state that the submitted materials may contain proprietary information. You inform us that you notified Educational Testing Service ("ETS") of the agency's receipt of the request for information and of ETS's right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305 (d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We 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.

Initially, you assert that the present request for information is a standing request because the requestor seeks the information "in real time, as the list is being generated" as well as "throughout the year." It is implicit in several provisions of the Act that the Act applies only to information already in existence. See Gov't Code §§ 552.002, 552.021, 552.227, 552.351. 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), 87 (1975), 452 at 2-3 (1986). Consequently, a governmental body is not required to comply with a standing request to supply information on a periodic basis as such information is prepared in the future. See Attorney General Opinion JM-48 at 2 (1983); see also Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). Thus, the only information encompassed by this request consists of documents that the agency maintained or had a right of access to as of the date that it received the request.

Next, we note that an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. See Gov't Code § 552.305 (d)(2)(B). As of the date of this letter, ETS has not submitted comments to this office explaining why any portion of the submitted information should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate ETS's proprietary interests. See *id.* § 552.110; Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the agency may not withhold any portion of the submitted information on the basis of any proprietary interests that ETS may have in the information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 552.101 encompasses section 21.048 of the Education Code, which provides in part:

(c-1) The results of an examination administered under this section are confidential and are not subject to disclosure under [the Act] unless:

(1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or

to the extent that those records contain substantially different types of information than that submitted to this office.

(2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). You inform us that the submitted information consists of results of examinations administered under section 21.048 of the Education Code. Specifically, you state that the information at issue pertains to the Texas Examinations of Educator Standards and the Examination for the Certification of Educators in Texas. You indicate that the information you have marked pertains to educators who have failed these examinations five times or less. Upon review, we determine that the agency must withhold the information you have marked, in addition to the information we have marked, under section 552.101 in conjunction with section 21.048(c-1) of the Education Code.

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* Gov’t Code § 552.137 (a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, we agree that the agency must withhold the e-mail addresses you have marked under section 552.137 of the Government Code, unless the agency receives consent for their release.

In summary, the agency must withhold (1) the marked information under section 552.101 in conjunction with section 21.048(c-1) of the Education Code and (2) the e-mail addresses you have marked under section 552.137, unless the agency receives consent for their release. The remaining information must be released.

Finally, you ask this office to issue a previous determination permitting the agency to withhold e-mail addresses of members of the public under section 552.137 of the Government Code. We decline to issue such a previous determination at this time. Accordingly, 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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, 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 challenge 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,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/eeg

Ref: ID# 304109

Enc. Submitted documents

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