



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 16, 2010

Mr. Robert J. Davis
Matthews, Stein, Shiels,
Pearce, Knott, Eden, & Davis, L.L.P.
Attorneys at Law
8131 LBJ Freeway, Suite 700
Dallas, Texas 75251

OR2010-05402

Dear Mr. Davis:

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# 376416 (Collin County File No. 1600-63247).

Collin County (the "county"), which you represent, received a request for copies of (1) the employee tests, and corresponding answer sheets, that were given on two specified dates; (2) the county policy regarding the county auditor's authority to administer certain employment tests; (3) the county policy regarding the auditor's authority to make certain personnel decisions; (4) all approved skill-based tests administered to new and current employees in certain departments; and (5) the names of certain employees. You state the county has released all the existing information responsive to items 1, 2, 3, and 5. You claim the submitted test questions are excepted from disclosure under sections 552.103 and 552.122 of the Government Code. 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.

Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired

an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state that the county reasonably anticipates litigation in this case. You state the requestor was terminated under contentious circumstances and "has contacted and/or retained an attorney presumably to pursue litigation against the [county]." However, you have not provided this office with documentation or other evidence that the requestor has taken any objective steps toward filing a lawsuit. Upon review, we therefore conclude you have not established that litigation was reasonably anticipated on the date that the county received the request for information. *See* ORD 452 (governmental body must furnish concrete evidence to establish that litigation is reasonably anticipated); *see also* ORD 361. Accordingly, the county may not withhold the submitted information under section 552.103 of the Government Code.

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 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. Open Records Decision No. 626 at 6 (1994). 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); ORD 626 at 8.

Having considered your arguments and reviewed the submitted test questions, we find the test questions we have marked evaluate an individual's or group's knowledge or ability in a particular area for purposes of section 552.122(b). You state release of this information would interfere with the county's ability to "accurately test employees and candidates for job performance and other matters directly related to their competency." Thus, we conclude the county may withhold the information we have marked pursuant to section 552.122(b) of the Government Code. However, we find that the remaining test questions evaluate an applicant's general workplace skills and overall suitability for employment, and do not test any specific knowledge of an applicant. *See* ORD 626 at 6. Thus, we conclude that the remaining information you seek to withhold does not qualify as test items under section 552.122(b), and the county may not withhold this information on that basis. As no other exceptions to disclosure are raised, the remaining information must be released to the requestor.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/cc

Ref: ID# 376416

Enc. Submitted documents

c: Requestor
(w/o enclosures)