



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 28, 2013

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 East 11th Street
Austin, Texas 78701-2483

OR2013-03453

Dear Ms. Alexander:

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# 480365.

The Texas Department of Transportation (the "department") received a request for the interview questions, answers, and scores for all interviewed applicants for job requisition number 017844. The department received a second request from the same requestor for information regarding job requisition number 018457, including the applications, screening steps, applicant scoring and ranking, interview questions, answers, and scores, and the salary offered the selected applicant. The department received a third request from the same requestor for information regarding job requisition number 018176, including the applications, screening steps, applicant scoring and ranking, interview questions, answers, and scores, and the salary offered the selected applicant.¹ You state the department is releasing some of the requested information. You claim the submitted information is excepted from disclosure under section 552.122 of the Government Code. We have

¹As you did not submit a copy of this written request for information, we take our description from the department's brief.

considered the exception you claim and reviewed the submitted representative samples of information.²

Initially, we note the information responsive to the first request for information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-19884 (2012). In Open Records Letter No. 2012-19884, we determined the department may withhold the information pertaining to job requisition number 017844 under section 552.122 of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the prior ruling was based. Accordingly, we conclude the department may rely on Open Records Letter No. 2012-19884 as a previous determination and withhold the information pertaining to job requisition number 017844 in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we must address the department's obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. *See* Gov't Code § 552.301. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e)(1)(D). You inform us the department received the third request for information, which pertains to job requisition number 018176, on December 11, 2012. However, as of the date of this letter, you have not submitted for our review a copy of that written request for information. Consequently, we find the department failed to comply with the requirements of section 552.301 with regard to the request for information pertaining to job requisition number 018176.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 of the Government Code results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *Id.* § 552.302; *Simmons v.*

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

Kuzmich, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). Sections 552.122 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interest and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Thus, in failing to comply with section 552.301 with regard to the request for information pertaining to job requisition number 018176, the department has waived its argument under section 552.122 for that information and may not withhold any of the submitted information responsive to that request on this basis. However, we will consider your argument against release of the remaining submitted information.

Section 552.122(b) of the Government Code excepts from 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 job performance or suitability. ORD 626 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); ORD 626 at 8.

You state the submitted interview questions “relate to the stated knowledge, skills, and abilities required for the position and do not focus on qualifications or experience unique to a particular applicant.” Further, you argue release of the information at issue could compromise future interviews. Having considered your arguments and reviewed the information at issue, we find the submitted interview questions pertaining to job requisition number 018457 qualify as test items under section 552.122(b) of the Government Code. We also find the release of the candidates' answers to these questions would tend to reveal the questions themselves. Therefore, the department may withhold the submitted interview questions pertaining to job requisition number 018457 pursuant to section 552.122(b) of the Government Code.

In summary, the department may rely on Open Records Letter No. 2012-19884 as a previous determination and withhold the information pertaining to job requisition number 017844 in accordance with Open Records Letter No. 2012-19884. The department may withhold the submitted interview questions pertaining to job requisition number 018457 under

section 552.122(b) of the Government Code. The department must release the information pertaining to job requisition number 018176.

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,

A handwritten signature in black ink, appearing to read "Kathryn R. Mattingly". The signature is fluid and cursive, with a long horizontal stroke at the end.

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 480365

Enc. Submitted documents

c: Requestor
(w/o enclosures)