



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 10, 2013

Ms. Elizabeth West  
Senior Attorney  
General Law Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

OR2013-05748

Dear Ms. West:

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# 483605.

The Texas Commission on Environmental Quality ("TCEQ") received two requests from the same requestor for all information pertaining to two specified job postings.<sup>1</sup> We understand you to assert that information responsive to the portion of the request seeking personnel action forms and an exception memo did not exist at the time TCEQ received the requests for information.<sup>2</sup> You state you have released some information to the requestor. You claim portions of the submitted information are excepted from disclosure under section 552.122 of the Government Code. We have considered the exception you claim and reviewed the

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<sup>1</sup>We note TCEQ sought and received clarification of the information requested in the second request. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request).

<sup>2</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

submitted information.<sup>3</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion that TCEQ did not meet its procedural obligations under section 552.301 of the Government Code, because the information TCEQ has submitted as responsive to the instant request was also responsive to a prior request for information the requestor made on January 14, 2013, for which TCEQ did not seek a ruling from this office. Section 552.301 prescribes the procedures a governmental body must follow in asking this office to determine whether information is excepted from public disclosure under the Act. *See id.* § 552.301(a). Pursuant to section 552.301(b), within ten business days of receipt of the request the governmental body must ask for a decision from this office and state which exceptions apply to the requested information. *Id.* § 552.301(b). Pursuant to section 552.301(e), within fifteen business days of receipt of a request the governmental body must submit to this office, among other items, 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). Upon review, we find that in the first request the requestor agreed to allow TCEQ to withhold some information. Thus, we understand TCEQ did not consider the information at issue in the second request to be responsive to the first request. We note a governmental body must make a good-faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We further note this office is unable to resolve disputes of fact in the open records ruling process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Accordingly, where an issue cannot be resolved as a matter of law, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Thus, based on TCEQ's representations and the information provided to this office, we conclude TCEQ made a good-faith effort to respond to the first request. Thus, we find TCEQ complied with section 552.301 of the Government Code with respect to these requests, and we will consider TCEQ's argument against disclosure of the information at issue.

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

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<sup>3</sup>We understand Exhibits C and E were submitted for informational purposes only. This ruling does not address the public availability of non-responsive information, and TCEQ is not required to release non-responsive information in response to this request.

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 seek to withhold some of the submitted interview questions and corresponding moderate answers under section 552.122. You explain the questions at issue are technical-based and measure specific experience and knowledge related to the functions of the jobs at issue. Further, you argue release of the information at issue could compromise future interviews. Having considered your arguments and reviewed the submitted information, we find some of the questions at issue, which we have marked, qualify as test items under section 552.122(b) of the Government Code. We also find the release of the moderate answers to these questions, which we have marked, would tend to reveal the questions themselves. Accordingly, TCEQ may withhold the questions we have marked, as well as the moderate answers to these questions, which we have marked, under section 552.122(b) of the Government Code. We find, however, that the remaining question and corresponding answer you seek to withhold only evaluates an applicant's individual abilities, personal opinions, and subjective ability to respond to particular situations, and does not test any specific knowledge of an applicant. Accordingly, we determine the remaining information at issue does not consist of test items under section 552.122(b) of the Government Code and may not be withheld on that basis. As you have not claimed any other exceptions to disclosure, the remaining information must be released.

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](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,



Cynthia G. Tynan  
Assistant Attorney General  
Open Records Division

CGT/akg

Ref: ID# 483605

Enc. Submitted documents

c: Requestor  
(w/o enclosures)