



June 4, 2002

Mr. Jesus Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2002-3033

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 163824.

The City of Dallas (the "city") received a request for 15 types of information relating to the January 7-9, 2002 Lieutenants' Assessment Center Exercises. You state that the city has released some of the requested information. You inform us that the Dallas Police Department is responding separately to item numbers 6, 12, and 13 of this request. You also state that the city has no information that is responsive to item numbers 2, 7, 8, and 14 of the request. Chapter 552 of the Government Code does not require the city to release information that did not exist when it received this request or to create responsive information. *See* Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). You claim that information that is responsive to item number 3 of the request is excepted from disclosure under section 552.122 of the Government Code. Additionally, you believe that item numbers 1, 3, 4, and 5 of the request implicate the proprietary interests of a third party, the Booth Research Group, Inc. ("Booth"). You notified Booth of this request for information and of its right to submit arguments to this office as to why information in which Booth has an interest should not be released.¹ We have considered the city's arguments and have reviewed the submitted information.² As you have not accounted for

¹*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

²This letter ruling assumes that the submitted representative samples of information are truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the city to withhold any responsive information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

item numbers 9, 10, 11, or 15 of this request for information, we assume that the city has released any information that is responsive to those aspects of this request. If not, then such information, to the extent that it exists, must be released at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000).

Initially, we address your statement that the city received a previous request for these same types of information. In fact, this office has addressed information that relates to the Lieutenants' Assessment Center and Booth in Open Records Letter Nos. 2002-1975 (2002) and 2002-2642 (2002). You have not informed this office, nor are we otherwise aware, of any change in the facts and circumstances on which these previous decisions are based. Therefore, to the extent that Open Records Letter Nos. 2002-1975 (2002) and 2002-2642 (2002) are applicable to the submitted information, the city must release or withhold that information in accordance with our previous decisions. *See* Open Records Decision No. 673 at 6-7 (2001) (attorney general decision constitutes first type of previous determination under Gov't Code § 552.301(a) where (1) precisely the same records or information previously were submitted under Gov't Code § 552.301(e)(1)(D), (2) same governmental body previously requested and received a ruling, (3) prior ruling concluded that same records or information are or are not excepted from disclosure, and (4) law, facts, and circumstances on which prior ruling was based have not changed).

We next note that you have submitted a copy of a letter, dated February 19, 2002, that the city received from an attorney for Booth. The city previously submitted this same letter to this office in connection with its request for Open Records Letter No. 2002-1975 (2002). Thus, as we have already addressed the arguments set forth in the February 19 letter in Open Records Letter No. 2002-1975 (2002), we need not consider these same claims again.

This office has received no correspondence from Booth in connection with the city's request for this decision. An interested third party has ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). Thus, Booth has not demonstrated that the city must withhold any of the submitted information that is not already the subject of Open Records Letter Nos. 2002-1975 (2002) and 2002-2642 (2002). *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990) (attorney general will grant exception to disclosure under statutory predecessor to Gov't Code § 552.110(a) if governmental body takes no position, third party makes *prima facie* case that information qualifies as trade secret under section 757 of Restatement of Torts, and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm).

Subject to the applicability of Open Records Letter Nos. 2002-1975 (2002) and 2002-2642 (2002) to the information, we next address the city's claim under section 552.122 of the Government Code with regard to the information submitted as Exhibit C. Section 552.122(b) excepts from disclosure "a test item developed by a . . . governmental body[.]" 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. *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). Having considered your arguments, we conclude that the city has not demonstrated that any of the information submitted as Exhibit C is excepted from disclosure under section 552.122 of the Government Code.

Lastly, we note that some of the submitted information is copyrighted. An officer for public information must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary, the submitted information must be released or withheld in accordance with Open Records Letter Nos. 2002-1975 (2002) and 2002-2642 (2002), insofar as those decisions are applicable to the information. To the extent that those decisions are not applicable, the submitted information is not excepted from disclosure and 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.

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), (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).

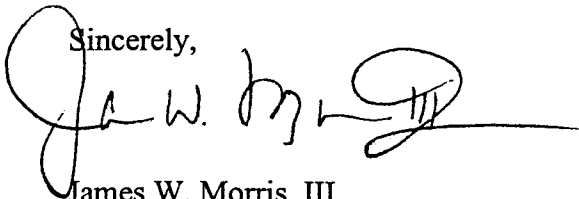
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public 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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 163824

Enc: Submitted documents

c: Mr. Lee A. Bush
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