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ATTORNEY GENERAL OF TEXAS

September 28, 2017

Mr. James Kopp
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2017-22247

Dear Mr. Kopp:

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# 678324 (COSA File Nos. W175430, W175557, W175653, W18909, and W182581).

The City of San Antonio (the "city") received five requests from different requestors for information pertaining to the city's police department's lieutenant's assessment examination. You state you have released some information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant requests because it was created after the date the requests were received. This ruling does not address the public availability of any information that is not responsive to the requests and the city is not required to release such information in response to this request.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

¹We 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.

Gov't Code § 552.101. Section 552.101 encompasses section 143.032 of the Local Government Code. Section 143.032 provides, in relevant part,

(a) The [Fire Fighters' and Police Officers' Civil Service Commission] shall adopt rules governing promotions and shall hold promotional examinations to provide eligibility lists for each classification in the fire and police departments. Unless a different procedure is adopted under an alternate promotional system as provided by Section 143.035, the examinations shall be held substantially as prescribed by this section.

(b)(1) Each eligible promotional candidate shall be given an identical examination in the presence of the other eligible promotional candidates[.]

...

(c) The examination must be entirely in writing and may not in any part consist of an oral interview.

...

(h) A person commits an offense if the person knowingly or intentionally:

(1) reveals a part of a promotional examination to an unauthorized person; or

(2) receives from an authorized or unauthorized person a part of a promotional examination for unfair personal gain or advantage.

Local Gov't Code § 143.032(a), (b)(1), (c), (h). Thus, the clear language of section 143.032 makes the city's promotional examination confidential and permits its disclosure only to an authorized person. *Cf.* Open Records Decision No. 584 (1991) (statute making release of information criminal offense deems information confidential by law for purposes of section 552.101). Generally, a promotional examination under chapter 143 must be entirely in writing and may not in any part consist of an oral interview. *See* Local Gov't Code § 143.032(c). We note some of the submitted information consists of video recordings of an oral examination. Because the examination at issue consists of an oral examination that is not in writing, we find section 143.032 is generally inapplicable to the information at issue.

Section 174.006 of the Local Government Code permits the city and a labor association to agree to alter the terms of state civil service provisions in a collective bargaining contract ("CBC"). *See id.* § 174.006(a) (state or local civil service provision prevails over CBC under chapter 174 of Local Government Code unless CBC specifically provides otherwise). You assert, and provide documentation showing, the city and the San Antonio Police Officer's Association adopted a Collective Bargaining Agreement ("CBA") in which Article 11 modified the procedures for promotional testing to include video assessments. Thus, you

contend that although section 143.032(c) refers to a written examination, through legal amendment of the testing process by the CBA, the confidentiality provision of section 143.032(h) now includes the entirety of the examination process, including the video assessment. Upon review, we find that, although article 11 in the CBA outlines the procedures for promotional testing, the CBA does not specifically provide the CBA prevails over the provisions of section 143.032; thus, we find section 143.032(h) is only applicable to the written portion of the promotional exam and the video assessments may not be withheld under section 552.101 on that basis.

You also contend the written portions of the promotional examinations are confidential under section 552.101 in conjunction with section 143.032 of the Local Government Code. We note section 143.034 of the Local Government Code entitles eligible promotional candidates from fire or police departments to inspect their own promotional examination and answers, the examination grading, and the source material for the examination. *See id.* § 143.034(a); *see also id.* § 143.034(b) (prohibiting eligible promotional candidate from removing examination or copying examination questions). None of the requestors are authorized to receive examination materials that are not their own. Therefore, the remaining examination materials at issue are generally confidential under section 143.032(h) of the Local Government Code and must be withheld under section 552.101 of the Government Code.

However, in this instance, the second and third requestors took one of the written promotional examinations at issue. Accordingly, the city must allow the second and third requestors to inspect their own promotional examinations, consisting of the submitted questions and answers. Although you seek to withhold the submitted written portion of the promotional examinations to which the second and third requestors have a right of access to under section 552.122 of the Government Code, we note a statutory right of access generally prevails over the exceptions to public disclosure under the Act. *See, e.g.*, Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exception to disclosure under the Act). Accordingly, the city must allow the requestors to inspect their own promotional examinations, consisting of the submitted questions and answers. However, these requestors may not remove their examinations or copy the questions. *See* Local Gov't Code § 143.034(b) (prohibiting eligible promotional candidate from removing examination or copying examination questions). We will address your argument under section 552.122 for the remaining information to which the second and third requestors do not have a right of access.

Section 552.122 of the Government Code excepts from 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. 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.

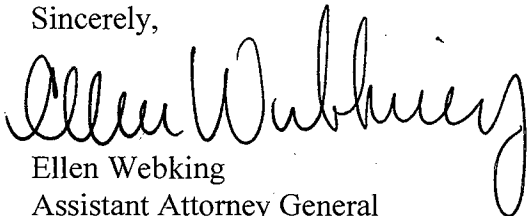
You argue the remaining information consists of test items that are protected from disclosure under section 552.122. You state the information at issue assesses a wide range of job knowledge and skills. You state these types of exercises are highly consistent and there is a substantial commonality between promotional assessments. Thus, you contend release of the information at issue “poses a significant threat to the reliability of future assessments.” However, upon review, we find the information at issue only evaluates an individual’s experience, personal opinions, and subjective ability to respond to particular situations and does not test any specific knowledge of the applicant. Accordingly, we find the remaining information does not consist of test items under section 552.122(b) of the Government Code and may not be withheld on that basis.

In summary, the city must allow the second and third requestors to inspect their own written portion of the promotional examinations, however, the second and third requestors may not remove their examinations or copy the questions. They city must withhold the remaining written examination materials at issue under section 552.101 of the Government Code in conjunction with section 143.032(h) of the Local Government Code. The city must release the remaining responsive information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/tdw

Ref: ID# 678324

Enc. Submitted documents

c: 5 Requestors
(w/o enclosures)