



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

March 31, 2020

Ms. Lisa Ruiz  
Paralegal  
City of Dallas  
City Hall  
Dallas, Texas 75201

OR2020-09881

Dear Ms Ruiz:

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# 818858 (ORR Nos. C000260-010920 and C000282-010920).

The City of Dallas (the "city") received two requests from different requestors for specified exam information. You indicate you have released some of the requested information. You claim some of the submitted information is excepted from disclosure under section 552.122 of the Government Code. Additionally, you state release of this information may implicate the proprietary interests of Industrial/Organizational Solutions, Inc. ("IOS"). Accordingly, you state, and provide documentation showing, you notified IOS of the request for information and of IOS' right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received arguments from IOS. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, you state some of the submitted information is not responsive to the present request because it does not pertain to any of the information requested by the requestor.

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<sup>1</sup> We 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 that those records contain substantially different types of information than that submitted to this office.

This ruling does not address the public availability of the non-responsive information, which you indicated, and the city need not release it in response to this request.<sup>2</sup>

Section 552.122 of the Government Code excepts from disclosure “a test item developed by a licensing agency or governmental body[.]” *Id.* § 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. 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) (construing statutory predecessor). 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 inform us the fire captain’s rescue test consists of the tactical, oral presentation, and in-basket test exercises. You inform us the city utilizes this information to evaluate the qualifications of candidates for promotion in the city’s fire department. You explain Exhibit B consists of checklists for these test exercises, and are analogous to a teacher’s manual for the assessors because they “reveal unique information about the test questions, preferred answers, and criteria for grading the test questions.” You further inform us the checklists “identify specific behaviors and answers to test questions that would be rated high or low” by the assessors of the candidate interviews, and the BARS function “like a descriptive answer key” to the test exercises. Having reviewed the information at issue and your arguments, we find the items you marked are “test items” for purposes of section 552.122(b), and the checklists reveal the test exercises themselves. Therefore, we conclude the city may withhold the information you marked under section 552.122(b) of the Government Code.<sup>3</sup> However, we find IOS failed to demonstrate any of the remaining information constitutes a test item or reveals test questions. Thus, the city may not withhold the remaining information on the basis of section 552.122(b) of the Government Code.

Section 552.110(b) of the Government Code states “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See* Gov’t Code § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable

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<sup>2</sup> As our ruling is dispositive, we need not address IOS’ arguments against disclosure of this information.

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through proper means by, another person who can obtain economic value from the disclosure or use of the information.

*Id.* § 552.110(a). IOS argues the remaining information consists of trade secrets subject to section 552.110(b). Upon review, however, we find IOS has failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret. Therefore, the city may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

We note some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person 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.

In summary, the city may withhold the information you marked under section 552.122(b) of the Government Code. The city must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.

Finally, the city asks this office to issue a previous determination that would permit it to withhold information under section 552.122 of the Government Code without the necessity of requesting a decision from this office. We decline to issue such a previous determination at this time. Accordingly, 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Ashley Crutchfield  
Assistant Attorney General  
Open Records Division

AC/eb

Ref: ID# 818858

c: Requestor

2 Third Parties