



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 20, 2004

The Honorable Beverly Kaufman
County Clerk
Harris County
P.O. Box 1525
Houston, Texas 77251-1525

OR2004-0437

Dear Ms. Kaufman:

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# 193595.

The Harris County Clerk's Office (the "county clerk") received a request for lists of names of individuals voting by personal appearance and by mail in the November 4, 2003, joint election. We understand you to assert that the roster of persons requesting a ballot by mail is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 87.121 of the Election Code, which concerns early voting rosters.¹ We have considered your argument and reviewed the submitted information.

Initially, we must address the county clerk's obligations under section 552.301 of the Government Code. Under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general 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

¹We presume that you have released any other responsive information to the extent to which such information was in existence at the time of the request. See Gov't Code §§ 552.301, .302.

requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You received the request for information by e-mail on October 17, 2003. You provided us with a copy of the request on November 18, 2003, and submitted a copy of the responsive information on November 21, 2003. Consequently, you failed to submit the requisite information within the fifteen-business-day period mandated by section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the provisions of section 552.301 results in the legal presumption that the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). However, because section 552.101 provides a compelling reason to overcome the presumption of openness, we will address your argument under that exception.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by section 87.121 of the Election Code. Prior to its amendment by the Seventy-eighth Legislature, section 87.121(f) provided:

(f) Information on the roster for a person to whom an early voting mail ballot has been sent is not available for public inspection, except to the voter seeking to verify that the information pertaining to the voter is accurate, until:

- (1) 72 hours after the time a ballot is mailed to the voter; or
- (2) 48 hours after the time a ballot is mailed to the voter if the mailing occurs on the fourth day before election day.

Act of May 27, 1997, 75th Leg., R.S., ch. 1381, § 23, 1997 Tex. Gen. Laws 5179, 5183, *amended by* Act of May 31, 2003, 78th Leg., R.S., ch. 393, § 17, 2003 Tex. Sess. Law Serv. 1633, 1638 (Vernon). Section 87.121(f), as amended, now provides:

(f) Information on the roster for a person to whom an early voting mail ballot has been sent is not available for public inspection, except to the voter seeking to verify that the information pertaining to the voter is accurate, until the first business day after election day.

Act of May 31, 2003, 78th Leg., R.S., ch. 393, § 17, 2003 Tex. Sess. Law Serv. 1633, 1638 (to be codified as amendment to Elec. Code § 87.121(f)).² The amendments to section 87.121 apply only to an election for which the action ordering the election is taken on or after September 1, 2003; an election for which the action ordering the election was taken before September 1, 2003, is governed by the law in effect on the date that action was taken. *See* Act of May 31, 2003, 78th Leg., R.S., ch. 393, §§ 23-24, 2003 Tex. Sess. Law Serv. 1633, 1640 (Vernon) (to be codified as historical note to Elec. Code § 87.121).

Your office has submitted a CD-ROM containing information for persons to whom early voting mail ballots were sent.³ Section 87.121(f) of the Election Code sets out conditions on the right of inspection of such roster information for members of the general public. However, you have not indicated the date on which the action ordering the election was taken. If the action ordering the election was taken before September 1, 2003, the prior version of section 87.121(f) applies. In that case, information on the roster for a person to whom an early voting mail ballot has been sent would not be available for general public inspection until seventy-two hours after the time a ballot is mailed.⁴ Roster information concerning a person to whom a ballot is mailed less than seventy-two hours before the time of the request would be confidential under section 87.121(f) and therefore excepted from disclosure pursuant to section 552.101 of the Government Code. If, however, the action ordering the election was taken on or after September 1, 2003, the amended version of section 87.121(f) applies.

You suggest that the amendment to section 87.121(f) of the Election Code creates a potential conflict with section 86.014 of the Election Code, which allows for public inspection of certain voting records prior to election day. We note that these two sections address different

²Section 87.121 of the Election Code, as amended, contains two additional provisions allowing for public inspection of early voting rosters. Subsection (g) states that “[i]nformation on the roster for a person who votes an early voting ballot by personal appearance shall be made available for public inspection not later than the beginning of regular business hours on the day after the date the information is entered on the roster” Elec. Code § 87.121(g). Subsection (h) states that “[i]nformation on the roster for a person who votes an early voting ballot by mail shall be made available for public inspection not later than the day following the day the early voting clerk receives a ballot voted by mail.” Act of May 31, 2003, 78th Leg., R.S., ch. 393, § 18, 2003 Tex. Sess. Law Serv. 1633, 1638 (Vernon) (to be codified at Elec. Code § 87.121(h)).

³We note that the roster you have provided indicates that it was current through October 31, 2003; however, the act only covers information available at the time the request was made. A governmental body need not comply with a standing request to provide information on a periodic basis. *See* Open Records Decision Nos. 476 (1987), 465 (1987). A governmental body is not obliged to treat a request as embracing information prepared after the request was made or to inform the requestor subsequently when the information does come into existence. *See* Open Records Decision No. 452 (1986). This ruling is consequently limited to information in existence on October 17, 2003, the date on which the request was made, and does not address information that was added to the roster subsequent to the request.

⁴Section 87.121(f)(2) would be inapplicable in these particular circumstances given that the request was made prior to the fourth day before election day.

kinds of early voting information. While section 87.121(f) concerns certain information included on rosters compiled by the early voting clerk, section 86.014 pertains to the actual applications filed by voters to receive mail ballots, the raw data used in creating the early voting rosters. Section 86.014(a) provides:

(a) A copy of an application for a ballot to be voted by mail may be obtained from the early voting clerk:

- (1) 72 hours after the time a ballot is mailed to the voter; or
- (2) 48 hours after the time a ballot is mailed to the voter if the mailing occurs on the fourth day before election day.

Elec. Code § 86.014(a).⁵ The Seventy-eighth Legislature did not amend section 86.014(a) to prohibit the public inspection of copies of applications for mail ballots until the first business day after election day as it amended section 87.121(f) with respect to certain information on early voting rosters. Because the early voting roster information protected under section 87.121(f) includes data from the applications for mail ballots that are made available for public inspection under section 86.014(a), you contend that, to the extent that the applications are made public, there appears to be an inconsistency with section 87.121(f).

To begin our analysis, we note that the primary goal in statutory interpretation is ascertaining and effectuating the Legislature's intent. *In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001). When the Legislature amends a statute, the Legislature is presumed to have made the amendment with complete knowledge of and reference to existing law. *See Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990); Open Records Decision No. 643 at 2 (1996). The legislative history of the amendment to section 87.121(f) suggests that its primary purpose was to combat election fraud associated with the premature release of ballot recipient information. *See* Hearings on Tex. H.B. 54 Before the House Comm. on Elections, 78th Leg., R.S. (Mar. 5, 2003) (tape available from House Communication Office); Hearings on Texas H.B. 54 on the Floor of the House, 78th Leg., R.S. (Apr. 8, 2003) (tape available from House Communication Office). Legislators expressed concern that making *lists* of voters requesting mail ballots available for public inspection prior to election day would lead to ballot theft and "vote harvesting," a practice where unscrupulous campaign workers obtain lists of recently mailed ballots, visit the homes of the recipients, and then use coercive techniques to encourage the voter to select certain candidates on the ballots. Campaign workers must act quickly to intercept the mailed ballots before they are marked by potential voters. Proponents of the amendment argued that such fraudulent practices would be facilitated by making early voting information available in a convenient roster form prior to

⁵Section 86.014(b) provides that originals of the applications are not available for public inspection until they have been delivered to the general custodian of election records after the election. *See* Elec. Code § 86.014(b).

the election. Conversely, however, this Legislature did not express a similar concern that the release of applications for mail ballots under the current version of section 86.014(a) would contribute to election fraud. When the Legislature amended section 87.121(f) to make certain roster information confidential until the first business day after election day, it is presumed that the Legislature did so with complete knowledge of and reference to section 86.014(a), which allows for public inspection of ballot applications on a different timeline. Consequently, we conclude that, while copies of mail ballot applications themselves remain available for public inspection prior to election day, the Legislature intended to make certain roster information concerning persons to whom ballots were mailed confidential until after election day.

Therefore, if the action ordering the election was taken on or after September 1, 2003, section 87.121(f) would make the submitted roster information confidential until the first business day after election day. In that event, because the request was made before election day, the information, though now public, is properly withheld from the requestor under section 552.101 of the Government Code in conjunction with the amended section 87.121(f) of the Election Code.

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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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 Dep't of Pub. 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 ten calendar days of the date of this ruling.

Sincerely,



Steven W. Bartels
Assistant Attorney General
Open Records Division

SWB/seg

Ref: ID# 193595

Enc. Submitted documents

c: Mr. Reed Hibbitts
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(w/o enclosures)