ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 7, 2006

Ms. Renee Smith Byas
Vice Chancellor and General Counsel
North Harris Montgomery Community College District
5000 Research Forest Drive
The Woodlands, Texas 77381-4356

OR2006-08852

Dear Ms. Byas:

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# 255920.

The North Harris Montgomery Community College District (the "district") received a request for 13 categories of information relating to an election and other matters, including copies of certain "Mail Ballot request[s.]" You have submitted a sample of information that you appear to claim is excepted from disclosure under section 552.101 of the Government Code.[1] We have considered your arguments and have reviewed the submitted information.[2] We assume that the district has released the rest of the information to which the requestor seeks access, to the extent that the requested information existed when the district received the request.[3] If not, then any other information that is responsive to this request must be released

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[1] This letter ruling assumes that the submitted sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

[2] We note that the other documents that you have submitted do not appear to be responsive to this request for information. This decision does not address the public availability of information that is not responsive to the request.

[3] We note that the Act does not require the district to release information that did not exist when it received this request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

immediately. *See* Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We first note that under section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). If a governmental body fails to comply with section 552.301 in requesting a decision, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. Although you have not demonstrated that the district complied with section 552.301(b) in requesting this decision, a claim under section 552.101 of the Government Code can provide a compelling reason for non-disclosure. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Accordingly, we will address your arguments.

We next note that the information at issue falls within the scope of section 86.014 of the Election Code. Section 86.014 provides in relevant part:

> (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). You understand the requestor to be seeking access to "copies of applications for ballots to be voted by mail that were timely received by the [d]istrict by 5:00 p.m. on May 5, 2006." Thus, section 86.014(a) provides for the public availability of the requested information. You believe, however, that the district may be required to withhold the information in question under section 66.058 of the Election Code.

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." Gov't Code § 552.101. This exception encompasses information that another statute makes confidential. Section 66.058 of the Election Code states in relevant part that "[e]xcept as otherwise provided by this code, the precinct election records shall be preserved by the authority to whom they are distributed for at least 22 months after election day." Elec. Code § 66.058 (a).[4] You inform us that the information at issue relates to an election that was

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[4] "Precinct election records" means the precinct election returns, voted ballots, and other records of an election that are assembled and distributed under chapter 66 of the Election Code. *See* Elec. Code § 66.002.

originally scheduled to be held on May 13, 2006, but was cancelled by the district on May 11. You state that "because the district's election was cancelled," the requested applications for ballots by mail "remain[] with the district's voting clerk and are being secured for a period of 22 months, pursuant to §66.058[.]"

We note that section 66.058(a) provides for the preservation of election records "after election day." *Id.* § 66.058(a). You have not explained how or why section 66.058(a) would be applicable to information relating to an election that was never held. *See* Act of May 25, 2005, 79th Leg. R.S. ch. 950 § 2, 2005 Tex. Sess. Law Serv. 3221 ("The change in law made by this Act applies to the preservation of precinct records for *an election held* on or after [September 1, 2005].") (amending Elec. Code § 66.058(a)) (emphasis added). We therefore conclude that you have not demonstrated that the district may withhold the requested copies of ballot applications under section 552.101 of the Government Code on the basis of section 66.058 of the Election Code. *See also* Elec. Code § 1.012(c) ("Except as otherwise provided by this code or Chapter 552, Government Code, all election records are public information."); Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). As you assert no other arguments against disclosure, the requested information 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,

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

JWM/sdk

Ref: ID# 255920

Enc: Submitted documents

c: Mr. Fred Blanton
c/o Ms. Renee Smith Byas
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The Woodlands, Texas 77381-4356
(w/o enclosures)