



February 8, 2001

Mr. D. Craig Wood
Langley & Banack
745 East Mulberry, Suite 900
San Antonio, Texas 78212-3166

OR2001-0488

Dear Mr. Wood:

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# 144036.

The North East Independent School District (the "district"), which you represent, received on November 14, 2000 a request for the proposals and "any and all scoring sheets and notes used during the ranking process" with regard to the proposals submitted to the district for two construction projects (Serna Elementary and Royal Ridge Elementary). You state that you have released to the requestor all of the information responsive to the request, except for "scoring sheets," a representative sample of which you have submitted for our review.¹ You claim that the scoring sheets are excepted from disclosure under section 552.111 of the Government Code. Counsel for the requestor has also submitted comments to this office, on behalf of the requestor. *See* Gov't Code § 552.304. We have considered the exception you claim, and we have reviewed the submitted comments and information.

Before addressing the claimed exception, we must first address certain procedural matters. Counsel for the requestor has submitted to this office a copy of correspondence to the district dated October 13, 2000, which we are advised "was served on the district" on that date, and

¹We assume that 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 any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

which requests "all documents" concerning the Royal Ridge construction project, including the proposals and "all scoring sheets and notes used during the ranking process" as well as the "names of the individuals who composed the ranking committee." We were also provided with a copy of correspondence from the requestor to the district dated October 23, 2000 seeking the same information with regard to the Serna Elementary construction project. Counsel for the requestor has also submitted a copy of correspondence from the district to the requestor dated October 18, 2000 regarding both construction projects, and which states in pertinent part:

Our school district attorney has informed me that the bid information you requested can be made public when the bidding process has been complete. I understand that the district is about to enter phase two of the bidding process for both of these projects. I will make available to you information which is deemed public upon completion of the bidding process.

Thus, it appears that the same information sought in the November 14, 2000 request was previously requested by the requestor in separate prior requests, and the district responded by declining to release the responsive information. However, this office has no record of the district seeking a decision of this office, in order to withhold the requested information, prior to your correspondence dated December 1, 2000 that was submitted in response to the request received by the district on November 14, 2000. The Act provides that unless this office has issued a previous determination that the requested information falls within an exception to disclosure, a governmental body "must ask for a decision" of this office "not later than the 10th business day after the date of receiving the written request." Gov't Code § 552.301(a), (b).

We acknowledge that some of the submitted samples are dated in November of 2000 and, therefore, some of the information responsive to the present request evidently did not exist at the time of the district's receipt of the October 2000 requests. It is implicit in several provision of the Act that the Act applies only to information already in existence at the time a governmental body receives a written request. *See* Gov't Code §§ 552.002, .021, .227, .351. Hence, this office has stated that the Act neither requires a governmental body to prepare new information in response to a request, nor to inform a requestor if requested information comes into existence after the request was made. *See, e.g.,* Attorney General Opinion H-90 (1973); Open Records Decision No. 452 at 2-3 (1986).

However, with respect to the information that existed at the time the district received the October 2000 requests, the information submitted to this office indicates that the district did not timely request a decision of this office as required by section 552.301 of the Act. Section 552.302 provides that if a governmental body does not request a decision of this office as provided by section 552.301, the information requested "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302. Section 552.111, a discretionary

exception under the Act, does not demonstrate a compelling reason to withhold information from the public and thereby does not overcome the section 552.302 presumption of openness.² Accordingly, we conclude the information responsive to the October 2000 requests must be released to the requestor in its entirety, pursuant to section 552.302 of the Act. We next address the section 552.111 assertion with regard to the present request and the responsive information that did not exist at the time the district received the October 2000 requests.

The requestor's comments contend that the district failed to timely seek a decision of this office with regard to the present request. As indicated above, you represent that the district received the present request, which is dated November 13, 2000, on November 14, 2000. You further represent that the district was not open for business on November 22, 23, or 24, 2000 due to the Thanksgiving holiday. Your request for a decision of this office is dated and was received by this office on December 1, 2000, which, based on the above representations, was the tenth business day after the date the district received the present request for information. Gov't Code § 552.301(b). We therefore conclude that your request to this office in response to the request dated November 13, 2000 was timely made.

Section 552.111 excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the *policymaking* processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. You do not explain, nor is it apparent to this office, how any of the submitted samples of information relate to *policymaking* by the district, as opposed to internal administrative matters. Accordingly, we conclude that you have not demonstrated the applicability of section 552.111 to the information responsive to the present request that did not exist at the time the district received the October 2000 requests, and that such information is therefore subject to release to the requestor.

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)); 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 549 at 6 (1990) (governmental body may waive informer's privilege); 522 at 4 (1989) (discretionary exceptions in general).

In summary, the district must release to the requestor, in its entirety, the information responsive to the October and November 2000 requests.

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).

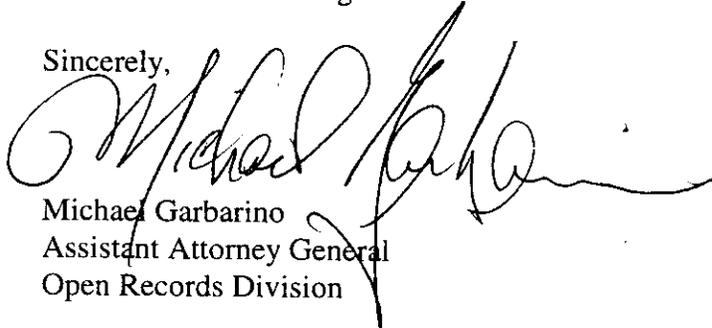
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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 General Services 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. 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 "Michael Garbarino". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID# 144036

Encl. Submitted documents

cc: Ms. Karen Grant
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