



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 27, 1997

Mr. David B. Casas
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR97-2380

Dear Mr. Casas:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your requests were assigned ID numbers 109669, 109676, 109678, 109700, 109787, 109828, and 109836.

The City of San Antonio (the "city") received several requests to review election related documents pertaining to a municipal election held on May 3, 1997, and a subsequent runoff election held on May 27, 1997. You have released some of the requested information. You claim that the requested information that relates to the District 1 May 3 election is excepted from disclosure under section 552.103 of the Government Code. You also claim that all voted ballots that are responsive to the various requests are confidential under section 552.101 in conjunction with section 4 of article VI of the Texas Constitution and the Election Code. You have submitted representative samples of the requested information for our review.

The city received the first request for all election related materials on May 13, 1997. The city did not request a ruling from this office with respect to that request until August 6, 1997, (ID# 109787), after it received a second request from the same requestor dated July 29, 1997, complaining that the city had not provided information in response to the May 13 request. The city received subsequent requests for the same or similar information and timely requested rulings from this office (ID#s 109082, 109669, 109676, 109678, 109700, 109828, and 109836).

This office issued a ruling regarding much of the information at issue in the present requests in response to a request for information made to the city dated July 2, 1997. In Open Records Letter No. 97-2005 (1997), assigned ID # 109082, this office concluded that the city could withhold under section 552.103 "all election ballot related documents pertaining to" the May 3, 1997, election for precincts located in District 1." When the city

asked for a ruling from the attorney general concerning the July 2 request, the city did not inform us that the May 13 request was pending or that the city had not timely requested a ruling on that request for information.

Although the city timely asked for a ruling regarding the July 2 request and all subsequent requests, the city failed to request a ruling within the time period required by section 552.301 of the Government Code for the May 13 request. Furthermore, the May 13 request sought the same information as the July 2 request. Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth business day after the date of receiving the written request. When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). A governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2.

The city argues that the July 29 letter from the requestor is a clarification of the May 13 request and, therefore, the ten-day time period did not begin to run until July 29. The city further contends that compelling interests exist because the privacy interests of third parties are implicated by the request and, in the alternative, that its pending litigation interests are compelling.

We disagree with your argument that the July 29 request is a clarification of the May 13 request. The May 13 request delineates the specific information requested. Furthermore, the requestor states that the July 29 request is the "second request to be provided copies" of the requested documents and does not further clarify which records were sought. Therefore, the ten-day time period was not tolled in the interim between the May 13 and July 29 requests. Thus, the ten-day time period in which to request a ruling from our office commenced on May 13, 1997, the date the city received the first request for the information.

We also conclude that the city's litigation interests are not sufficiently compelling to withhold the information under section 552.103. A governmental body's failure to meet the ten-day deadline waives the protection of section 552.103. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); Open Records Decision No. 473 (1987). Because the city failed to request a ruling from this office in response to the first request, and thereby waived the protection of section 552.103, it also waived the protection of section 552.103 for any subsequent requests for the same information. Gov't Code § 552.007. Therefore, the city cannot withhold any ballot or election related materials under section 552.103 of the Government Code. Open Records Letter No. 97-2005 (1997) is overruled to the extent it permitted the city to withhold election related information under section 552.103.

We next address your arguments that privacy interests of third parties are at stake by release of the voted ballots. You contend that section 4 of article VI of the Texas Constitution and the Election Code make voted ballots confidential by law. Section 4 of article VI provides as follows:

In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box; and the Legislature shall provide by law for the registration of all voters.

The Texas Supreme Court has stated that this provision means “that the voter in all elections shall be accorded a secret vote or ballot.” *Wood v. State*, 133 Tex. 110, 119, 126 S.W.2d 4, 9 (1939). We disagree with your contention that the constitutional guarantee of a secret ballot makes voted ballots confidential. Although section 4 of article VI the Texas Constitution provides for a secret ballot, we do not believe that it is unconstitutional for a city to provide access to voted ballots that do not identify the person who voted or reveal how an individual voted. None of the voted ballots submitted for our review identify the person voting. With respect to the representative sample of the mail-in ballot information, we believe the city can provide for the anonymity of the persons voting by mail merely by detaching the voted ballot from the attached application and envelope. You have not explained, nor is it apparent from reviewing the submitted documents, how a review of voted ballots identifies individual voters or reveals how an individual voted.

The Election Code provisions governing the retention and disposition of election records in general supports the conclusion that voted ballots are public information. Section 1.102 of the Election Code states that “[e]xcept as provided by [the Election Code] or Chapter 552, Government Code, all election records are public information.”¹ Voted ballots are generally available for public inspection after a statutorily required preservation period, which varies depending upon the kind of election held. Open Records Decision No. 505 (1988).² Section 1.013 of the Election Code permits but does not require the destruction of voted ballots and other election records after the retention period unless, among other things, the election is contested. If the election is contested, that provision requires preservation of the records until the election contest is final.³

¹Voted ballots are also specifically included in the definition of “precinct election records” in section 66.002 of the Election Code.

²Pursuant to section 1.012 of the Election Code “an election record that is public information shall be made available to the public during the regular business hours of the record’s custodian.”

³Section 1.013 relates to the preservation of records and does not affect section 1.102 which expressly makes public all election records.

During the retention period, voted ballots are excepted from required public disclosure under section 552.101 of the Government Code in conjunction with section 66.058 of the Election Code. Open Records Decision No. 505 (1988). If a governmental body receives a request for election information during the retention period, the request must be treated as a request to inspect the election materials when the retention period expires. *Id.* Furthermore, the election records may not be destroyed until the request for inspection of the records has been granted. Open Records Decision No. 505 (1988). Thus, based on the relevant Election Code provisions and Open Records Decision No. 505 (1988), we conclude that voted ballots are public information and are not confidential pursuant to the Texas Constitution.

You also contend that section 221.008 of the Election Code implicitly makes voted ballots confidential. Section 221.008 of the Election Code provides that a court may open secured ballot boxes during the trial of an election contest. Section 66.058 of the Election Code provides the retention periods for voted ballots and other election records. That provision further requires that voted ballots be "preserved securely in a locked room in the locked ballot box." Lastly, section 66.058(b) provides that "except as permitted by [the Election Code], a ballot box containing voted ballots may not be opened during the preservation period." Thus, section 221.008 merely provides an exception for the general proposition that voted ballots are to be preserved securely for the prescribed preservation period.

The city may not withhold voted ballots under the Texas Constitution or the Election Code. Furthermore, as explained above, the city has waived the protection of section 552.103 of the Government Code because it failed to timely request a ruling from this office when it received the first request for the election related information. The city must therefore release the requested records in their entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

Ref.: ID# 109787

Enclosures: Submitted documents

cc: Mr. Glen Stehle
701 North St. Mary's Street
San Antonio, Texas 78205
(w/o enclosures)

Mr. Ron Barton
P.O. Box 700624
San Antonio, Texas 78270
(w/o enclosures)

Ms. Marilyn Moritz
Reporter
KSAT/TV 12
1408 N. St. Mary's Street
San Antonio, Texas 78215
(w/o enclosures)

Ms. Joan L. Lucas
News 4 San Antonio
P.O. Box 2641
San Antonio, Texas 78251
(w/o enclosures)