



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 1, 2005

Ms. Gloria R. Salinas
Manager
Rio Water Supply Corporation
42 N. Suntext Rd.
Rio Grande City, Texas 78582

OR2005-06883

Dear Ms. Salinas:

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# 228473.

The Rio Water Supply Corporation (the "corporation") received a request for "proxy votes, sign in sheets, and votes cast at the annual meeting which occurred on April 21, 2005." You ask whether the responsive proxy ballots must be released to the requestor, but raise no exceptions to disclosure for the requested information. In response to a letter sent to counsel for the corporation ("counsel") pursuant to section 552.303 of the Government Code, counsel argues to this office that the requested proxy ballots are confidential pursuant to constitutional privacy.¹ We have considered your comments, the arguments of counsel, the

¹We note that the requestor asserts, and provides documentation demonstrating, that the corporation has released to her copies of the list of members who voted while in attendance at the annual meeting as well as copies of those members' ballots. Therefore, this ruling is limited to the issue of whether the requested proxy ballots are confidential by law.

comments submitted to this office by the requestor,² and have reviewed the submitted representative sample of information.³

Initially, we address your obligations under section 552.301 of the Government Code. This section prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to 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)*. Section 552.302 provides that if a governmental body does not request an attorney general decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id. § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App. — Austin 1990, no writ).

In this instance, neither you nor counsel claimed any exception to disclosure of the submitted information within the 10-day deadline. Thus, you have not complied with section 552.301 of the Government Code in requesting this decision. Therefore, the submitted information is presumed to be public under section 552.302 and must be released, unless there is a compelling reason to withhold any of the information. The statutory presumption that information is public can generally be overcome by a demonstration that the information is confidential by law or that third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. Because counsel argues that the submitted information is confidential by law, we will address counsel's argument that the information is protected by constitutional privacy.

By letter dated June 30, 2005, this office requested that counsel provide us with her position on the applicability of section 67.007(c) of the Water Code to the proxies at issue. *See Gov't Code § 552.303*. Chapter 67 of the Water Code is titled "Non-Profit Water Supply or Sewer Services Corporations." Section 67.007 of the Water Code is titled "Annual or Special Meeting" and provides:

- (a) The annual meeting of the members or shareholders of the corporation must be held between January 1 and May 1 at a time specified by the bylaws or the board.

²See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

³This letter ruling assumes that the submitted information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the corporation 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)*.

(b) The board shall adopt written procedures for conducting an annual or special meeting of the members or shareholders, which shall include the following:

- (1) notification to eligible members or shareholders of the proposed agenda, location, and date of the meeting;
- (2) establishment of a quorum consisting of proxies and the votes of members or shareholders present;
- (3) nomination and election procedures;
- (4) approval of the proxy and ballot form to be used; and
- (5) validation of eligible voters, proxies, ballots, and election results.

(c) The board shall adopt an official proxy and ballot form to be used in conducting the business of the corporation at any annual or special meeting. No other proxy or ballot form will be valid. Proxies and ballots from members or shareholders are confidential and are exempted from disclosure by the corporation until after the date of the relevant election.

Water Code § 67.007. In response to our letter, counsel advised this office that “it is the position of the [corporation] that . . . section 67.007(c) . . . is applicable to the corporation’s proxy ballots and that same are subject to disclosure to the public pursuant to an open records request.” Counsel further argued, however, that “it is also the position of the [corporation] that the provisions in Article VI, section 4 of the Texas Constitution providing for a secret ballot take precedence [over] the provisions of the Texas Water Code.” It is our understanding that the submitted proxy form relates to an election that the corporation held earlier this year. We thus understand counsel to argue that, although the proxy forms are not now confidential under section 67.007(c) of the Water Code, they are nevertheless confidential under a right of privacy afforded by the Texas Constitution.

Article VI of the Texas Constitution is titled “Suffrage.” Section 4 of article VI states:

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.

Counsel cites to several Texas court decisions construing article VI, section 4 as providing for a secret ballot. *See Wood v. State*, 126 S.W. 2d 4 (Tex. 1939); *Oliphint v. Christie*, 299

S.W. 2d 933 (Tex. 1957); *In the Matter of the Talco-Bogota Consolidated Independent School District Bond Election*, 994 S.W. 2d 343 (Tex. App.—Texarkana 1999, no pet.). Counsel states that “[i]t is very clear that under the provisions of [article VI, section 4] and the rulings of Texas Courts the right to privacy in how a voter casts his/her vote *in any election* is a sacred right.” [Italics added]. Counsel therefore argues that, because the proxies at issue on their face disclose the identities of the voters and how they voted, release of such proxies would violate the voters’ constitutional right to a secret ballot.

We note, however, that Texas courts have long held that the provisions of article VI do not pertain to every election of any kind whatsoever held in the state. *See Graham v. City of Greenville*, 2 S.W. 742 (Tex. 1886) (vote on annexation of territory by a city held not violative of article VI, section 4, despite fact that vote not taken by ballot; such vote did not constitute an “election” under article VI, section 4). Rather, the suffrage provisions of article VI apply only to governmental elections, such as general elections, which concern the general public. *Koy v. Schneider* 221 S.W. 880, 917 (Tex. 1921) (governmental elections, to which suffrage clause of Texas constitution is applicable, are elections, such as “general elections,” which directly and finally affect all the people of the included territory and which determine who shall hold public office or whether a particular government policy shall or shall not prevail; suggesting that elections of domestic corporations, both of stockholders and directors, are not subject to the suffrage clause); *see also* 31B Tex. Jur. 3d *Elections* § 98 (suffrage provisions of Texas constitution refer to governmental elections). According to the court in *Koy*, “‘governmental’ elections, such as ‘general elections,’ certainly do perform, finally, a distinct ‘governmental’ purpose, affecting all the people of the involved territory, in the election of individuals to fill offices, and in the actual adoption or rejection of governmental policies. Taxes are collected from practically all the people, for whose benefit the government is maintained.” 221 S.W. 2d at 901.

Therefore, we next address whether an election by members of a water supply corporation organized and operating under the provisions of Chapter 67 of the Water Code (“chapter 67”) to appoint or remove directors would be considered a governmental election for purposes of article VI, section 4, and thus, whether the information at issue would be excepted from pursuant to section 552.101 of the Government Code⁴ as information made confidential by constitutional law.

We note that in Texas, the holding of public elections to elect public officers is considered to be an attribute of a political subdivision of the state. *See Bolen v. Board of Firemen, Policemen, and Fire Alarm Operators’ Trustees*, 308 S.W. 2d 904 (Tex. App. -San Antonio 1957, writ ref’d) (attributes of a political subdivision necessarily include geographical areas and boundaries, public elections, public officials, taxing power and a general public purpose or benefit); *State v. \$50,600.00*, 800 S.W.2d 872 (Tex. App.- San Antonio 1990, writ denied) (same). However, water supply corporations formed pursuant to chapter 67 of the Water Code or its predecessor have routinely been found not to be

⁴Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

political subdivisions of the state. See *Tarrant County Water Supply Corp. v. Hurst-Euleless Bedford Indep. Sch. Dist.*, 391 S.W. 2d 162 (Tex. Civ. App.—Ft. Worth 1965, writ ref'd n.r.e.) (finding that water supply corporation formed pursuant to predecessor to chapter 67 was not political subdivision; thus, its properties used exclusively for public purposes were not exempt from taxation); *City of Combes v. East Rio Hondo Water Supply Corp.*, 244 F. Supp. 2d 778 (S.D. Tex. 2003) (water supply corporation organized under chapter 67 not political subdivision under Texas law, whether viewed definitionally or functionally, and therefore, not subject to the requirements of federal Voting Rights Act); Ethics Advisory Opinion No. 9 (1992) (water supply corporations organized under predecessor to chapter 67 not political subdivisions for purpose of chapter 305 of Government Code relating to registration of lobbyists). See also Tex. Op. Atty Gen. JM-596 (1986) (nonprofit water supply corporation not a political subdivision).

Further, we note that a Texas court has concluded that a chapter 67 water supply corporation is not an entity of state or local government for purposes of governmental immunity, pursuant to the provisions of the Texas Tort Claims Act. *Lone Star Caliper Co. v. Talty Water Supply Corp.*, 102 S.W. 3d 198, 201 (Tex. App.—Dallas, 2003, pet. granted, judgment vacated w.r.m.). In addition, this office has concluded that a nonprofit water supply corporation created under the provisions of chapter 67 is not subject to the Texas Local Government Records Act, chapters 201 to 205 of the Local Government Code. Tex. Op. Atty Gen. GA-0111(2003).

Of special significance to the question at issue, in *City of Combes, supra*, the court compared a chapter 67 water supply corporation with an Arizona public utility that had been found to be subject to the Voting Rights Act. The court, quoting the Ninth Circuit Court of Appeals, noted that the Arizona utility at issue “‘exercises many governmental powers, including the power of eminent domain, the power to levy taxes on lands within its boundaries, and the power to issue tax exempt bonds.’ . . . In addition the [Arizona utility] ‘conducts elections according to statutory procedures.’” 244 F. Supp 2d at 783, quoting *Smith v. Salt River Project Agricultural Improvement and Power Dist.* 109 F. 3d 586, 593-594 (9th Cir. 1997). In contrast, the *City of Combes* court found that, with the exception of the power of eminent domain, a chapter 67 water supply corporation exercises none of the governmental powers typical of political subdivisions, including the power of taxation. In a footnote, the court added that “while it is true that the Texas Water Code establishes several general rules for elections, §§ 67.005-007, the elaboration of electoral procedure is to be found, rather, in the water supply corporation's bylaws. These rules, it is important to note, are *not* found in the Texas Election Code.... [Emphasis in original].⁵ *In all important respects, Texas law does*

⁵We note that counsel informs us that the corporation “follows the election code in connection with Proxy Ballots” [sic]. However, subsections 67.007(b)(3)-(5) and (c) of the Water Code set forth the authority of the board of a chapter 67 water supply corporation to adopt procedures for elections and for approval of the proxy and ballot form to be used. See *Melissa Indus. Development Corp. v. North Collin Water Supply Corp.* 316 F. Supp. 2d 421(E.D. Tex., 2004) (finding that section 67.007(b)(4) requires a water supply corporation's board to adopt procedures for the approval of official proxy and ballot forms, and that section 67.007(c) requires the adoption of an official proxy and ballot form to be used in the conduct of official

not treat water corporation elections as a matter of municipal politics.” [Emphasis added]. 244 F. Supp. 2d at 783, fn.2. Finally, the court concluded that “[t]he primary concern of the Ninth Circuit — that enjoyment of ‘the powers and privileges of the political subdivision’ demands fulfillment of ‘the duties and obligations of a political subdivision’— is simply not implicated *by the very nearly apolitical status of water supply corporations in Texas.*” 244 F. Supp. 2d at 784. [Emphasis added].

We recognize that the governing body of a non-profit corporation organized under chapter 67 of the Water Code is subject to the requirements of the Act. *See* Gov’t Code § 552.003(1)(A)(ix). Further, the Water Code in several instances defines “political subdivision” to encompass chapter 67 water supply corporations. *See, e.g.,* Water Code §§ 15.001(5); 15.602(9) (pertaining to the Texas Water Assistance Program). However, as stated by the court in *City of Combes*, “[i]t simply cannot be said that the definitions found in the Texas Water Code provide a basis for regarding water supply corporations as ‘political subdivision[s]’ for anything other than the narrow purposes set forth in the Code.” 244 F. Supp. 2d at 782.

On the basis of the foregoing, we find that an election by members of a chapter 67 water supply corporation to appoint or remove directors is not a governmental election for purposes of article VI, section 4. Therefore, we conclude that release of the proxy ballots at issue pursuant to a request under the Act would not violate the members’ constitutional right to a secret ballot. Accordingly, the submitted information may not be withheld pursuant to a constitutional right of privacy.

Counsel alternatively argues that “the provisions of Water Code § 67.007(c) could be complied with by redacting the voters identifying information from the proxy ballot. In that fashion, the requestor may see the ballot without the identity of the voter being disclosed and therefore, protecting the voters right to non-disclosure of how the voter cast his ballot.” However, section 67.007(c) only makes proxies and ballots from members or shareholders confidential until after the date of the relevant election. As the relevant election is now concluded, section 67.007(c) provides no basis for withholding any portion of the proxy ballots at issue. Therefore, as neither you nor counsel makes any further arguments against

business). Nowhere in chapter 67 of the Water Code does the statute require that the provisions of the Texas Election Code be followed with regard to such elections, proxies, and ballots. *Compare* Water Code § 49.101 (water conservation and reclamation district elections must generally be held in accordance with the Election Code). We further note in this regard that, during committee deliberations, in discussing the necessity for adding section 67.007 to chapter 67 of the Water Code, members stated “[c]urrently nonprofit water supply and sewer service corporations are required to hold annual meetings between specified dates. *Procedures for holding the annual meeting are not currently set out by statute.* Therefore, general meeting management relies on bylaws of the individual corporation. However, *without legislative directives regarding written procedures for annual meetings and elections*, a corporation might not adequately fulfill its responsibility to conduct annual meetings in a fair, impartial, and nondiscriminatory manner.” [Emphasis added]. House Comm. on Natural Res., Bill Analysis, S.B. 533, 76th Leg. (1999). Based on the foregoing, it is clear that the legislature does not consider the Election Code to be applicable to elections held under section 67.007.

disclosure of the submitted information, we conclude that the submitted information must be released to the requestor in its entirety.⁶

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); *Tex. 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

⁶We note that counsel informs us that "for all subsequent annual meetings, the proxy ballots will be designed in a manner which protects the voters rights to a secret ballot."

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 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/krl

Ref: ID#228245

Enc. Submitted documents

c: Ms. Romelia Reyes
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(w/o enclosures)