



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 30, 2006

Ms. Julie Joe
Assistant County Attorney
Travis County Attorney's Office
P.O. Box 1748
Austin, Texas 78767

OR2006-00981

Dear Ms. Joe:

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# 241100.

The Travis County Clerk's Office (the "county clerk") received a request for various categories of information, including ballot images, related to the Joint Special Elections held on November 8, 2005. The county clerk subsequently received another request for the digital images of all ballots cast in the elections. You state that you have released some information responsive to the first request. You claim that the requested ballot images are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim.

Initially, we note that you sought clarification from the first requestor because you believe that certain categories of her request are unclear.¹ See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). A governmental body has a duty to make a good faith effort to relate a request to information that the governmental body holds. Open Records Decision No. 561 (1990). In this case, you have identified

¹Specifically, you sought clarification regarding the requested "data dumps," "back-up files," and "internal memory tapes."

information that is possibly responsive to the requested categories of information for which you sought clarification and claimed an exception to disclosure for such information. Therefore, we consider you to have made a good faith effort to relate the request at issue to information the county clerk maintains. Accordingly, we will address the applicability of the exception you claim to the requested information at issue.

Next, we note, and you acknowledge, that the county clerk has failed to comply with the deadlines prescribed by 552.301 of the Government Code in seeking an open records decision from this office. *See* Gov't Code § 552.301. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *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 section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). The county clerk's claim under section 552.101 of the Government Code can provide a compelling reason to withhold information, and we will therefore address your arguments under that exception.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You state that the requested ballot images are "precinct election records" that are confidential under section 66.058 of the Election Code, which states in relevant part:

(a) Except 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.

(b) The voted ballots shall be preserved securely in a locked room in the locked ballot box in which they are delivered to the general custodian of election records. Except as permitted by this code, a ballot box containing voted ballots may not be opened during the preservation period.

...

(d) A custodian of a ballot box containing voted ballots commits an offense if, during the preservation period prescribed by Subsection (a), the custodian:

(1) makes an unauthorized entry into the box; or

(2) fails to prevent another person from handling the box in an unauthorized manner or from making an unauthorized entry into the box.

(e) An offense under Subsection (d) is a Class A misdemeanor.

Elec. Code § 66.058 (a)-(b), (d)-(e). “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 id.* § 66.002. You assert, and we agree, that the requested images of voted ballots are within this meaning of “precinct election records.”

The Election Code authorizes access to voted ballots during the preservation period for several purposes, including, for example, recounts, election contests, criminal investigations, and counts conducted pursuant to chapter 127 of the Election Code. *See Open Records Decision No. 505 at 2 n. 2 (1988)*. We have no information that the Election Code authorizes access to the records at issue in this case. Thus, this information is not subject to disclosure under the Act until the preservation period has run. The preservation period in the instant case is at least 22 months after the November 8, 2005 election. *See Elec. Code § 66.058(a)*. Therefore, the responsive ballot records are confidential as long as the records are required to be preserved. After this period, the records are subject to public disclosure. *See Open Records Decision No. 505 at 4 (1988)* (a request made during the preservation period to inspect voted ballots must be treated as a request to inspect the ballots when the retention period expires).

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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 241100

c: Ms. Karen Renick
2500 Tower Drive
Austin, Texas 78703

Ms. Kathleen Wynne
Black Box Voting, Inc.
330 SW 43rd Street, Suite K, Box 547
Renton, Washington 98055