



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 1, 2010

Mr. Fred M. Barker
Assistant County Attorney
County of Parker
118 West Columbia Street
Weatherford, Texas 76086

OR2010-14976

Dear Mr. Barker:

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# 395457.

The Parker County Elections Administrator (the "administrator") received a joint request from three requestors for all information pertaining to the municipal election of the City of Weatherford held on May 8, 2010, including (1) voted ballots and test ballots, (2) computer software and programming for the voting machines and tally machine, and (3) access to voting machines, election equipment, and computers.¹ You claim that the computer software and programming for the voting machines and tally machines, as well the voting machines, election equipment and computers themselves, are not subject to the Act. You claim the voted ballots and test ballots are excepted from disclosure under section 552.101 of the Government Code. You state that all other information responsive to this request has been released. You also state that this request for information implicates the proprietary interests of Hart Intercivic, Inc. ("Hart") under section 552.110 of the Government Code.

¹We note the administrator asked for and received clarification of the request. *See* Gov't Code § 552.222(b)(providing that if request for information is unclear, governmental body may ask requestor to clarify the request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Accordingly, you notified Hart of the request and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have considered your arguments and reviewed the submitted information.

Initially, you assert the requested software and programming for the voting machines and tally machine are not subject to the Act. In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. You state the requested software and programming is part of the mechanism for operating the voting system. You further state the "only significance of the voting system programs and software is a tool or tools used to manage, maintain, manipulate and protect data or information concerning the election[.]" Based on your representations and our review, we find the requested software and programming do not constitute public information under section 552.002 of the Government Code.² We therefore conclude this information is not subject to the Act and need not be released to the requestor. You also argue the requested voting machines, equipment, and computers used in the election are not subject to the Act. This office has ruled that tangible physical items are not "information" as that term is contemplated under the Act. *See, e.g.*, ORD 581. Thus, any responsive tangible object that is maintained by the administrator is not public information that is subject to the Act. Therefore, the administrator is not required to release the voting machines, equipment, and computers in response to the present request. *See* Gov't Code §§ 552.002, .021.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes. Section 66.058 of the Election Code reads in part as follows:

(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) For a period of at least 60 days after the date of the election, 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.

²As our ruling is dispositive for this information, we need not address your argument under section 122.0331 of the Election Code.

...

(b-1) Except as permitted by this code, a ballot box or other secure container containing voted ballots may not be opened during the preservation period.

...

(d) A custodian of a ballot box or secure container 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 container; or
- (2) fails to prevent another person from handling the box or container in an unauthorized manner or from making an unauthorized entry into the box or container.

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

Elec. Code § 66.058 (a)-(b-1), (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 voted ballots are within this meaning of "precinct election records."

The Election Code authorizes access to election records 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 voted ballots 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 May 8, 2010 election. *See Elec. Code § 66.058(a)*. Therefore, the voted ballots are confidential as long as the ballots are required to be preserved pursuant to section 66.058 of the Election Code, and thus, the voted ballots at issue must be withheld under section 552.101 of the Government Code for the duration of the retention period. After this period, these ballots are subject to public disclosure. *See ORD 505 at 4 (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)*.

You claim that the requested test ballots are made confidential under section 127.099 of the Election Code, also encompassed by section 552.101. Section 127.099 provides as follows:

- (a) On completing each test, the presiding judge shall place the test ballots and other test materials in a container provided for that purpose and seal the

container so it cannot be opened without breaking the seal. The manager, tabulation supervisor, presiding judge, and not more than two watchers, if one or more watchers are present, shall sign the seal. The watchers must be of opposing interests if such watchers are present.

(b) The test materials shall remain sealed for the period for preserving the precinct election records.

(c) The container may not be unsealed unless the contents are necessary to conduct a test under this subchapter, a criminal investigation, election contest, or other official proceeding under this code. If the container is unsealed, the authority in charge of the proceeding shall reseal the contents when not in use.

Elec. Code § 127.099(a)-(c). You claim that the requested test ballots are made confidential under section 127.099(c), which prohibits the unsealing of the container holding the test results except in certain circumstances not present here. Furthermore, section 127.099(b) specifies that the container must remain sealed for “the period for preserving the precinct election records.” The retention period for the May 8, 2010 election is, as noted above, at least 22 months. *Id.* § 66.058(a). Accordingly, because the administrator received this request during the retention period, the requested test ballots are confidential pursuant to section 127.099(c) of the Election Code and they must be withheld under section 552.101 of the Government Code for the duration of the retention period. After this period, the test ballots are subject to public disclosure. *Cf.* ORD 505 at 4 (confidentiality conferred by section 66.058 of Election Code applies only during retention period).

In summary, the requested software and programming for the voting machines and tally machine, as well as the voting machines, equipment, and computers, are not subject to the Act. The requested voted ballots are confidential pursuant to section 66.058 of the Election Code and the requested test ballots are confidential pursuant to section 127.099(c) of the Election Code for as long as the election record and test materials are required to be preserved; thus, the voted ballots and test ballots at issue must be withheld under section 552.101 of the Government Code for the duration of the retention period.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Tamara H. Holland". The signature is written in a cursive style with a large initial "T".

Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/em

Ref: ID# 395457

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Peter Lichtenheld
Director of Operations
Hart InterCivic, Inc.
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Austin, Texas 78728
(w/o enclosures)