



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 20, 1993

Honorable Andy J. McMullen
District Attorney
220th Judicial District
P.O. Box 706
Hamilton, Texas 76531

Letter Opinion No. 93-65

Re: When, if ever, an application for a place on a party primary ballot, filed with the party's county chairman, becomes a "governmental record" for purposes of Penal Code, section 37.01 (ID# 16194)

Dear Mr. McMullen:

You ask at what point, if ever, an application for a place on a party primary ballot for a public office, filed with the party's county chairman, becomes a "governmental record" for purposes of Penal Code, chapter 37. See Elec. Code § 172.022 (authority with whom application to appear on primary ballot is filed).

Section 37.01(1) defines "governmental record," for purposes of that chapter as:

- (A) anything belonging to, received by, or kept by government for information;
- (B) anything required by law to be kept by others for information of government; or
- (C) a license, certificate, permit, seal, title, or similar document issued by government.¹

¹"Governmental record" is an operative term in the offense set out in section 37.10, "Tampering With Governmental Record." Section 37.10 reads, in relevant part, as follows:

- (a) A person commits an offense if he:
 - (1) knowingly make a false entry in, or false alteration of, a governmental record;
 - (2) makes, presents, or uses any record, document, or thing, with knowledge of its falsity and with intent that it be taken as a genuine governmental record; [or]
 - (3) intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record.

We first address your concern that "the application was never filed in a governmental office." Although a political party may not be a public entity, nor its officers, such as the county chairman with whom the application here was filed, public officers, we think the primary ballot application at issue here nevertheless falls within the definition of "governmental record" set out in section 37.01(1)(B) as a document "required by law to be kept by others for information of government." This is the only application a party candidate for public office in the November general election will ever have to file, his placement on the ballot in the latter election being effected by the county chairman's certifying him as the party's nominee if he receives the majority of votes for the office at the primary or runoff primary election. Elec. Code §§ 172.002 - 172.004, 172.117. The contents required in such application are set out in section 141.031 of the Election Code and are the same as for applications for places on any public election ballot. Such an application becomes public information "immediately upon its filing" with the county chairman who must preserve it for two years. *Id.* §§ 141.034, 141.035.² We think it clear the party's maintenance and preservation of these documents, pursuant to legislative directive, serves governmental purposes in connection with the election process--both for the provision of general information to the public and as records of candidates' attestations that they meet the eligibility requirements of the offices they seek. *See, e.g., id.* § 141.034 (challenge of application). The applications are thus, in our opinion, documents "required by law to be kept by others for information of government" under the definition of "governmental record" in Penal Code section 37.01(B).

You also suggest that the holding in *Constructors Unlimited, Inc. v. State*, 717 S.W.2d 169 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd), precludes treating such an application as a "governmental record," at least until the document is filed and in the possession of the filing authority. In *Constructors Unlimited, Inc.*, a contractor on a building project for the University of Texas had filed a document which included an allegedly false statement that "all current invoices and obligations had been paid." The document had been filed, pursuant to an agreement between the parties, as a prerequisite to the contractor's being paid. The contractor was subsequently charged under section 37.10(a)(1) of the Penal Code with "knowingly making a false entry in, or false alteration of, a government document." The state argued that the document in question was a "governmental record" under the definition set out in section 37.01(1)(A)--as "belonging to, received by, or kept by government." The court found the document in question had not been a governmental document under the section 37.01(1)(A) definition at the time of the alleged false entry--the document not at that time "belonging to," or having been "received by," or "kept by government" and that the defendant had therefore not committed the offense set out in section 37.10(a)(1), of "knowingly making a false entry

²Prior to there being specific indication in the election laws that primary application components were public information, this office opined that such information held by political parties, such as the Democratic Party, which receive state funds under what is now chapter 173 of the Election Code, was public information under the Open Records Act. Attorney General Opinion MW-175 (1980) (nominating petitions).

in, or false alteration of a governmental record." The court specifically noted, however, that the state had not argued that the document was a "governmental record" by virtue of section 37.01(1)(B)--as one "required by law to be kept by others for information of government"--and moreover that the state had not charged the defendant with an offense under section 37.10(a)(2)--for one who "makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record." *Compare Lewis v. State*, 773 S.W.2d 689 (Tex. App.--Corpus Christi, writ ref'd) (arrest warrant became "governmental record" simultaneously with justice of the peace's completion of it, including allegedly false entry thereon).

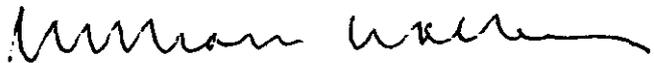
As discussed above, we think that the definition of "governmental record" applicable in the situation you ask about is that in subsection (1)(B) of section 37.01: "anything required by law to be kept by others for information of government," rather than that in subsection (1)(A), which was found in *Contractors Unlimited, Inc.* to require that the document be already in the possession of the government in order to be a "governmental record." As the *Contractors Unlimited, Inc.* opinion turns on the definition of "governmental record" in section 37.01(1)(A), it does not, we think, govern here. Subsection (1)(B), unlike subsection (1)(A) as construed in *Contractors Unlimited, Inc.*, does not, we think, preclude a document's becoming a "governmental record" until it actually belongs to, has been received by, or is being kept by government. In our opinion, the application for a place on the primary ballot at issue here may be deemed to have become a governmental record under the subsection (1)(B) definition, as a document "required by law to be kept by others for information of government," at the time it was executed.

We caution, finally, that whether any particular conduct constitutes an offense that should be prosecuted would depend on the facts of the case, and is subject, of course, to the reasonable discretion of the prosecutor having jurisdiction over the matter. We in the opinion process are unable to make the fact-findings requisite to such determinations.

S U M M A R Y

An application for a place on a party primary ballot for a public office, filed with the party's county chairman, may be deemed to have become a "governmental record" for purposes of the definition of that term in section 37.01(1)(B) of the Penal Code, as "anything required by law to be kept by others for information of government," at the time it was executed.

Yours very truly,

A handwritten signature in cursive script, appearing to read "William Walker".

William Walker
Assistant Attorney General
Opinion Committee