



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 14, 2004

Ms. Holly C. Lytle  
Assistant County Attorney  
El Paso County  
500 East San Antonio, Room 503  
El Paso, Texas 79901

OR2004-5811

Dear Mr. Lytle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205218.

El Paso County (the "county") received a request from a state senator for print outs of the images of all ballots cast in the March 9<sup>th</sup> Democratic primary for precincts 160, 125, 68, and 33.<sup>1</sup> The requestor also seeks a copy of the log created by the Diebold system that details the actions of each user, the time and the user for the months of January, February, March, and April of 2004. You state that the county will release the audit log to the requestor. You ask whether the requested voted ballot images are excepted from disclosure under section 552.101 of the Government Code. You also ask whether the requestor has a right of access to the information under section 552.008 of the Government Code.

Section 552.101 of the Government Code excepts from required public disclosure information that is deemed confidential by law, including information that is made confidential by statute. You raise section 66.058 of the Election Code. Section 66.058 requires the custodian of election records to securely preserve voted ballots in a locked room in the locked ballot box in which they are delivered. *See Elec. Code § 66.058(b)*. Furthermore, except as permitted by the Election Code, a ballot box containing voted ballots may not be opened during the preservation period. *See id.*

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<sup>1</sup>The county clerk is the general custodian of election records for a primary election. *See Elec. Code § 66.001(1)*.

Section 66.058 reads 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 60 days 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.

(c) If during the preservation period an authorized entry is made into a ballot box containing voted ballots, when the purpose for the entry is fulfilled, the box shall be relocked, and the box and key returned to the custodian.

(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.

(f) The records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian. If the records are removed from the box, they may not be commingled with any other election records kept by the custodian.

(g) The precinct election records in an election involving a federal office shall be preserved by the authority to whom they are distributed for at least 22 months after election day in accordance with federal law. The secretary of state shall instruct the affected authorities on the actions necessary for compliance with federal law.

*Id.* § 66.058. "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. We believe the requested images of voted ballots are within this meaning of "precinct election records."

You inform us that the March 9<sup>th</sup> primary election included federal offices on the ballot. In Open Records Decision No. 505 (1988), this office determined that, under section 66.058, the voted ballots from a primary election are exempt from public disclosure only during the prescribed retention period and that a request made during the retention period to inspect voted ballots must be treated as a request to inspect the ballots when the retention period expires. The decision also determined that, under section 66.058(g) the preservation period for ballots cast in an election involving a federal office is 22 months after election day and that during the preservation period, the voted ballots are protected from required disclosure under the predecessor to section 552.101. *See* Open Records Decision No. 505 at 2 (1988).

You urge a different interpretation of subsection (g) from the interpretation this office took in Open Records Decision No. 505. You suggest that subsection (g) means that all election records for an election with federal offices on the ballot must be retained for 22 months, but that the voted ballots must be secured in the locked box for only 60 days. You note that no federal law requires that federal election records be secured in a locked box without access for 22 months.

We consulted with the Elections Division of the Secretary of State's Office concerning your interpretation of subsection (g). The Secretary of State's Office does not object to the conclusion this office reached in Open Records Decision No. 505 that, unless authorized by the Election Code, federal election records must be in a locked room in a locked box for a period of 22 months and with no unauthorized access. Furthermore, while it is true that the federal law on the retention and preservation of federal election records does not require the records to be secured in a locked box without access for 22 months, subsection (b) states that, "except as permitted by this code, a ballot box containing voted ballots may not be opened during the preservation period." Elec. Code § 66.058(b). Since the injunction of subsection (b) is lifted at the end of the preservation period, subsection (b) must be read with subsection (g), which defines the preservation period for federal election records. The preservation period for federal election records is set by both federal and state law as 22 months after election day. *See* 42 U.S.C. § 1974; Elec. Code § 66.058(g). Thus, the 22-month preservation period for federal election records is the time during which the records must be secured in a locked room in the locked ballot box with no unauthorized entry into the box.

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 in this situation. Therefore, the requested election records are confidential as long as the records are required to be preserved, 22 months after election day. After that period, the records are subject to public disclosure. *See* Open Records Decision No. 505 at 3.

You raise section 552.008 of the Government Code, which grants access to requested information, including confidential information, to individual members, agencies, or committees of the legislature. The provision reads as follows:

(a) This chapter does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.

(b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter if the requesting member, agency or committee states that the public information is requested under this chapter for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

(1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;

(2) the information be labeled as confidential;

(3) the information be kept securely; or

(4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

(c) This section does not affect:

- (1) the right of an individual member, agency, or committee of the legislature to obtain information from a governmental body under other law, including under the rules of either house of the legislature;
- (2) the procedures under which the information is obtained under other law; or
- (3) the use that may be made of the information obtained under other law.

Gov't Code § 552.008. We have reviewed the request. The requestor does not state that the information is requested for legislative purposes. Furthermore, you state that you inquired of the senator's office whether the information is requested for legislative purposes, but have not received a reply to your inquiry. Thus, we find that release of the responsive information is not compelled by section 552.008 in response to this request. Accordingly, as we have determined that the requested information is deemed confidential under section 66.058 of the Election Code, the county must withhold the information from the requestor based on section 552.101 of the Government Code until the end of the preservation period.

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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 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 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,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/seg

Ref: ID# 205218

c: Senator Eliot Shapleigh  
800 Wyoming Avenue, Suite A  
El Paso, Texas 79902