



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2007

Mr. Chad Cowan
Jones County Attorney
P.O. Box 68
Anson, Texas 79501

OR2007-04535

Dear Mr. Cowan:

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# 277171.

The Jones County Clerk (the "county clerk") received a request for information relating to the November 2006 general election, including the electronic ballot audit log file, a precinct-tabulated results file, and copies of the ballot screens. We understand you to claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also believe that this request for information implicates the proprietary interests of Election Systems & Software, Inc. ("ES&S") under section 552.110 of the Government Code. You state that ES&S was notified of this request.¹ We have considered your arguments and have reviewed the submitted information. As you have not submitted copies of the ballot screens, we assume that the county clerk has released any information that is responsive to that aspect of the request, to the extent that such information existed when the county clerk received the request. If not, then any such information must be released immediately.² See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

²We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

We note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from ES&S. Thus, ES&S has not demonstrated that any of the submitted information is proprietary for the purposes of the Act. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. Section 66.058 of the Election Code provides 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. 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).

You state that the submitted information consists of the county clerk's election records. You inform us that "these . . . records[] are kept under lock and key at the request of the Secretary of State, Elections Division until [the] 22 month retention period expires." You do not

indicate that the Election Code authorizes access to the records in question at this time. Based on your representations, we conclude that the submitted records are not subject to disclosure under the Act until the preservation period has run. In this instance, the preservation period is at least 22 months after the election in question. *See* Elec. Code § 66.058(a). Therefore, the submitted records are confidential under section 552.101 of the Government Code in conjunction with section 66.058 of the Election Code for as long as the records are required to be preserved. After that period expires, the records in question are subject to public disclosure. *See* Open Records Decision No. 505 at 4 (request made during statutory preservation period to inspect voted ballots must be treated as request to inspect ballots when 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).

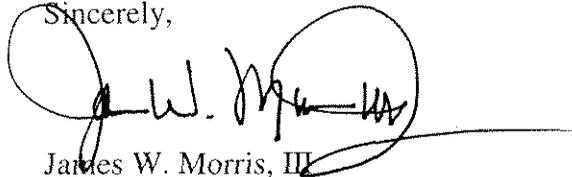
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J" and a long horizontal stroke at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jb

Ref: ID# 277171

Enc: Submitted documents

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