



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 29, 2009

Ms. Laura Garza Jimenez
Nueces County Attorney
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2009-01195

Dear Ms. Jimenez:

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# 333478.

The Nueces County Clerk (the "county clerk") received two requests from the same requestor for information pertaining to the November 2008 General Election, including an "[e]lectronic copy of individual ballot records for all votes cast via the Eslate voting machines," and an electronic copy of the ballot images related to "the self-checking system." You explain the county clerk has interpreted the request for an electronic copy of the ballot images related to the "self-checking system" to mean the test materials generated by the voting system testing. You state you have released all of the requested information except the electronic copies of the individual ballot records and the test materials. You claim that the requested individual ballot records and test materials are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim.

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. 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) 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 electronic copy of individual ballot records is 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 record 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 4, 2008 election. *See* Elec. Code § 66.058(a). Therefore, the responsive election record is confidential as long as the record is required to be preserved pursuant to section 66.058 of the Election Code, and thus, the election record at issue must be withheld under section 552.101 of the Government Code for the duration of the retention period. After this period, the record is 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 results 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 specifically contend that the requested test materials 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 November 4, 2008 election is, as noted above, at least 22 months. *Id.* § 66.058(a). Accordingly, because the county clerk received this request during the retention period, the requested test materials 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 record is subject to public disclosure. *Cf.* ORD 505 at 4 (confidentiality conferred by section 66.058 of Election Code applies only during retention period).

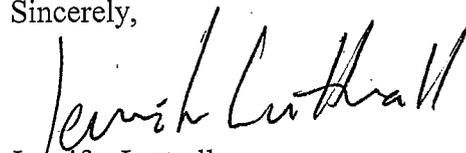
In summary, the responsive election record is confidential pursuant to section 66.058 of the Election Code and the requested test materials are confidential pursuant to section 127.099(c) of the Election Code for as long as the election record and test materials are required to be preserved; thus, the election record and test materials 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 at (512) 475-2497.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennifer Luttrall".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 333478

Enc. Submitted documents

c: Requestor
(w/o enclosures)