



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

August 10, 2015

Mr. Evaristo Garcia, Jr.  
Assistant City Attorney  
City of McAllen  
P.O. Box 220  
McAllen, Texas 78505-0220

OR2015-16426

Dear Mr. Garcia:

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# 575366.

The City of McAllen (the "city") received two requests from the same requestor for nineteen categories of information relating to all city elections and the May 2015 general election and special election runoff. The city states it is releasing some of the requested information. The city states it does not have information responsive to portions of the requests.<sup>1</sup> The city claims the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception the city claims and reviewed the submitted information.

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 section encompasses information protected by other statutes, such as section 66.058 of the Election Code. Section 66.058 reads, in part, as follows:

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

(a) Except as otherwise provided by this code, the precinct election records shall be preserved by the authority to whom they are distributed:

(1) in an election involving a federal office, for at least 22 months after election day in accordance with federal law; or

(2) in an election not involving a federal office, for at least six 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. . .

. . .

(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.

Elec. Code § 66.058 (a)-(b-1). “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 city informs us the information in Exhibit B consists of election records and test materials generated by the voting systems that are made confidential by section 66.058. *See id.* §§ 65.055(c) (for each accepted provisional ballot, the board shall place the corresponding envelope on which is printed the voter's affidavit and shall deliver the envelope to the general custodian of election records, to be retained for the period for preserving precinct election returns), .058 (provisional voting records shall be preserved after the election in the same manner as the corresponding precinct election returns). Upon review, we agree the information in Exhibit B is subject to section 66.058.

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 indication the Election Code authorizes access to the information at issue in this case. Thus, this information is not subject to disclosure under the Act until the preservation period has run. We note the election at issue did not involve a federal office. Accordingly, the preservation period in the instant case is at least six months after the May 9, 2015 election. *See Elec. Code § 66.058(a)*. Therefore, the information at issue is confidential as long as the precinct election records are required to be preserved pursuant to section 66.058 of the Election Code, and thus, the information at issue must be withheld under section 552.101 of the Government Code for the duration

of the retention period.<sup>2</sup> After this period, this information is subject to public disclosure. See ORD 505 at 4 (request made during preservation period to inspect voted ballots must be treated as request to inspect ballots when retention period expires).

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We note dates of birth of living members of the public are generally not highly intimate or embarrassing. See Open Records Decision No. 455 at 7 (1987) (dates of birth not protected under privacy). Upon review, we find the city has failed to demonstrate the dates of birth at issue are highly intimate or embarrassing and of no legitimate public interest. Thus, the city may not withhold them under section 552.101 of the Government Code in conjunction with common-law privacy.

We understand the city to also assert the dates of birth of members of the public are excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy on the basis of the decision in *Paxton v. City of Dallas*, No. 03-00546-CV (Tex. App.—Austin, May 22, 2015, pet. filed) (mem. op.). Although the city references *Paxton v. City of Dallas*, we note a petition for review was filed with the Texas Supreme Court on July 29, 2015. Accordingly, the city may not withhold the dates of birth at issue based on the court's decision in that case.

In summary, the city must withhold the information in Exhibit B under section 552.101 of the Government Code in conjunction with 66.058 of the Election Code. The city must release the remaining information.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

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<sup>2</sup>As our ruling is dispositive, we need not address the city's remaining argument against disclosure of this information.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Wheelus', with a long horizontal flourish extending to the right.

David L. Wheelus  
Assistant Attorney General  
Open Records Division

DLW/bhf

Ref: ID# 575366

Enc. Submitted documents

c: Requestor  
(w/o enclosures)