



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 10, 2015

Ms. Josephine Ramirez Solis
Assistant District Attorney
Hidalgo County Criminal District Attorney's Office
100 North Closner, Room 303
Edinburg, Texas 78539

OR2015-16467

Dear Ms. Solis:

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# 574681 (PIR-2015-0053-DA.CO and PIR-2015-0062-DA.CO).

Hidalgo County (the "county") received three requests from two separate requestors for specified records pertaining to a specified City of McAllen ("McAllen") election, as well as similar records pertaining to all McAllen, City of Pharr ("Pharr"), City of San Juan ("San Juan"), McAllen Independent School District ("MISD"), and Sharyland Independent School District ("SISD") elections. You state the county will provide some of the requested information to the requestors. You also state the county does not have any information responsive to parts of the requests.¹ You claim the submitted information is not subject to the Act. Alternatively, you claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state, and provide documentation showing, you notified McAllen, MISD, Pharr, San Juan, and SISD of the requests for information and of their rights to submit arguments to this office as to why the information at issue should not be released. Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information). We have received

¹The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

comments from SISD. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we address your assertion the information at issue is not subject to the Act. The Act is applicable only to “public information.” *See id.* §§ 552.002, .021. Section 552.002 of the Government Code defines “public information” as:

(a) [I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

(a-1) Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer’s or employee’s official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

(a-2) The definition of “public information” provided by Subsection (a) applies to and includes any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business.

²We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Id. § 552.002(a)-(a-2). Thus, virtually all the information in a governmental body's physical possession constitutes public information and is subject to the Act. *Id.*; see Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988).

You assert the information at issue is not subject to the Act because the county does not possess the information in connection with the transaction of official business of the county. You inform us, and have provided copies of contracts showing, the county contracted with McAllen and Pharr to lease county electronic voting equipment to those cities for use in each city's May 9, 2015, election. See Elec. Code §§ 123.032 (stating political subdivision other than county may contract to lease from county equipment necessary for operating voting system), .035 (explaining contract for acquisition of voting system equipment must be in writing and be approved by secretary of state); see also *id.* § 1.005(13) (defining "political subdivision" to include county, city, or school district). You contend the information at issue is the property of McAllen and Pharr. You explain the only reason the county has possession of the information is because the election records at issue are contained within county electronic voting equipment leased by McAllen and Pharr for their respective elections. You also explain McAllen and Pharr were the administrators of their own elections and, as such, are the general custodians of election records for their respective election records. The contracts with McAllen and Pharr state the county "shall have no responsibility as custodian of [McAllen's or Pharr's] election records." Pursuant to section 66.001 of the Election Code, the city secretary is the general custodian of election records with regards to a city election. See *id.* § 66.001. Therefore, we agree the information at issue pertaining to McAllen and Pharr does not constitute "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the county. See Gov't Code § 552.002. Thus, we conclude the information at issue pertaining to McAllen and Pharr is not subject to the Act and need not be released in response to the present requests for information.

You have also provided the contract for election services between the county and San Juan. The San Juan contract reflects the county agreed to perform election services for San Juan, including conducting and supervising San Juan's May 9, 2015, election. See Elec. Code § 31.092 (county election officer may contract with governing body of political subdivision to perform election services). Section 31.096(3) of the Election Code states "[a]n election services contract may not change . . . the authority to serve as custodian of voted ballots or other election records, except that a contract with a political subdivision *other than a city* may provide that the county election officer will be the custodian of voted ballots." *Id.* § 31.096(3) (emphasis added). Furthermore, as noted above, the city secretary is the general custodian of election records for a city. *Id.* § 66.001. Thus, although the county contracted to serve as the administrator of San Juan's election, San Juan's city secretary remains the general custodian of election records for its election records. Thus, we agree the information at issue pertaining to San Juan does not constitute "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the county. See Gov't Code § 552.002.

Therefore, we conclude the information at issue pertaining to San Juan is not subject to the Act and need not be released in response to the present requests for information.

Finally, you have provided the contracts for election services the county executed with MISD and SISD. The county also contracted with MISD and SISD to perform election services for MISD and SISD, including conducting and supervising each entity's May 9, 2015, election. *See* Elec. Code § 31.092. We note the contracts for election services with MISD and SISD both state the county election officer shall serve as the custodian of voted ballots for a specified time period, and the county received the requests for information during the specified time period. Pursuant to section 31.096(3) of the Election Code, an election services contract with a political subdivision, other than a city, may provide the county election officer will be the custodian of voted ballots. *Id.* § 31.096(3); *see also id.* § 1.005(13) (defining "political subdivision" to include county, city, or school district). In this instance, the political subdivisions at issue are school districts, not cities. *Id.* § 1.005(13) Accordingly, we find the county is holding the information at issue pertaining to MISD and SISD pursuant to the contracts executed between the county and MISD and SISD. Therefore, we find the information at issue pertaining to MISD and SISD constitutes "information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the county. *See* Gov't Code § 552.002. Therefore, the information at issue pertaining to MISD and SISD constitutes public information subject to the Act and may only be withheld if an exception to disclosure under the Act applies.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 66.058 of the Election Code, which 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:

(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.

...

(g) Electronic records created under Chapter 129 shall be preserved in a secure container.

Elec. Code § 66.058 (a)-(b-1), (g). “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; *see also id.* §§ 121.001 (noting other provisions of this code apply to an election in which a voting system is used), 127.132 (explaining voted ballots, election returns, and other election records of an electronic voting system shall be delivered to authorities who receive corresponding records from precinct polling places using regular paper ballots), 129.001 (stating chapter 129 applies to voting system that uses direct recording electronic voting machines and, to extent possible, procedures applicable to electronic voting system under chapter 127 are applicable to voting system under chapter 129). You assert the MISD and SISD information at issue constitutes precinct election records made confidential by section 66.058. Upon review, we agree the information at issue is subject to section 66.058.

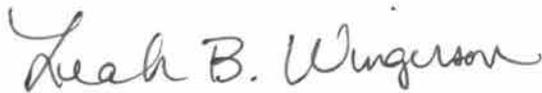
The Election Code authorizes access to election records during the preservation period for several purposes, including, for example, recounts, election contests, criminal investigations, and counts conducted pursuant to chapter 127 of the Election Code. *See* Open Records Decision No. 505 at 2 n. 2 (1988). We have no indication the Election Code authorizes access to the MISD and SISD 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 elections at issue did not involve a federal office. Accordingly, the preservation periods in the instant case are at least six months after the May 9, 2015, elections. *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. Thus, the MISD and SISD information at issue must be withheld under section 552.101 of the Government Code for the duration of the preservation period. After this period, the information at issue 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).

In summary, the information at issue pertaining to McAllen, Pharr, and San Juan is not subject to the Act and need not be released in response to the present requests for information. The county must withhold the information at issue pertaining to MISD and SISD under section 552.101 of the Government Code in conjunction with section 66.058 of the Election Code for the duration of the retention period, after which the information is subject to public disclosure.

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

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/bhf

Ref: ID# 574681

Enc. Submitted documents

c: Requestors
(w/o enclosures)

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