



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

September 2, 1988

Honorable Joe Lucas  
El Paso County Attorney  
Room 201, City-County  
Building  
El Paso, Texas 79901

Open Records Decision No. 505

Re: Whether voted ballots and software purchased for the tabulation of votes are public information under the Texas Open Records Act, article 6252-17a, V.T.C.S. (RQ-1410)

Dear Mr. Lucas:

You ask about the public availability under the Texas Open Records Act, article 6252-17a, V.T.C.S., of voted ballots from the March, 1988, primary elections in El Paso County and of computer software used in the tabulation of the votes in those elections.

Generally, all information held by governmental bodies is open to public inspection unless the information falls within an exception to disclosure under the Open Records Act. See Attorney General Opinion JM-672 (1987). You assert that the voted ballots and the computer programs are protected from disclosure under sections 3(a)(1) and 3(a)(10), respectively. Those sections except from disclosure the following:

(1) information deemed confidential by law, either Constitutional, statutory, or by judicial decision;

. . . .

(10) trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

Your inquiry about the voted primary ballots is a question of first impression to this office. The Election Code designates the county clerk or the county elections administrator, if any, as the general custodian of election

records for a primary election. Elec. Code §§ 66.001 and 31.043. The disposition of election records generally is governed by chapter 66 of the Election Code. Voted ballots come within the statutory definition of "precinct election records." Elec. Code § 66.002.

Both federal and state law govern the preservation and retention of voted ballots in an election involving a federal office.<sup>1</sup> Section 66.058(b) of the Election Code requires voted ballots to be preserved securely in a locked room in the locked ballot box in which the ballots were delivered to the general custodian on election night. The preservation period for precinct election records (including voted ballots) in an election such as a primary election is 22 months after election day. Elec. Code § 66.058(g). No entry may be made into the locked box except as authorized by the Election Code. Elec. Code § 66.058(b).<sup>2</sup> During the preservation period, the voted ballots are protected from required disclosure by section 3(a)(1) of the Open Records Act in conjunction with section 66.058 of the Election Code.

Section 1.013 of the Election Code permits but does not require the destruction of voted ballots and other election records after the expiration of the prescribed preservation period. Before the substantive revision and recodification of the Election Code in 1985, the destruction of voted ballots was governed by article 8.32 of the Election Code. The former law required the destruction of voted ballots by burning or shredding at the end of the preservation period, unless an election contest or criminal investigation was

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1. A primary election involves candidates for federal, state, district, county, and precinct offices. Elec. Code § 172.001. Section 1974 of Title 42, United States Code requires retention for 22 months of the records of an election (including voted ballots) where candidates for a federal office were voted upon. Because Texas law parallels the federally required retention period, only the state's statutory provisions will be discussed in this opinion.

2. As a general rule, no one may have access to voted ballots during the retention period. The statutory exceptions for gaining access to voted ballots include recounts, election contests, criminal investigations, and counts conducted pursuant to chapter 127 of the Election Code. None of these exceptions is applicable to your inquiry.

pending. Thus, under the former code provision, there was never a time when voted ballots maintained in the custody of an election official were available for public inspection.

Because the Election Code no longer mandates the destruction of voted ballots, it is our opinion that any voted ballots retained by the custodian of election records after the prescribed retention period are subject to the Open Records Act. They are, therefore, available for public inspection unless protected by one of the act's exceptions. Section 3(a)(1) of the Open Records Act applies only to the extent that section 66.058 applies -- during the retention period.

The Election Code specifically addresses the time and place that election records are to be made available. Section 1.012 provides:

(a) Subject to Subsection (b), an election record that is public information shall be made available to the public during the regular business hours of the record's custodian.

(b) For the purpose of safeguarding the election records or economizing the custodian's time, the custodian may adopt reasonable rules limiting public access.

Although the above-quoted language differs slightly from the wording of sections 4 and 13 of the Open Records Act pertaining to the production of public information for inspection or duplication, we do not consider the provisions to be in conflict. See Attorney General Opinion JM-757 (1987). The reference in Election Code section 1.012(b) to "limiting access" is not authorization for a custodian of election records to restrict the right of the public to inspect election records that are public records. Rather, that subsection recognizes the uniqueness of the information maintained by election officials and authorizes the custodian to adopt rules governing access to those documents. Any rule that purported to prohibit access would be unreasonable and would violate the requirements of both the Election Code and the Open Records Act.

It is not clear from your request whether you have asserted that voted ballots remain unavailable for inspection under the Open Records Act after the expiration of the

prescribed retention period. In our opinion, voted ballots from primary elections are statutorily exempt from public inspection only during the prescribed retention period. Any ballots retained by the custodian after that period are available for public inspection.

Further, it is our opinion 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. Our conclusion is based on our understanding of the purposes and interpretation of the Open Records Act. Section 14 of the Open Records Act provides, in part:

(a) This Act does not prohibit any governmental body from voluntarily making part or all of its records available to the public, unless expressly prohibited by law; provided that such records shall then be available to any person.

(b) This Act does not authorize the withholding of information or limit the availability of public records to the public, except as expressly so provided.

. . . .

(d) This Act shall be liberally construed in favor of the granting of any request for information.

This emphasis on the availability of public records coupled with the removal from the Election Code of the provision mandating the destruction of voted ballots requires us to conclude that records that would otherwise become public on a given date may not be destroyed until the request for public inspection has been resolved.

You also inquire about the availability of the computer programs used to tabulate the votes cast in the primary election. You indicate that the election results were tabulated on computer software which the county purchased from a private corporation. The vendor owns the copyrights to the programs. This copyright information appears on the screen whenever the various programs are accessed. Federal law, not the Open Records Act, governs the right to reproduce copyrighted materials. See Attorney General Opinion

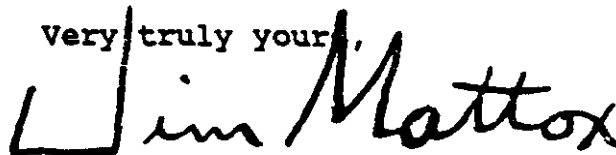
MW-307 (1981). Release of copies of computer programs protected by copy-right would violate federal law.

S U M M A R Y

Voted ballots from a primary election become public information available for public inspection after the 22 month retention period. A request under the Open Records Act for access to voted ballots must be honored before the ballots may be destroyed.

Release of copies of computer programs protected by copy-right would violate federal law.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive style with a large, stylized "J" and "M".

J I M M A T T O X  
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