

Subject: Public Information Act Request

Date: Tuesday, December 13, 2022 at 1:49:31 PM Eastern Standard Time

From: Hannah L. Bell

To: AO Records

CC: Krysten L. Louden

Attachments: image001.png, SKM_C450i22121312140.pdf, MASS EMAIL--CC_EA(930)--Recommended Procedures for Access to Anonymous Voted Ballots (Attorney General Opinion No. KP-0411).pdf, MASS EMAIL--CC_EA--Attorney General Opinion No. KP-0411.pdf, RE_ Article DUE 10am Today.pdf, RE_ Large file on the website.pdf, RE_ PIR - Protocols.pdf, RE_ Public Records Request_Redacted.pdf, RE_ Updates on litigation for Votebeat_Redacted.pdf, SKM_C450i22070810350.pdf, SKM_C450i22080514030.pdf, Supplemental Brief re MSJ.8.26.2022.attachment.pdf, Supplemental Brief re MSJ.pdf, Ballot review protocol .pdf, Ballot reviewing policy.pdf, doc09648820220818093838.pdf, doc09673420220826114646.pdf, EA-753991681-010922-1907.9.1.2022.attachment.collin.bruce.pdf, EA-753991681-010922-1907.9.1.2022.attachment.pdf, EA-753991681-080922-1625.9.8.22.attachment.pdf, EA-753991681-260822-1707.8.26.2022.attachment.pdf, FW_ Media Request -- NPR_Redacted.pdf, FYI.1.pdf, FYI.pdf, Mail.pdf, Policy for reviewing sensitive documents.pdf, RE_ [TAC-Elections] Court order Woohooo.1.pdf, RE_ [TAC-Elections] Court order Woohooo.pdf

EXTERNAL SENDER

Mr. Winters,

Tarrant County is in receipt of your Public Information Act Request. Some of the documents responsive to your request have been attached to this email. For the rest of the documents responsive to your request, find attached a request for a ruling from the Office of the Attorney General.

Sincerely,

Hannah Bell
Assistant Criminal District Attorney – Civil Division
State Bar No. 24068993
401 West Belknap
Fort Worth, Texas 76196
Phone: 817-884-1400
Email: HLBell@tarrantcountytx.gov

Sharen Wilson
Criminal District Attorney
Tarrant County, Texas



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From: [Heider I. Garcia](#)
To: [Bruce Sherbet](#)
Subject: Ballot review protocol
Date: Thursday, September 1, 2022 2:12:00 PM
Attachments: [EA-753991681-010922-1907.pdf](#)

Regards,

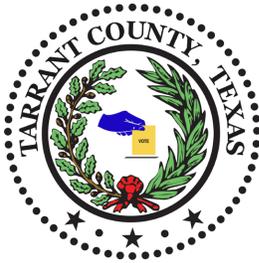
Heider Garcia, PMP, CERA
Tarrant County Elections Administrator
2700 Premier Street
Fort Worth, Texas 76111
(817) 831-8683



From: [Heider I. Garcia](#)
To: [Bruce Sherbet](#)
Subject: Ballot review protocol
Date: Thursday, September 1, 2022 2:12:00 PM
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Regards,

Heider Garcia, PMP, CERA
Tarrant County Elections Administrator
2700 Premier Street
Fort Worth, Texas 76111
(817) 831-8683



Inspecting sensitive documents in-person.



Version	5
Last revision Date	July 2022

First and foremost, the integrity and condition of the documents must be maintained throughout the process. To that end, the Tarrant County Elections Administration adopts the following rules of procedure pursuant to Texas Government Code section 552.230 relating to the inspection of sensitive documents:

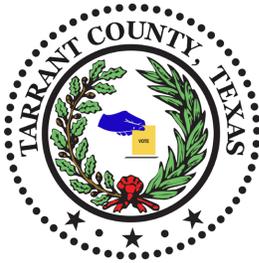
1. The term “documents” refers to any physical records being interacted with, to include paper ballots and printouts.
2. Requests to conduct an in-person inspection must be made a minimum of three (3) business days in advance of the desired date of inspection.
3. Dates will be scheduled based on availability of space and resources. Because the Elections Administration is consistently in the process of preparing for or conducting an election, it may be up to 90 days or more before an in-person inspection of documents at the Elections Administration can be scheduled. The Elections Administration will make every effort to allow an in-person inspection of documents as soon as practicable but cannot guarantee any specific turnaround time for every request.
4. Per Texas Government Code section 552.225(a), requestors have up to 10 business days to complete their inspection of documents and may only do so during normal business hours of the Elections Administration.
 - a. Normal business hours are Monday through Friday, 8 AM to 5 PM, excluding County holidays.
5. There will be specific tables designated for handling the documents:
 - a. No writing or marking instruments are allowed around the documents while they are on the inspection tables.
 - b. No food or drinks are allowed on the inspection tables.
6. All interaction with the documents by non-elections personnel may be subject to both video and in-person monitoring.
7. No more than two boxes or containers (inasmuch as the documents are in boxes or containers) may be simultaneously accessed per table. This constraint may be reduced to one box or container based on space and resource availability.
 - a. In the event that the documents are not boxed, the Elections Administration may limit the number of documents that may be accessed at the same time as allowed by physical restrictions and/or availability of said documents to avoid any potential issues.
8. The number of persons allowed simultaneous access to the documents is limited to the amount of space available in order to reasonably monitor such access but will not exceed the capacity as determined by Tarrant County Elections at any given time.
9. Laptops, tablets, or any other electronic devices which contain network capability are not allowed to be connected to any County network.
 - a. Ethernet cables are strictly prohibited in the inspection area.
 - b. Any attempt to plug a device into an ethernet jack in the Elections building at any time is prohibited.
 - c. Laptops, tables, cell phone, and other electronic devices that do not have ethernet ports may be brought into the inspection area.

Adherence to these guidelines is mandatory. Failure to comply with the policy can result in Elections asking the person to leave and the review of documents being rescheduled to a future date.

From: [Heider I. Garcia](#)
To: [Collin - Bruce Sherbet \(bsherbet@collincountytx.gov\)](mailto:bsherbet@collincountytx.gov)
Subject: Ballot reviewing policy
Date: Thursday, September 1, 2022 2:51:00 PM
Attachments: [EA-753991681-010922-1907.pdf](#)

Regards,

Heider Garcia, PMP, CERA
Tarrant County Elections Administrator
2700 Premier Street
Fort Worth, Texas 76111
(817) 831-8683



From: [Heider I. Garcia](#)
To: [Collin - Bruce Sherbet \(bsherbet@collincountytx.gov\)](mailto:bsherbet@collincountytx.gov)
Subject: Ballot reviewing policy
Date: Thursday, September 1, 2022 2:51:00 PM
Attachments: [EA-753991681-010922-1907.pdf](#)

Regards,

Heider Garcia, PMP, CERA
Tarrant County Elections Administrator
2700 Premier Street
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Inspecting sensitive documents in-person.



Version	5
Last revision Date	July 2022

First and foremost, the integrity and condition of the documents must be maintained throughout the process. To that end, the Tarrant County Elections Administration adopts the following rules of procedure pursuant to Texas Government Code section 552.230 relating to the inspection of sensitive documents:

1. The term “documents” refers to any physical records being interacted with, to include paper ballots and printouts.
2. Requests to conduct an in-person inspection must be made a minimum of three (3) business days in advance of the desired date of inspection.
3. Dates will be scheduled based on availability of space and resources. Because the Elections Administration is consistently in the process of preparing for or conducting an election, it may be up to 90 days or more before an in-person inspection of documents at the Elections Administration can be scheduled. The Elections Administration will make every effort to allow an in-person inspection of documents as soon as practicable but cannot guarantee any specific turnaround time for every request.
4. Per Texas Government Code section 552.225(a), requestors have up to 10 business days to complete their inspection of documents and may only do so during normal business hours of the Elections Administration.
 - a. Normal business hours are Monday through Friday, 8 AM to 5 PM, excluding County holidays.
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6. All interaction with the documents by non-elections personnel may be subject to both video and in-person monitoring.
7. No more than two boxes or containers (inasmuch as the documents are in boxes or containers) may be simultaneously accessed per table. This constraint may be reduced to one box or container based on space and resource availability.
 - a. In the event that the documents are not boxed, the Elections Administration may limit the number of documents that may be accessed at the same time as allowed by physical restrictions and/or availability of said documents to avoid any potential issues.
8. The number of persons allowed simultaneous access to the documents is limited to the amount of space available in order to reasonably monitor such access but will not exceed the capacity as determined by Tarrant County Elections at any given time.
9. Laptops, tablets, or any other electronic devices which contain network capability are not allowed to be connected to any County network.
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Adherence to these guidelines is mandatory. Failure to comply with the policy can result in Elections asking the person to leave and the review of documents being rescheduled to a future date.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

RECEIVED
AUG 05 2022
CIVIL DIVISION
CRIMINAL DISTRICT ATTORNEY

August 1, 2022

Ms. Hannah Bell
Assistant Criminal District Attorney
Tarrant County
401 West Belknap Street, 9th Floor
Fort Worth, Texas 76196

OR2022-17146A

Dear Ms. Bell:

Our office issued Open Records Letter No. 2022-17146 (2022) on June 14, 2022. We have examined this ruling and determined we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on June 14, 2022. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Your request was assigned ID# 953340.

The Tarrant County Criminal District Attorney's Office (the "district attorney's office") received a request for eleven categories of information pertaining to election records. You state the district attorney's office will release some information. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the claimed exception and reviewed the submitted information, a portion of which consists of a representative sample of information.¹ We have received comments from the requestor. *See id.* § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from public 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:

- (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.

¹ We 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 that those records contain substantially different types of information than that submitted to this office.

(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. On the 61st day after election day, the general custodian of election records may:

(1) require a person who has possession of a key that operates the lock on a ballot box containing voted ballots to return the key to the custodian; and

(2) unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.

(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.

(c) If during the preservation period an authorized entry is made into a ballot box or other secure container containing voted ballots, when the purpose for the entry is fulfilled, the box or container shall be relocked or resecured, and the box and key or secure container returned to the custodian.

(d) A custodian of a ballot box or secure container 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 container; or

(2) fails to prevent another person from handling the box or container in an unauthorized manner or from making an unauthorized entry into the box or container.

(e) An offense under Subsection (d) is a Class A misdemeanor.

(f) The records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian. If the records are removed from the box, they may not be commingled with any other election records kept by the custodian.

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

(h) For the preservation of precinct election records in an election involving a federal office, the secretary of state shall instruct the affected authorities on the actions necessary to comply with federal law and otherwise implement this section.

Elec. Code § 66.058. “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). We understand the requested voted ballots are 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). You state the Election Code does not authorize access to the information at issue in this case. Therefore, pursuant to section 66.058(a) of the Election Code, the information at issue is confidential for at least 22 months after election day. *See* Elec. Code § 66.058(a). Accordingly, the district attorney’s office must withhold the information at issue under section 552.101 of the Government Code on that basis 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).

Section 552.101 of the Government Code also encompasses section 129.024 of the Election Code, which provides:

- (a) On completing each test, the general custodian of election records shall place the test materials in a container provided for that purpose and seal the container in a manner that prevents opening without breaking the seal. The general custodian of election records and at least two members of the testing board shall sign the seal.
- (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 or 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 § 129.024; *see also id.* § 129.021 (upon receiving a voting system from a vendor, the general custodian of election records shall verify the system delivered is certified by the secretary of state (the “secretary”), perform a hardware diagnostic test, a public test of logic and accuracy, and any additional tests the secretary may prescribe). You argue the requested test materials are made confidential by section 129.024(c), which prohibits the

unsealing of the container holding election test materials except in certain circumstances not present here. Furthermore, section 129.024(b) specifies the container must remain sealed for “the period for preserving the precinct election records.” The retention period of the November 3, 2020, election is, as noted above, at least 22 months. *Id.* § 66.058(a). Accordingly, because the district attorney’s office received this request during the retention period, the requested test materials are confidential pursuant to section 129.024(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 test materials are subject to public disclosure. *Cf.* ORD 505 at 4 (confidentiality conferred by section 66.058 of Election Code applies only during retention period).

Section 552.101 of the Government Code also encompasses section 86.014 of the Election Code, which states, in relevant part:

(a) A copy of an application for a ballot to be voted by mail is not available for public inspection, except to the voter seeking to verify that the information pertaining to the voter is accurate, until the first business day after the election day of the earliest occurring election for which the application is submitted.

(b) Originals of the applications and carrier envelopes are not available for public inspection until those materials are delivered to the general custodian of election records after the election.

Elec. Code § 86.014. You indicate the Applications for Ballot by Mail (“ABBMs”) at issue were submitted for the November 2020 general election. Upon review, we find the ABBMs at issue are now available for public inspection pursuant to section 86.014(a). *See id.* § 86.014(a).

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The court of appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). We note information that is specifically made public by statute may not be withheld under section 552.101 of the Government Code on the basis of common-law privacy. *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common-law principle); *Center Point Energy Houston Elec. LLC v. Harris County Toll Rd. Auth.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law). Accordingly, no information in the ABBMs may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the requested election records are confidential pursuant to section 66.058 of the Election Code and the requested test materials are confidential pursuant to section 124.029(c) of the Election Code for as long as the election records and test materials are

required to be preserved; thus, the election records and test materials at issue must be withheld under section 552.101 of the Government Code for the duration of the retention period. The district attorney's office must release the remaining requested 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Sarah E. Reese
Attorney
Open Records Division

SER/eb

Ref: ID# 937133

Enc. Submitted documents

c: Requestor
(w/o enclosures)

11





KEN PAXTON
ATTORNEY GENERAL OF TEXAS

RECEIVED
AUG 22 2022
CIVIL DIVISION
CRIMINAL DISTRICT ATTORNEY

August 12, 2022

Ms. Hannah Bell
Assistant Criminal District Attorney
Tarrant County
401 West Belknap Street, 9th Floor
Fort Worth, Texas 76196

OR2022-24048

Dear Ms. Bell:

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# 965859.

The Tarrant County Criminal District Attorney's Office (the "district attorney's office") received a request for twelve categories of information pertaining to election records. You state the district attorney's office will release some information. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the claimed exception and reviewed the submitted representative sample of information.¹ We have received comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you state you will seek clarification of portions of the request for information. *See id.* § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request

¹ We 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 that those records contain substantially different types of information than that submitted to this office.

is clarified or narrowed). We understand you have not received a response to the request for clarification. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). In this instance, you have submitted information you believe is responsive to the remaining portions of the request and made arguments against disclosure of this information. Thus, we assume you have made a good-faith effort to relate the request to information the district attorney's office holds, and we will address the applicability of the submitted arguments to the information. However, the district attorney's office has no obligation at this time to release any additional responsive information for which you have not received clarification. If the requestor responds to the request for clarification, the district attorney's office must seek a ruling from this office before withholding any additional responsive information from the requestor. *See* Gov't Code § 552.222(b); *City of Dallas*, 304 S.W.3d at 387.

Next, we note portions of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2022-17146A (2022). In that ruling, we concluded the following (1) the requested election records are confidential pursuant to section 66.058 of the Election Code and the requested test materials are confidential pursuant to section 124.029(c) of the Election Code for as long as the election records and test materials are required to be preserved; thus, the election records and test materials at issue must be withheld under section 552.101 of the Government Code for the duration of the retention period and (2) the district attorney's office must release the remaining submitted information. We have no indication the law, facts, and circumstances on which Open Records Letter No. 2022-17146A was based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, the district attorney's office must continue to rely on Open Records Letter No. 2022-17146A as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the previous ruling, we will address the submitted arguments.

We note the information at issue is subject to section 1.012 of the Election Code, which provides, in relevant part, the following:

(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.

...

(c) Except as otherwise provided by [the Election Code] or [the Act], all election records are public information.

(d) In this code, “election record” includes:

...

(3) a certificate, application, notice, report, or other document or paper issued or received by government under this code.

Elec. Code § 1.012(a), (c), (d)(3). Thus, under section 1.012(a), the information at issue constitutes “election records” and the district attorney’s office must make it available to the public, except as provided by the Act. *See id.* § 1.012(a), (c). Accordingly, we will address the district attorney’s office’s claimed exception to disclosure of the information at issue.

Section 552.101 of the Government Code excepts from public 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, which provides:

(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) 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. On the 61st day after election day, the general custodian of election records may:

(1) require a person who has possession of a key that operates the lock on a ballot box containing voted ballots to return the key to the custodian; and

(2) unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.

(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.

(c) If during the preservation period an authorized entry is made into a ballot box or other secure container containing voted ballots, when the purpose for the entry is fulfilled, the box or container shall be relocked or resecured, and the box and key or secure container returned to the custodian.

(d) A custodian of a ballot box or secure container 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 container; or

(2) fails to prevent another person from handling the box or container in an unauthorized manner or from making an unauthorized entry into the box or container.

(e) An offense under Subsection (d) is a Class A misdemeanor.

(f) The records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian. If the records are removed from the box, they may not be commingled with any other election records kept by the custodian.

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

(h) For the preservation of precinct election records in an election involving a federal office, the secretary of state shall instruct the affected authorities on the actions necessary to comply with federal law and otherwise implement this section.

Elec. Code § 66.058. "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). We understand the requested voted ballots are 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). You state the Election Code does not authorize access to the information at issue in this case. Therefore, pursuant to section 66.058(a) of the Election Code, the information at issue is confidential for at least 22 months after election day. *See* Elec. Code § 66.058(a). Accordingly, the district attorney's office must withhold the information at issue under section 552.101 of the Government Code on that basis 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).

The district attorney's office asserts the dates of birth are excepted from public disclosure

under section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Accordingly, the district attorney's office must generally withhold the public citizens' dates of birth under section 552.101 in conjunction with common-law privacy.

However, we note the requestor seeks, in part, voter registration data for all eligible voters in the specified election. Pursuant to subchapter A of chapter 18 of the Election Code, the registrar in each county must prepare for each precinct a certified list of registered voters in the precinct. See Elec. Code §§ 18.001-.004 (discussing original, supplemental, registration correction, and revised original lists of registered voters). Each original and supplemental list of registered voters must contain the voter's name, date of birth, and registration number, the voter's residence address, except as provided by subsections (b) and (c) or section 18.0051, and the notation required by section 15.111 of the Election Code. See *id.* § 18.005(a)(1)-(2), (4); see also *id.* §§ 18.0051 (discussing substitute addresses in list of registered voters), 15.111(a) (explaining registrar shall enter certain notation on registered voter's list beside voter's name on suspense list). Section 18.008 of the Election Code provides, in part, the following:

(a) The registrar shall furnish a copy of any list prepared under . . . subchapter [A of chapter 18] to any person requesting it. The copy shall be furnished without the names of voters whose names appear on a list with the notation "S", or a similar notation, if requested in that form.

Id. § 18.008(a). We note information that is specifically made public by statute may not be withheld under section 552.101 of the Government Code on the basis of common-law privacy. See *Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common law principle); see also *Center Point Energy Houston Elec. LLC v. Harris County Toll Rd. Auth.*, 436 F.3d 541, 544 (5th Cir. 2006) (common-law controls only where there is no conflicting or controlling statutory law). Accordingly, to the extent the submitted information consists of voter registration lists subject to section 18.008, the district attorney's office may not withhold the dates of birth in the voter registration lists under section 552.101 in conjunction with common-law privacy.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon by this office, the district attorney's office must continue to rely on Open Records Letter No. 2022-17146A as a previous determination and withhold or release the identical information in accordance with that ruling. The requested election records are confidential pursuant to section 66.058 of the Election Code for as long as the election records are required to be preserved; thus, the election records must be withheld under section 552.101 of the Government Code for the duration of the retention period. The district attorney's office must generally withhold the submitted public citizens'

dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy; however, pursuant to section 18.008 of the Elections Code, the district attorney's office may not withhold the dates of birth to the extent the information consists of voter registration lists subject to section 18.008 of the Election Code. The district attorney's office 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/jm

Ref: ID# 965859

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Inspecting sensitive documents in-person.



Version	5
Last revision Date	July 2022

First and foremost, the integrity and condition of the documents must be maintained throughout the process. To that end, the Tarrant County Elections Administration adopts the following rules of procedure pursuant to Texas Government Code section 552.230 relating to the inspection of sensitive documents:

1. The term “documents” refers to any physical records being interacted with, to include paper ballots and printouts.
2. Requests to conduct an in-person inspection must be made a minimum of three (3) business days in advance of the desired date of inspection.
3. Dates will be scheduled based on availability of space and resources. Because the Elections Administration is consistently in the process of preparing for or conducting an election, it may be up to 90 days or more before an in-person inspection of documents at the Elections Administration can be scheduled. The Elections Administration will make every effort to allow an in-person inspection of documents as soon as practicable but cannot guarantee any specific turnaround time for every request.
4. Per Texas Government Code section 552.225(a), requestors have up to 10 business days to complete their inspection of documents and may only do so during normal business hours of the Elections Administration.
 - a. Normal business hours are Monday through Friday, 8 AM to 5 PM, excluding County holidays.
5. There will be specific tables designated for handling the documents:
 - a. No writing or marking instruments are allowed around the documents while they are on the inspection tables.
 - b. No food or drinks are allowed on the inspection tables.
6. All interaction with the documents by non-elections personnel may be subject to both video and in-person monitoring.
7. No more than two boxes or containers (inasmuch as the documents are in boxes or containers) may be simultaneously accessed per table. This constraint may be reduced to one box or container based on space and resource availability.
 - a. In the event that the documents are not boxed, the Elections Administration may limit the number of documents that may be accessed at the same time as allowed by physical restrictions and/or availability of said documents to avoid any potential issues.
8. The number of persons allowed simultaneous access to the documents is limited to the amount of space available in order to reasonably monitor such access but will not exceed the capacity as determined by Tarrant County Elections at any given time.
9. Laptops, tablets, or any other electronic devices which contain network capability are not allowed to be connected to any County network.
 - a. Ethernet cables are strictly prohibited in the inspection area.
 - b. Any attempt to plug a device into an ethernet jack in the Elections building at any time is prohibited.
 - c. Laptops, tables, cell phone, and other electronic devices that do not have ethernet ports may be brought into the inspection area.

Adherence to these guidelines is mandatory. Failure to comply with the policy can result in Elections asking the person to leave and the review of documents being rescheduled to a future date.

Inspecting sensitive documents in-person.



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From: [Heider I. Garcia](#)
To: [William B. Hanna](#)
Subject: FW: Media Request -- NPR
Date: Tuesday, September 6, 2022 11:12:00 AM

FYI

From: Ashley Lopez [REDACTED]
Sent: Tuesday, September 6, 2022 11:11 AM
To: Heider I. Garcia <HIGarcia@tarrantcounty.com>
Subject: Media Request -- NPR

EXTERNAL EMAIL ALERT! Think Before You Click!

Hey Heider,

I am asking various counties in Texas this, but I am wondering how Tarrant County specifically has responded to Texas Attorney General Ken Paxton's [recent opinion](#) that county officials must turn over ballots for public inspection prior to the 22-month mark that has been the law until now?

Has Tarrant County already turned over some 2020 presidential election ballots, for example?

I want to get a sense of how different counties are interpreting/reacting to this opinion. I know the SOS has advised counties to listen to in house counsel, so I am wondering what that has meant for your specific county?

Any information would be helpful!

Thanks!

Ashley Lopez

Political Correspondent, NPR

[REDACTED]
C: 786-556-6200

@ashlopezradio

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To: [William B. Hanna](#)
Subject: FW: Media Request -- NPR
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Thanks!

Ashley Lopez

Political Correspondent, NPR

[REDACTED]
C: 786-556-6200

@ashlopezradio

From: [Heider I. Garcia](#)
To: [Michael Scarpello](#)
Subject: FYI
Date: Friday, August 26, 2022 12:03:00 PM
Attachments: [Supplemental Brief re MSJ.pdf](#)

From: [Heider I. Garcia](#)
To: [Michael Scarpello](#)
Subject: FYI
Date: Friday, August 26, 2022 12:03:00 PM
Attachments: [Supplemental Brief re MSJ.pdf](#)

Karen Wiseman,

Plaintiff,

v.

**Tarrant County, Texas, and
Heider Garcia, in his capacity as
Elections Administrator for
Tarrant County, Texas,**

Defendants.

IN THE DISTRICT COURT

96th JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

Supplemental Brief in Support of Motion for Summary Judgment

As requested by the Court at the August 5, 2022 summary judgment hearing, the Defendants offer the additional briefing below concerning election records.

Election records and confidentiality

The Election Code provides that “an election record that is public information shall be made available to the public during the regular business hours of the record’s custodian.” Tex. Election Code Ann. § 1.012(a). Election records are “the precinct election returns, voted ballots, and other records of an election[.]” Tex. Election Code Ann. § 66.002. All election records—except as otherwise provided in the Election Code or the Public Information Act—are public information. Tex. Election Code Ann. § 1.012(c). The Public Information Act provides that information is excepted from public disclosure when it is considered confidential by law. Tex. Gov’t Code Ann. § 552.101. This law can include both the PIA and other statutes. *Id.*

The Election Code requires the election authority to preserve election records for at least 22 months after election day. Tex. Election Code Ann. § 65.058(a). During the preservation period, voted ballots must be kept in a locked ballot box or secured container. Tex. Election Code Ann. § 66.058(b). If ballots are electronic, those must be kept in a secure container. Tex. Election Code Ann. § 66.058(g). During the preservation period, “a ballot box or other secure container containing

voted ballots may not be opened” unless otherwise permitted in the Election Code. Tex. Election Code Ann. § 66.058(b-1) (emphasis added). To access ballots during the preservation period (unless authorized in the Election Code) is a crime. Tex. Election Code Ann. § 66.058(d). Tarrant County contends that Section 66.058 makes voted ballots (whether paper or electronic) confidential for 22 months following an election.

Established rules of statutory construction show that voted ballots are confidential

The Attorney General consistently ruled as such since Open Records Decision No. 505 (1988) (**Exh. A**), including as recently as July 26, 2022 (**Exh. B**). But, on August 17, 2022, the Attorney General issued a formal opinion concluding for the first time in almost 40 years that voted ballots are not confidential. *See*, Op. Att’y Gen. KP-0441 (**Exh. C**). For the reasons below, the Attorney General’s most recent interpretation is erroneous, and the Court should not follow it.

A court is to construe a statute as a whole rather than viewing individual parts in isolation. *Johnson v. Simmons*, 597 S.W.3d 538, 541 (Tex. App.—Fort Worth 2020, pet. denied). The court must also avoid an interpretation that renders any portion of the statute meaningless. *Id.*

Considering Sections 1.012 and 66.058 together, while all election records are public information, voted ballots are confidential during the 22-month preservation period. This gives effect to Section 1.012’s command that election records be made available except as otherwise provided in the Election Code or the PIA. It also gives effect to Section 66.058’s prohibition on accessing voted ballots except as otherwise authorized in the Election Code.

If the Legislature intended to include PIA requests as an authorized reason to access voted ballots, it would have explicitly stated as such. It has in other instances, such as recounts, Tex. Election Code Ann. § 213.007 (when presented with a recount order, custodian shall make ballots available to recount committee), and election contests. Tex. Election Code Ann. § 221.008 (tribunal hearing election contest may cause secured ballots to be accessed to determine any issue relevant to the contest). Section 1.012 has no such language about accessing secured ballots. Tex. Election Code Ann. § 1.012. The lack of such language shows that the Legislature did not include PIA requests as one of the

permissible reasons to access voted ballots. *City of Richardson v. Oncor Electric Delivery Co., LLC*, 539 S.W.3d 252, 261 (Tex. 2018) (term used in one provision but excluded in another should not be implied where excluded). Because the Attorney General’s opinion conflicts with both the Election Code and the rules of statutory construction, the Court should decline to follow it. Instead, the Court should follow Section 66.058’s plain language, which prohibits disclosure of voted ballots.

Conclusion and Prayer

All of the items at issue in Wiseman’s September PIA request and item 7 in her November PIA request are ballots. *See*, Exh. A to Reply in Support of Motion for Summary Judgment. Because ballots are confidential for the 22 months following the election, Wiseman is not entitled to them. Hence, the Court should grant the Defendants judgment as a matter of law denying Wiseman’s claim for mandamus for those ballots.

Respectfully submitted,

SHAREN WILSON
Criminal District Attorney
Tarrant County, Texas

s/ Stephen A. Lund

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STEPHEN A. LUND
State Bar No. 24086920
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Attorneys for Defendants

Certificate of Service

On August 19, 2022, I served the above document on all counsel of record in accordance with Tex. R. Civ. P. 21a.

s/ Stephen A. Lund

STEPHEN A. LUND



Exhibit A

**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.¹ 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).² 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

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

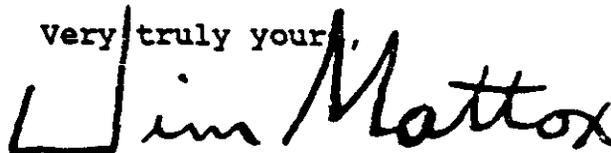
MW-307 (1981). Release of copies of computer programs protected by copy-right would violate federal law.

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,



J I M M A T T O X
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

LOU MCCREARY
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

JENNIFER S. RIGGS
Chief, Open Government Section
of the Opinion Committee

Prepared by Karen C. Gladney
Assistant Attorney General



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

RECEIVED
Exhibit B
AUG 02 2022
CIVIL DIVISION
CRIMINAL DISTRICT ATTORNEY

July 26, 2022

Ms. Hannah Bell
Assistant District Attorney
Tarrant County Criminal District Attorney's Office
401 West Belknap, 9th Floor
Fort Worth, Texas 76196-0201

OR2022-21874

Dear Ms. Bell:

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# 962319.

The Tarrant County Criminal District Attorney's Office and the Tarrant County Elections Administration (collectively, the "county") received two requests from different requestors for specified election records. The county claims the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception the county claims and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from public 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, which provides:

- (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) 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

¹ We assume that 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 that those records contain substantially different types of information than that submitted to this office.

in which they are delivered to the general custodian of election records. On the 61st day after election day, the general custodian of election records may:

(1) require a person who has possession of a key that operates the lock on a ballot box containing voted ballots to return the key to the custodian; and

(2) unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.

(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.

(c) If during the preservation period an authorized entry is made into a ballot box or other secure container containing voted ballots, when the purpose for the entry is fulfilled, the box or container shall be relocked or resecured, and the box and key or secure container returned to the custodian.

(d) A custodian of a ballot box or secure container 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 container; or

(2) fails to prevent another person from handling the box or container in an unauthorized manner or from making an unauthorized entry into the box or container.

(e) An offense under Subsection (d) is a Class A misdemeanor.

(f) The records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian. If the records are removed from the box, they may not be commingled with any other election records kept by the custodian.

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

(h) For the preservation of precinct election records in an election involving a federal office, the secretary of state shall instruct the affected authorities on the actions necessary to comply with federal law and otherwise implement this section.

Elec. Code § 66.058. “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 state the submitted information 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 indication the Election Code authorizes access to the submitted information in this case. Therefore, pursuant to section 66.058(a) of the Election Code, the information at issue is confidential for at least 22 months after election day. *See* Elec. Code § 66.058(a). Accordingly, the county must withhold the information at issue under section 552.101 of the Government Code on that basis 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).

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/mo

Ref: ID# 962319

Enc. Submitted documents

c: Requestor
(w/o enclosures)



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

Exhibit C

August 17, 2022

The Honorable Kelly Hancock
Chair, Senate Committee on Veteran Affairs & Border Security
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

The Honorable Matt Krause
Chair, House Committee on General Investigating
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0411

Re: Whether a legislator or a member of the public may inspect or obtain copies of anonymous voted ballots (RQ-0424-KP)

Dear Senator Hancock and Representative Krause:

You ask whether a member of the public or a legislator may inspect or obtain copies of anonymous voted ballots.¹ To be clear, you explain that the subject of your inquiry is “anonymous voted ballots” or other voted ballots that have had any voter-identifying data redacted. Krause Letter at 1. You explain that members of the public and individual members of the Legislature desire to audit the results of Texas elections, but election administrators cite section 66.058 of the Election Code as precluding the release of voted ballots. Hancock Letter at 1; Krause Letter at 1. Thus, the question presented is whether the information contained within a voted ballot *that has been stripped of any information that could be used to reveal the identity of the voter* is public information subject to disclosure.

¹See Letter from Honorable Kelly Hancock, Chair, Senate Comm. on Veteran Affairs & Border Sec., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Sept. 28, 2021) (“Hancock Letter”); Letter from Honorable Matt Krause, Chair, House Comm. on Gen. Investigating, to Honorable Ken Paxton, Tex. Att’y Gen. at 1–2 (Aug. 16, 2021) (“Krause Letter”); <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2021/RQ0424KP.pdf>.

To fulfill the Texas Constitution’s mandate that Texas preserve election integrity, the Legislature has designated anonymous voted ballots as election records under the Election Code and has established procedures aimed at both preserving those records and granting public access to them.

Article VI, section 4 of the Texas Constitution provides:

In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box; and the Legislature shall provide by law for the registration of all voters.

TEX. CONST. art. VI, § 4. This provision requires the Legislature to “pass laws as necessary to deter fraud and protect ballot purity [and] is addressed to the sound discretion of the Legislature.” *Andrade v. NAACP*, 345 S.W.3d 1, 16 (Tex. 2011) (quoting *Wood v. State ex rel. Lee*, 126 S.W.2d 4, 9 (Tex. 1939) (quotation marks omitted)).

Your question involves access to “election records” which include “anything distributed or received by government under [the Election Code].” TEX. ELEC. CODE § 1.012(d)(1). Voted ballots are expressly designated as “precinct election records.” *Id.* § 66.002 (defining “precinct election records” as “the precinct election returns, *voted ballots*, and other records of an election that are assembled and distributed” under chapter 66 of the Election Code (emphasis added)). The Election Code contains provisions aimed at both preserving election records and granting access to review those records. *See id.* §§ 1.012, 66.058.

To fulfill its constitutional mandate, the Legislature created the position of general custodian of election records and charged that office with, among other things, preserving precinct election records.² *See id.* §§ 66.001, .058. Subsection 66.058(a) requires “the precinct election records [to] be preserved by the authority to whom they are distributed for at least 22 months after election day.” *Id.* § 66.058(a); *see also* 52 U.S.C. § 20701 (establishing 22-month preservation period for election records in certain federal elections). For at least 60 days after an election, voted ballots must be kept in a locked room, in the locked ballot box delivered to the custodian. TEX. ELEC. CODE § 66.058(b).³ On the 61st day, the custodian may require the return of the key that unlocks the ballot box containing voted ballots and may “unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.” *Id.* § 66.058(b)(1), (2).

“Except as permitted by [the Election Code], a ballot box or other secure container containing voted ballots may not be opened during the preservation period.” *Id.* § 66.058(b-1).

²Depending on the type of election, the general custodian of election records is either the county clerk, the city secretary, or the secretary or presiding officer of a political subdivision’s governing body. TEX. ELEC. CODE § 66.001.

³Due to potential recounts and provisional ballots, the Legislature requires the election record custodian to keep voted ballots secure for the 60-day period. *Id.* § 66.058(b)

Id. § 66.058(d), (e). If anonymous voted ballots are disclosable public information, then the custodian’s entry into the box to fulfill the state’s disclosure obligations is authorized.

The Election Code designates all election records, including anonymous voted ballots, as public information.

Alongside the goal of ballot preservation, the Election Code also recognizes the importance of granting access to the public to review election records and ensure transparency and confidence in Texas elections. To that end, section 1.012 of the Election Code provides: “Except as otherwise provided by [the Election Code] or [the Public Information Act], all election records are public information.” *Id.* § 1.012(c). Voted ballots become public information once “the custodian completes the unofficial tabulation of the results for that precinct.” *Id.* § 66.057(a). “[A]n election record that is public information shall be made available to the public during the regular business hours of the record’s custodian.” *Id.* § 1.012(a).

Because the Legislature designated anonymous voted ballots as public information and required public access to those records, a custodian’s entry into the locked box for such purposes is an authorized entry under the Election Code.

Section 66.058 recognizes the existence of exceptions that authorize entry into the locked ballot box during the preservation period provided the box or container is relocked or resecured after the authorized purpose has been fulfilled. *Id.* § 66.058(b-1), (c); *see, e.g., id.* §§ 213.007 (authorizing the custodian to make ballots available for a recount), 273.042 (authorizing the custodian to make the ballots available to a grand jury for purposes of a criminal investigation). Section 1.012 of the Election Code establishes one such exception by generally requiring the custodian to make election records available to the public, unless such records are expressly excepted by the Public Information Act or the Election Code.⁴ *Id.* § 1.012(c); *see also* TEX. GOV’T CODE § 552.006 (providing that the Public Information Act “does not authorize the withholding of public information or limit the availability of public information to the public, except as expressly provided” within the Act).

Subchapter C of the Public Information Act establishes the exceptions to the general rule that public information shall be made available to the public. *See* TEX. GOV’T CODE §§ 552.101–.162 (“Information Excepted from Required Disclosure”). No section within that subchapter addresses anonymous voted ballots or expressly excepts them from disclosure. Furthermore, no

⁴Thirty-four years ago, in Open Records Decision 505, a previous Attorney General considered public access to voted ballots under the Public Information Act. Tex. Att’y Gen. ORD 505 (1988) at 1–2. The decision concluded that section 66.058’s prohibition on unauthorized entry into the locked ballot box during the preservation period fell within the Public Information Act’s disclosure exceptions for privileged or confidential information. Tex. Att’y Gen. ORD 505 (1988) at 2–3. However, in-depth review by this office of the issues raised in that decision results in the opposite conclusion. No language in either the Election Code nor the Public Information Act makes the entirety of a voted ballot privileged or confidential. Open Records Decision 505 is therefore overruled to the extent inconsistent with this opinion.

provision in the Election Code designates anonymous voted ballots as confidential or otherwise prohibits their disclosure to the public. By demanding that the public have access to election records, including anonymous voted ballots, the Legislature thereby authorized the election records custodian's entry to the locked ballot box during the 22-month preservation period for such purposes.

Any personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections must be redacted for purposes of disclosure to protect the constitutional right to a secret ballot in Texas.

While you ask specifically about *anonymous* voted ballots, it is important to note that Texas law has long established that all elections shall be by secret ballot. *Wood*, 126 S.W.2d at 9. This requirement of secrecy is mandatory—"that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy *in regard to the persons for whom he votes*["*Id.* at 8; *Carroll v. State*, 61 S.W.2d 1005, 1007 (Tex. Crim. App. 1933) (emphasis added). In order to protect the secret ballot, "[p]ublic policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it["*Carroll*, 61 S.W.2d at 1008. The right of nondisclosure belongs to the individual voter. *See Oliphint v. Christy*, 299 S.W.2d 933, 939 (Tex. 1957). Your question appears to acknowledge this requirement by only inquiring about voted ballots that (1) have no information that could be used to identify the voter or (2) have been redacted to exclude any information that could be used to identify the voter. Krause Letter at 1.

Information is excepted from public disclosure under the Public Information Act "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE § 552.101. No statutory provision generally designates election records or their contents to be confidential. However, the right to a secret ballot has been held to protect personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections. *See generally Wood*, 126 S.W.2d at 9; *Carroll*, 61 S.W.2d at 1008. Therefore, a court would likely find that personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections is excepted from public disclosure. As a result, such information must be preserved, and the election records custodian must redact such personally identifiable information to protect the constitutional right to a secret ballot in Texas. TEX. GOV'T CODE § 552.007 (providing that a governmental body has no discretion to release information deemed confidential by law). To be clear, the presence of some confidential information on a ballot does not provide a basis to withhold the ballot in its entirety.

The Election Code authorizes the Secretary of State and election records custodians to establish procedures to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots.

The Secretary of State is the chief elections officer of the state and is required to "assist and advise all election authorities with regard to the application, operation, and interpretation" of the Election Code and any other election laws. TEX. ELEC. CODE §§ 31.001(a), .004(a). In furtherance of the preservation of precinct election records in particular, the Legislature directed the Secretary of State to "instruct the affected authorities on the actions necessary to comply" with

section 66.058. *Id.* § 66.058(h). Thus, the Secretary of State has the authority to instruct elections administrators as to how to comply with both the ballot preservation requirements in section 66.058 and the public access requirements in section 1.012.

With the Secretary of State’s oversight, the Legislature expressly authorized the election records custodian to “adopt reasonable rules limiting public access” under section 1.012 to further the purposes of “safeguarding the election records or economizing the custodian’s time.” *Id.* § 1.012(b). Pursuant to their respective authority, the Secretary of State and the election records custodians may establish procedures as authorized by law to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots under the Election Code.

S U M M A R Y

Anonymous voted ballots are election records under the Election Code, and the Legislature has established procedures aimed at both preserving those records and granting public access to them.

Section 66.058 of the Election Code requires the anonymous ballots to be held in a locked ballot box during a 22-month preservation period, with entry only as authorized by the Election Code. Section 1.012 establishes these ballots as public information and requires the election records custodian to make the ballots available to the public. By expressly requiring the custodian to provide public access to such records, the Legislature authorized entry into the locked ballot box for such purpose during the 22-month period. Thus, members of the public and legislators may inspect or obtain copies of anonymous voted ballots during the 22-month preservation period.

Personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections is confidential and excepted from public disclosure. Any confidential information on an anonymous voted ballot must be redacted for purposes of disclosure in order to protect the constitutional right to a secret ballot.

The Election Code authorizes the Secretary of State and election records custodians to establish procedures to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots.

Very truly yours,



KEN PAXTON
Attorney General of Texas

BRENT E. WEBSTER
First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

D. FORREST BRUMBAUGH
Deputy Attorney General for Legal Counsel

AARON REITZ
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CHARLOTTE M. HARPER
Deputy Chair, Opinion Committee

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Syretta Antwi-Boasiako on behalf of Stephen Lund

Bar No. 24086920

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Associated Case Party: THETARRANT COUNTY TEXAS

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Leslie Hunt		llhunt@tarrantcountytx.gov	8/19/2022 2:46:56 PM	SENT
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Syretta Antwi-Boasiako on behalf of Stephen Lund

Bar No. 24086920

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Envelope ID: 67484043

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From: [Heider I. Garcia](#)
To: ["Trudy R. Hancock"; "Jennifer Anderson"; shannon.lackey@randallcounty.com; "Christopher J. Davis"; Remi Garza](#)
Subject: FYI
Date: Friday, August 26, 2022 9:46:00 AM
Attachments: [Supplemental Brief re MSJ.pdf](#)

From: [Heider I. Garcia](#)
To: ["Trudy R. Hancock"; "Jennifer Anderson"; shannon.lackey@randallcounty.com; "Christopher J. Davis"; Remi Garza](#)
Subject: FYI
Date: Friday, August 26, 2022 9:46:00 AM
Attachments: [Supplemental Brief re MSJ.pdf](#)

Karen Wiseman,

Plaintiff,

v.

**Tarrant County, Texas, and
Heider Garcia, in his capacity as
Elections Administrator for
Tarrant County, Texas,**

Defendants.

IN THE DISTRICT COURT

96th JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

Supplemental Brief in Support of Motion for Summary Judgment

As requested by the Court at the August 5, 2022 summary judgment hearing, the Defendants offer the additional briefing below concerning election records.

Election records and confidentiality

The Election Code provides that “an election record that is public information shall be made available to the public during the regular business hours of the record’s custodian.” Tex. Election Code Ann. § 1.012(a). Election records are “the precinct election returns, voted ballots, and other records of an election[.]” Tex. Election Code Ann. § 66.002. All election records—except as otherwise provided in the Election Code or the Public Information Act—are public information. Tex. Election Code Ann. § 1.012(c). The Public Information Act provides that information is excepted from public disclosure when it is considered confidential by law. Tex. Gov’t Code Ann. § 552.101. This law can include both the PIA and other statutes. *Id.*

The Election Code requires the election authority to preserve election records for at least 22 months after election day. Tex. Election Code Ann. § 65.058(a). During the preservation period, voted ballots must be kept in a locked ballot box or secured container. Tex. Election Code Ann. § 66.058(b). If ballots are electronic, those must be kept in a secure container. Tex. Election Code Ann. § 66.058(g). During the preservation period, “a ballot box or other secure container containing

voted ballots may not be opened” unless otherwise permitted in the Election Code. Tex. Election Code Ann. § 66.058(b-1) (emphasis added). To access ballots during the preservation period (unless authorized in the Election Code) is a crime. Tex. Election Code Ann. § 66.058(d). Tarrant County contends that Section 66.058 makes voted ballots (whether paper or electronic) confidential for 22 months following an election.

Established rules of statutory construction show that voted ballots are confidential

The Attorney General consistently ruled as such since Open Records Decision No. 505 (1988) (**Exh. A**), including as recently as July 26, 2022 (**Exh. B**). But, on August 17, 2022, the Attorney General issued a formal opinion concluding for the first time in almost 40 years that voted ballots are not confidential. *See*, Op. Att’y Gen. KP-0441 (**Exh. C**). For the reasons below, the Attorney General’s most recent interpretation is erroneous, and the Court should not follow it.

A court is to construe a statute as a whole rather than viewing individual parts in isolation. *Johnson v. Simmons*, 597 S.W.3d 538, 541 (Tex. App.—Fort Worth 2020, pet. denied). The court must also avoid an interpretation that renders any portion of the statute meaningless. *Id.*

Considering Sections 1.012 and 66.058 together, while all election records are public information, voted ballots are confidential during the 22-month preservation period. This gives effect to Section 1.012’s command that election records be made available except as otherwise provided in the Election Code or the PIA. It also gives effect to Section 66.058’s prohibition on accessing voted ballots except as otherwise authorized in the Election Code.

If the Legislature intended to include PIA requests as an authorized reason to access voted ballots, it would have explicitly stated as such. It has in other instances, such as recounts, Tex. Election Code Ann. § 213.007 (when presented with a recount order, custodian shall make ballots available to recount committee), and election contests. Tex. Election Code Ann. § 221.008 (tribunal hearing election contest may cause secured ballots to be accessed to determine any issue relevant to the contest). Section 1.012 has no such language about accessing secured ballots. Tex. Election Code Ann. § 1.012. The lack of such language shows that the Legislature did not include PIA requests as one of the

permissible reasons to access voted ballots. *City of Richardson v. Oncor Electric Delivery Co., LLC*, 539 S.W.3d 252, 261 (Tex. 2018) (term used in one provision but excluded in another should not be implied where excluded). Because the Attorney General’s opinion conflicts with both the Election Code and the rules of statutory construction, the Court should decline to follow it. Instead, the Court should follow Section 66.058’s plain language, which prohibits disclosure of voted ballots.

Conclusion and Prayer

All of the items at issue in Wiseman’s September PIA request and item 7 in her November PIA request are ballots. *See*, Exh. A to Reply in Support of Motion for Summary Judgment. Because ballots are confidential for the 22 months following the election, Wiseman is not entitled to them. Hence, the Court should grant the Defendants judgment as a matter of law denying Wiseman’s claim for mandamus for those ballots.

Respectfully submitted,

SHAREN WILSON
Criminal District Attorney
Tarrant County, Texas

s/ Stephen A. Lund

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Certificate of Service

On August 19, 2022, I served the above document on all counsel of record in accordance with Tex. R. Civ. P. 21a.

s/ Stephen A. Lund

STEPHEN A. LUND



Exhibit A

**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.¹ 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).² 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

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

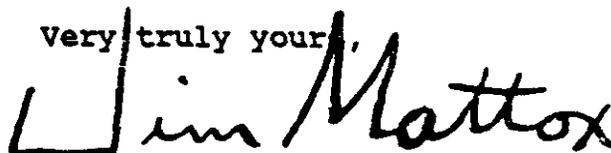
MW-307 (1981). Release of copies of computer programs protected by copy-right would violate federal law.

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,



J I M M A T T O X
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

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Executive Assistant Attorney General

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Special Assistant Attorney General

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Chairman, Opinion Committee

JENNIFER S. RIGGS
Chief, Open Government Section
of the Opinion Committee

Prepared by Karen C. Gladney
Assistant Attorney General



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

RECEIVED
Exhibit B
AUG 02 2022
CIVIL DIVISION
CRIMINAL DISTRICT ATTORNEY

July 26, 2022

Ms. Hannah Bell
Assistant District Attorney
Tarrant County Criminal District Attorney's Office
401 West Belknap, 9th Floor
Fort Worth, Texas 76196-0201

OR2022-21874

Dear Ms. Bell:

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# 962319.

The Tarrant County Criminal District Attorney's Office and the Tarrant County Elections Administration (collectively, the "county") received two requests from different requestors for specified election records. The county claims the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception the county claims and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from public 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, which provides:

- (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) 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

¹ We assume that 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 that those records contain substantially different types of information than that submitted to this office.

in which they are delivered to the general custodian of election records. On the 61st day after election day, the general custodian of election records may:

(1) require a person who has possession of a key that operates the lock on a ballot box containing voted ballots to return the key to the custodian; and

(2) unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.

(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.

(c) If during the preservation period an authorized entry is made into a ballot box or other secure container containing voted ballots, when the purpose for the entry is fulfilled, the box or container shall be relocked or resecured, and the box and key or secure container returned to the custodian.

(d) A custodian of a ballot box or secure container 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 container; or

(2) fails to prevent another person from handling the box or container in an unauthorized manner or from making an unauthorized entry into the box or container.

(e) An offense under Subsection (d) is a Class A misdemeanor.

(f) The records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian. If the records are removed from the box, they may not be commingled with any other election records kept by the custodian.

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

(h) For the preservation of precinct election records in an election involving a federal office, the secretary of state shall instruct the affected authorities on the actions necessary to comply with federal law and otherwise implement this section.

Elec. Code § 66.058. “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 state the submitted information 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 indication the Election Code authorizes access to the submitted information in this case. Therefore, pursuant to section 66.058(a) of the Election Code, the information at issue is confidential for at least 22 months after election day. *See* Elec. Code § 66.058(a). Accordingly, the county must withhold the information at issue under section 552.101 of the Government Code on that basis 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).

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/mo

Ref: ID# 962319

Enc. Submitted documents

c: Requestor
(w/o enclosures)



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

Exhibit C

August 17, 2022

The Honorable Kelly Hancock
Chair, Senate Committee on Veteran Affairs & Border Security
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

The Honorable Matt Krause
Chair, House Committee on General Investigating
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0411

Re: Whether a legislator or a member of the public may inspect or obtain copies of anonymous voted ballots (RQ-0424-KP)

Dear Senator Hancock and Representative Krause:

You ask whether a member of the public or a legislator may inspect or obtain copies of anonymous voted ballots.¹ To be clear, you explain that the subject of your inquiry is “anonymous voted ballots” or other voted ballots that have had any voter-identifying data redacted. Krause Letter at 1. You explain that members of the public and individual members of the Legislature desire to audit the results of Texas elections, but election administrators cite section 66.058 of the Election Code as precluding the release of voted ballots. Hancock Letter at 1; Krause Letter at 1. Thus, the question presented is whether the information contained within a voted ballot *that has been stripped of any information that could be used to reveal the identity of the voter* is public information subject to disclosure.

¹See Letter from Honorable Kelly Hancock, Chair, Senate Comm. on Veteran Affairs & Border Sec., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Sept. 28, 2021) (“Hancock Letter”); Letter from Honorable Matt Krause, Chair, House Comm. on Gen. Investigating, to Honorable Ken Paxton, Tex. Att’y Gen. at 1–2 (Aug. 16, 2021) (“Krause Letter”); <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2021/RQ0424KP.pdf>.

To fulfill the Texas Constitution’s mandate that Texas preserve election integrity, the Legislature has designated anonymous voted ballots as election records under the Election Code and has established procedures aimed at both preserving those records and granting public access to them.

Article VI, section 4 of the Texas Constitution provides:

In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box; and the Legislature shall provide by law for the registration of all voters.

TEX. CONST. art. VI, § 4. This provision requires the Legislature to “pass laws as necessary to deter fraud and protect ballot purity [and] is addressed to the sound discretion of the Legislature.” *Andrade v. NAACP*, 345 S.W.3d 1, 16 (Tex. 2011) (quoting *Wood v. State ex rel. Lee*, 126 S.W.2d 4, 9 (Tex. 1939) (quotation marks omitted)).

Your question involves access to “election records” which include “anything distributed or received by government under [the Election Code].” TEX. ELEC. CODE § 1.012(d)(1). Voted ballots are expressly designated as “precinct election records.” *Id.* § 66.002 (defining “precinct election records” as “the precinct election returns, *voted ballots*, and other records of an election that are assembled and distributed” under chapter 66 of the Election Code (emphasis added)). The Election Code contains provisions aimed at both preserving election records and granting access to review those records. *See id.* §§ 1.012, 66.058.

To fulfill its constitutional mandate, the Legislature created the position of general custodian of election records and charged that office with, among other things, preserving precinct election records.² *See id.* §§ 66.001, .058. Subsection 66.058(a) requires “the precinct election records [to] be preserved by the authority to whom they are distributed for at least 22 months after election day.” *Id.* § 66.058(a); *see also* 52 U.S.C. § 20701 (establishing 22-month preservation period for election records in certain federal elections). For at least 60 days after an election, voted ballots must be kept in a locked room, in the locked ballot box delivered to the custodian. TEX. ELEC. CODE § 66.058(b).³ On the 61st day, the custodian may require the return of the key that unlocks the ballot box containing voted ballots and may “unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.” *Id.* § 66.058(b)(1), (2).

“Except as permitted by [the Election Code], a ballot box or other secure container containing voted ballots may not be opened during the preservation period.” *Id.* § 66.058(b-1).

²Depending on the type of election, the general custodian of election records is either the county clerk, the city secretary, or the secretary or presiding officer of a political subdivision’s governing body. TEX. ELEC. CODE § 66.001.

³Due to potential recounts and provisional ballots, the Legislature requires the election record custodian to keep voted ballots secure for the 60-day period. *Id.* § 66.058(b)

Id. § 66.058(d), (e). If anonymous voted ballots are disclosable public information, then the custodian’s entry into the box to fulfill the state’s disclosure obligations is authorized.

The Election Code designates all election records, including anonymous voted ballots, as public information.

Alongside the goal of ballot preservation, the Election Code also recognizes the importance of granting access to the public to review election records and ensure transparency and confidence in Texas elections. To that end, section 1.012 of the Election Code provides: “Except as otherwise provided by [the Election Code] or [the Public Information Act], all election records are public information.” *Id.* § 1.012(c). Voted ballots become public information once “the custodian completes the unofficial tabulation of the results for that precinct.” *Id.* § 66.057(a). “[A]n election record that is public information shall be made available to the public during the regular business hours of the record’s custodian.” *Id.* § 1.012(a).

Because the Legislature designated anonymous voted ballots as public information and required public access to those records, a custodian’s entry into the locked box for such purposes is an authorized entry under the Election Code.

Section 66.058 recognizes the existence of exceptions that authorize entry into the locked ballot box during the preservation period provided the box or container is relocked or resecured after the authorized purpose has been fulfilled. *Id.* § 66.058(b-1), (c); *see, e.g., id.* §§ 213.007 (authorizing the custodian to make ballots available for a recount), 273.042 (authorizing the custodian to make the ballots available to a grand jury for purposes of a criminal investigation). Section 1.012 of the Election Code establishes one such exception by generally requiring the custodian to make election records available to the public, unless such records are expressly excepted by the Public Information Act or the Election Code.⁴ *Id.* § 1.012(c); *see also* TEX. GOV’T CODE § 552.006 (providing that the Public Information Act “does not authorize the withholding of public information or limit the availability of public information to the public, except as expressly provided” within the Act).

Subchapter C of the Public Information Act establishes the exceptions to the general rule that public information shall be made available to the public. *See* TEX. GOV’T CODE §§ 552.101–.162 (“Information Excepted from Required Disclosure”). No section within that subchapter addresses anonymous voted ballots or expressly excepts them from disclosure. Furthermore, no

⁴Thirty-four years ago, in Open Records Decision 505, a previous Attorney General considered public access to voted ballots under the Public Information Act. Tex. Att’y Gen. ORD 505 (1988) at 1–2. The decision concluded that section 66.058’s prohibition on unauthorized entry into the locked ballot box during the preservation period fell within the Public Information Act’s disclosure exceptions for privileged or confidential information. Tex. Att’y Gen. ORD 505 (1988) at 2–3. However, in-depth review by this office of the issues raised in that decision results in the opposite conclusion. No language in either the Election Code nor the Public Information Act makes the entirety of a voted ballot privileged or confidential. Open Records Decision 505 is therefore overruled to the extent inconsistent with this opinion.

provision in the Election Code designates anonymous voted ballots as confidential or otherwise prohibits their disclosure to the public. By demanding that the public have access to election records, including anonymous voted ballots, the Legislature thereby authorized the election records custodian's entry to the locked ballot box during the 22-month preservation period for such purposes.

Any personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections must be redacted for purposes of disclosure to protect the constitutional right to a secret ballot in Texas.

While you ask specifically about *anonymous* voted ballots, it is important to note that Texas law has long established that all elections shall be by secret ballot. *Wood*, 126 S.W.2d at 9. This requirement of secrecy is mandatory—"that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy *in regard to the persons for whom he votes*["]” *Id.* at 8; *Carroll v. State*, 61 S.W.2d 1005, 1007 (Tex. Crim. App. 1933) (emphasis added). In order to protect the secret ballot, "[p]ublic policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it["]” *Carroll*, 61 S.W.2d at 1008. The right of nondisclosure belongs to the individual voter. *See Oliphint v. Christy*, 299 S.W.2d 933, 939 (Tex. 1957). Your question appears to acknowledge this requirement by only inquiring about voted ballots that (1) have no information that could be used to identify the voter or (2) have been redacted to exclude any information that could be used to identify the voter. Krause Letter at 1.

Information is excepted from public disclosure under the Public Information Act "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE § 552.101. No statutory provision generally designates election records or their contents to be confidential. However, the right to a secret ballot has been held to protect personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections. *See generally Wood*, 126 S.W.2d at 9; *Carroll*, 61 S.W.2d at 1008. Therefore, a court would likely find that personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections is excepted from public disclosure. As a result, such information must be preserved, and the election records custodian must redact such personally identifiable information to protect the constitutional right to a secret ballot in Texas. TEX. GOV'T CODE § 552.007 (providing that a governmental body has no discretion to release information deemed confidential by law). To be clear, the presence of some confidential information on a ballot does not provide a basis to withhold the ballot in its entirety.

The Election Code authorizes the Secretary of State and election records custodians to establish procedures to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots.

The Secretary of State is the chief elections officer of the state and is required to "assist and advise all election authorities with regard to the application, operation, and interpretation" of the Election Code and any other election laws. TEX. ELEC. CODE §§ 31.001(a), .004(a). In furtherance of the preservation of precinct election records in particular, the Legislature directed the Secretary of State to "instruct the affected authorities on the actions necessary to comply" with

section 66.058. *Id.* § 66.058(h). Thus, the Secretary of State has the authority to instruct elections administrators as to how to comply with both the ballot preservation requirements in section 66.058 and the public access requirements in section 1.012.

With the Secretary of State's oversight, the Legislature expressly authorized the election records custodian to "adopt reasonable rules limiting public access" under section 1.012 to further the purposes of "safeguarding the election records or economizing the custodian's time." *Id.* § 1.012(b). Pursuant to their respective authority, the Secretary of State and the election records custodians may establish procedures as authorized by law to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots under the Election Code.

S U M M A R Y

Anonymous voted ballots are election records under the Election Code, and the Legislature has established procedures aimed at both preserving those records and granting public access to them.

Section 66.058 of the Election Code requires the anonymous ballots to be held in a locked ballot box during a 22-month preservation period, with entry only as authorized by the Election Code. Section 1.012 establishes these ballots as public information and requires the election records custodian to make the ballots available to the public. By expressly requiring the custodian to provide public access to such records, the Legislature authorized entry into the locked ballot box for such purpose during the 22-month period. Thus, members of the public and legislators may inspect or obtain copies of anonymous voted ballots during the 22-month preservation period.

Personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections is confidential and excepted from public disclosure. Any confidential information on an anonymous voted ballot must be redacted for purposes of disclosure in order to protect the constitutional right to a secret ballot.

The Election Code authorizes the Secretary of State and election records custodians to establish procedures to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots.

Very truly yours,



KEN PAXTON
Attorney General of Texas

BRENT E. WEBSTER
First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

D. FORREST BRUMBAUGH
Deputy Attorney General for Legal Counsel

AARON REITZ
Deputy Attorney General for Legal Strategy

AUSTIN KINGHORN
General Counsel

RALPH MOLINA
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CHARLOTTE M. HARPER
Deputy Chair, Opinion Committee

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Syretta Antwi-Boasiako on behalf of Stephen Lund

Bar No. 24086920

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Envelope ID: 67484043

Status as of 8/19/2022 2:55 PM CST

Associated Case Party: THETARRANT COUNTY TEXAS

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Syretta Antwi-Boasiako on behalf of Stephen Lund

Bar No. 24086920

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Envelope ID: 67484043

Status as of 8/19/2022 2:55 PM CST

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From: [Heider I. Garcia](#)
To: [B. Glen Whitley](#)
Date: Friday, August 26, 2022 9:48:00 AM
Attachments: [Supplemental Brief re MSJ.pdf](#)

From: [Heider I. Garcia](#)
To: [B. Glen Whitley](#)
Date: Friday, August 26, 2022 9:48:00 AM
Attachments: [Supplemental Brief re MSJ.pdf](#)

Karen Wiseman,

Plaintiff,

v.

**Tarrant County, Texas, and
Heider Garcia, in his capacity as
Elections Administrator for
Tarrant County, Texas,**

Defendants.

IN THE DISTRICT COURT

96th JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

Supplemental Brief in Support of Motion for Summary Judgment

As requested by the Court at the August 5, 2022 summary judgment hearing, the Defendants offer the additional briefing below concerning election records.

Election records and confidentiality

The Election Code provides that “an election record that is public information shall be made available to the public during the regular business hours of the record’s custodian.” Tex. Election Code Ann. § 1.012(a). Election records are “the precinct election returns, voted ballots, and other records of an election[.]” Tex. Election Code Ann. § 66.002. All election records—except as otherwise provided in the Election Code or the Public Information Act—are public information. Tex. Election Code Ann. § 1.012(c). The Public Information Act provides that information is excepted from public disclosure when it is considered confidential by law. Tex. Gov’t Code Ann. § 552.101. This law can include both the PIA and other statutes. *Id.*

The Election Code requires the election authority to preserve election records for at least 22 months after election day. Tex. Election Code Ann. § 65.058(a). During the preservation period, voted ballots must be kept in a locked ballot box or secured container. Tex. Election Code Ann. § 66.058(b). If ballots are electronic, those must be kept in a secure container. Tex. Election Code Ann. § 66.058(g). During the preservation period, “a ballot box or other secure container containing

voted ballots may not be opened” unless otherwise permitted in the Election Code. Tex. Election Code Ann. § 66.058(b-1) (emphasis added). To access ballots during the preservation period (unless authorized in the Election Code) is a crime. Tex. Election Code Ann. § 66.058(d). Tarrant County contends that Section 66.058 makes voted ballots (whether paper or electronic) confidential for 22 months following an election.

Established rules of statutory construction show that voted ballots are confidential

The Attorney General consistently ruled as such since Open Records Decision No. 505 (1988) (**Exh. A**), including as recently as July 26, 2022 (**Exh. B**). But, on August 17, 2022, the Attorney General issued a formal opinion concluding for the first time in almost 40 years that voted ballots are not confidential. *See*, Op. Att’y Gen. KP-0441 (**Exh. C**). For the reasons below, the Attorney General’s most recent interpretation is erroneous, and the Court should not follow it.

A court is to construe a statute as a whole rather than viewing individual parts in isolation. *Johnson v. Simmons*, 597 S.W.3d 538, 541 (Tex. App.—Fort Worth 2020, pet. denied). The court must also avoid an interpretation that renders any portion of the statute meaningless. *Id.*

Considering Sections 1.012 and 66.058 together, while all election records are public information, voted ballots are confidential during the 22-month preservation period. This gives effect to Section 1.012’s command that election records be made available except as otherwise provided in the Election Code or the PIA. It also gives effect to Section 66.058’s prohibition on accessing voted ballots except as otherwise authorized in the Election Code.

If the Legislature intended to include PIA requests as an authorized reason to access voted ballots, it would have explicitly stated as such. It has in other instances, such as recounts, Tex. Election Code Ann. § 213.007 (when presented with a recount order, custodian shall make ballots available to recount committee), and election contests. Tex. Election Code Ann. § 221.008 (tribunal hearing election contest may cause secured ballots to be accessed to determine any issue relevant to the contest). Section 1.012 has no such language about accessing secured ballots. Tex. Election Code Ann. § 1.012. The lack of such language shows that the Legislature did not include PIA requests as one of the

permissible reasons to access voted ballots. *City of Richardson v. Oncor Electric Delivery Co., LLC*, 539 S.W.3d 252, 261 (Tex. 2018) (term used in one provision but excluded in another should not be implied where excluded). Because the Attorney General’s opinion conflicts with both the Election Code and the rules of statutory construction, the Court should decline to follow it. Instead, the Court should follow Section 66.058’s plain language, which prohibits disclosure of voted ballots.

Conclusion and Prayer

All of the items at issue in Wiseman’s September PIA request and item 7 in her November PIA request are ballots. *See*, Exh. A to Reply in Support of Motion for Summary Judgment. Because ballots are confidential for the 22 months following the election, Wiseman is not entitled to them. Hence, the Court should grant the Defendants judgment as a matter of law denying Wiseman’s claim for mandamus for those ballots.

Respectfully submitted,

SHAREN WILSON
Criminal District Attorney
Tarrant County, Texas

s/ Stephen A. Lund

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Attorneys for Defendants

Certificate of Service

On August 19, 2022, I served the above document on all counsel of record in accordance with Tex. R. Civ. P. 21a.

s/ Stephen A. Lund

STEPHEN A. LUND



Exhibit A

**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.¹ 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).² 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

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

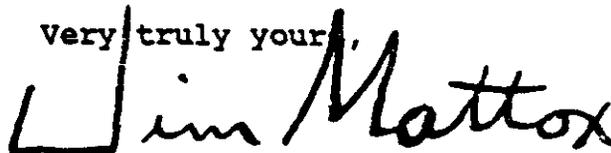
MW-307 (1981). Release of copies of computer programs protected by copy-right would violate federal law.

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,



J I M M A T T O X
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

LOU MCCREARY
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

JENNIFER S. RIGGS
Chief, Open Government Section
of the Opinion Committee

Prepared by Karen C. Gladney
Assistant Attorney General



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

RECEIVED
Exhibit B
AUG 02 2022
CIVIL DIVISION
CRIMINAL DISTRICT ATTORNEY

July 26, 2022

Ms. Hannah Bell
Assistant District Attorney
Tarrant County Criminal District Attorney's Office
401 West Belknap, 9th Floor
Fort Worth, Texas 76196-0201

OR2022-21874

Dear Ms. Bell:

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# 962319.

The Tarrant County Criminal District Attorney's Office and the Tarrant County Elections Administration (collectively, the "county") received two requests from different requestors for specified election records. The county claims the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception the county claims and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from public 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, which provides:

- (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) 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

¹ We assume that 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 that those records contain substantially different types of information than that submitted to this office.

in which they are delivered to the general custodian of election records. On the 61st day after election day, the general custodian of election records may:

(1) require a person who has possession of a key that operates the lock on a ballot box containing voted ballots to return the key to the custodian; and

(2) unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.

(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.

(c) If during the preservation period an authorized entry is made into a ballot box or other secure container containing voted ballots, when the purpose for the entry is fulfilled, the box or container shall be relocked or resecured, and the box and key or secure container returned to the custodian.

(d) A custodian of a ballot box or secure container 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 container; or

(2) fails to prevent another person from handling the box or container in an unauthorized manner or from making an unauthorized entry into the box or container.

(e) An offense under Subsection (d) is a Class A misdemeanor.

(f) The records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian. If the records are removed from the box, they may not be commingled with any other election records kept by the custodian.

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

(h) For the preservation of precinct election records in an election involving a federal office, the secretary of state shall instruct the affected authorities on the actions necessary to comply with federal law and otherwise implement this section.

Elec. Code § 66.058. "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 state the submitted information 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 indication the Election Code authorizes access to the submitted information in this case. Therefore, pursuant to section 66.058(a) of the Election Code, the information at issue is confidential for at least 22 months after election day. *See* Elec. Code § 66.058(a). Accordingly, the county must withhold the information at issue under section 552.101 of the Government Code on that basis 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).

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/mo

Ref: ID# 962319

Enc. Submitted documents

c: Requestor
(w/o enclosures)



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

Exhibit C

August 17, 2022

The Honorable Kelly Hancock
Chair, Senate Committee on Veteran Affairs & Border Security
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

The Honorable Matt Krause
Chair, House Committee on General Investigating
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0411

Re: Whether a legislator or a member of the public may inspect or obtain copies of anonymous voted ballots (RQ-0424-KP)

Dear Senator Hancock and Representative Krause:

You ask whether a member of the public or a legislator may inspect or obtain copies of anonymous voted ballots.¹ To be clear, you explain that the subject of your inquiry is “anonymous voted ballots” or other voted ballots that have had any voter-identifying data redacted. Krause Letter at 1. You explain that members of the public and individual members of the Legislature desire to audit the results of Texas elections, but election administrators cite section 66.058 of the Election Code as precluding the release of voted ballots. Hancock Letter at 1; Krause Letter at 1. Thus, the question presented is whether the information contained within a voted ballot *that has been stripped of any information that could be used to reveal the identity of the voter* is public information subject to disclosure.

¹See Letter from Honorable Kelly Hancock, Chair, Senate Comm. on Veteran Affairs & Border Sec., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Sept. 28, 2021) (“Hancock Letter”); Letter from Honorable Matt Krause, Chair, House Comm. on Gen. Investigating, to Honorable Ken Paxton, Tex. Att’y Gen. at 1–2 (Aug. 16, 2021) (“Krause Letter”); <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2021/RQ0424KP.pdf>.

To fulfill the Texas Constitution’s mandate that Texas preserve election integrity, the Legislature has designated anonymous voted ballots as election records under the Election Code and has established procedures aimed at both preserving those records and granting public access to them.

Article VI, section 4 of the Texas Constitution provides:

In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box; and the Legislature shall provide by law for the registration of all voters.

TEX. CONST. art. VI, § 4. This provision requires the Legislature to “pass laws as necessary to deter fraud and protect ballot purity [and] is addressed to the sound discretion of the Legislature.” *Andrade v. NAACP*, 345 S.W.3d 1, 16 (Tex. 2011) (quoting *Wood v. State ex rel. Lee*, 126 S.W.2d 4, 9 (Tex. 1939) (quotation marks omitted)).

Your question involves access to “election records” which include “anything distributed or received by government under [the Election Code].” TEX. ELEC. CODE § 1.012(d)(1). Voted ballots are expressly designated as “precinct election records.” *Id.* § 66.002 (defining “precinct election records” as “the precinct election returns, *voted ballots*, and other records of an election that are assembled and distributed” under chapter 66 of the Election Code (emphasis added)). The Election Code contains provisions aimed at both preserving election records and granting access to review those records. *See id.* §§ 1.012, 66.058.

To fulfill its constitutional mandate, the Legislature created the position of general custodian of election records and charged that office with, among other things, preserving precinct election records.² *See id.* §§ 66.001, .058. Subsection 66.058(a) requires “the precinct election records [to] be preserved by the authority to whom they are distributed for at least 22 months after election day.” *Id.* § 66.058(a); *see also* 52 U.S.C. § 20701 (establishing 22-month preservation period for election records in certain federal elections). For at least 60 days after an election, voted ballots must be kept in a locked room, in the locked ballot box delivered to the custodian. TEX. ELEC. CODE § 66.058(b).³ On the 61st day, the custodian may require the return of the key that unlocks the ballot box containing voted ballots and may “unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.” *Id.* § 66.058(b)(1), (2).

“Except as permitted by [the Election Code], a ballot box or other secure container containing voted ballots may not be opened during the preservation period.” *Id.* § 66.058(b-1).

²Depending on the type of election, the general custodian of election records is either the county clerk, the city secretary, or the secretary or presiding officer of a political subdivision’s governing body. TEX. ELEC. CODE § 66.001.

³Due to potential recounts and provisional ballots, the Legislature requires the election record custodian to keep voted ballots secure for the 60-day period. *Id.* § 66.058(b)

Id. § 66.058(d), (e). If anonymous voted ballots are disclosable public information, then the custodian’s entry into the box to fulfill the state’s disclosure obligations is authorized.

The Election Code designates all election records, including anonymous voted ballots, as public information.

Alongside the goal of ballot preservation, the Election Code also recognizes the importance of granting access to the public to review election records and ensure transparency and confidence in Texas elections. To that end, section 1.012 of the Election Code provides: “Except as otherwise provided by [the Election Code] or [the Public Information Act], all election records are public information.” *Id.* § 1.012(c). Voted ballots become public information once “the custodian completes the unofficial tabulation of the results for that precinct.” *Id.* § 66.057(a). “[A]n election record that is public information shall be made available to the public during the regular business hours of the record’s custodian.” *Id.* § 1.012(a).

Because the Legislature designated anonymous voted ballots as public information and required public access to those records, a custodian’s entry into the locked box for such purposes is an authorized entry under the Election Code.

Section 66.058 recognizes the existence of exceptions that authorize entry into the locked ballot box during the preservation period provided the box or container is relocked or resecured after the authorized purpose has been fulfilled. *Id.* § 66.058(b-1), (c); *see, e.g., id.* §§ 213.007 (authorizing the custodian to make ballots available for a recount), 273.042 (authorizing the custodian to make the ballots available to a grand jury for purposes of a criminal investigation). Section 1.012 of the Election Code establishes one such exception by generally requiring the custodian to make election records available to the public, unless such records are expressly excepted by the Public Information Act or the Election Code.⁴ *Id.* § 1.012(c); *see also* TEX. GOV’T CODE § 552.006 (providing that the Public Information Act “does not authorize the withholding of public information or limit the availability of public information to the public, except as expressly provided” within the Act).

Subchapter C of the Public Information Act establishes the exceptions to the general rule that public information shall be made available to the public. *See* TEX. GOV’T CODE §§ 552.101–.162 (“Information Excepted from Required Disclosure”). No section within that subchapter addresses anonymous voted ballots or expressly excepts them from disclosure. Furthermore, no

⁴Thirty-four years ago, in Open Records Decision 505, a previous Attorney General considered public access to voted ballots under the Public Information Act. Tex. Att’y Gen. ORD 505 (1988) at 1–2. The decision concluded that section 66.058’s prohibition on unauthorized entry into the locked ballot box during the preservation period fell within the Public Information Act’s disclosure exceptions for privileged or confidential information. Tex. Att’y Gen. ORD 505 (1988) at 2–3. However, in-depth review by this office of the issues raised in that decision results in the opposite conclusion. No language in either the Election Code nor the Public Information Act makes the entirety of a voted ballot privileged or confidential. Open Records Decision 505 is therefore overruled to the extent inconsistent with this opinion.

provision in the Election Code designates anonymous voted ballots as confidential or otherwise prohibits their disclosure to the public. By demanding that the public have access to election records, including anonymous voted ballots, the Legislature thereby authorized the election records custodian's entry to the locked ballot box during the 22-month preservation period for such purposes.

Any personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections must be redacted for purposes of disclosure to protect the constitutional right to a secret ballot in Texas.

While you ask specifically about *anonymous* voted ballots, it is important to note that Texas law has long established that all elections shall be by secret ballot. *Wood*, 126 S.W.2d at 9. This requirement of secrecy is mandatory—"that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy *in regard to the persons for whom he votes*["*Id.* at 8; *Carroll v. State*, 61 S.W.2d 1005, 1007 (Tex. Crim. App. 1933) (emphasis added). In order to protect the secret ballot, "[p]ublic policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it["*Carroll*, 61 S.W.2d at 1008. The right of nondisclosure belongs to the individual voter. *See Oliphint v. Christy*, 299 S.W.2d 933, 939 (Tex. 1957). Your question appears to acknowledge this requirement by only inquiring about voted ballots that (1) have no information that could be used to identify the voter or (2) have been redacted to exclude any information that could be used to identify the voter. Krause Letter at 1.

Information is excepted from public disclosure under the Public Information Act "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE § 552.101. No statutory provision generally designates election records or their contents to be confidential. However, the right to a secret ballot has been held to protect personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections. *See generally Wood*, 126 S.W.2d at 9; *Carroll*, 61 S.W.2d at 1008. Therefore, a court would likely find that personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections is excepted from public disclosure. As a result, such information must be preserved, and the election records custodian must redact such personally identifiable information to protect the constitutional right to a secret ballot in Texas. TEX. GOV'T CODE § 552.007 (providing that a governmental body has no discretion to release information deemed confidential by law). To be clear, the presence of some confidential information on a ballot does not provide a basis to withhold the ballot in its entirety.

The Election Code authorizes the Secretary of State and election records custodians to establish procedures to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots.

The Secretary of State is the chief elections officer of the state and is required to "assist and advise all election authorities with regard to the application, operation, and interpretation" of the Election Code and any other election laws. TEX. ELEC. CODE §§ 31.001(a), .004(a). In furtherance of the preservation of precinct election records in particular, the Legislature directed the Secretary of State to "instruct the affected authorities on the actions necessary to comply" with

section 66.058. *Id.* § 66.058(h). Thus, the Secretary of State has the authority to instruct elections administrators as to how to comply with both the ballot preservation requirements in section 66.058 and the public access requirements in section 1.012.

With the Secretary of State’s oversight, the Legislature expressly authorized the election records custodian to “adopt reasonable rules limiting public access” under section 1.012 to further the purposes of “safeguarding the election records or economizing the custodian’s time.” *Id.* § 1.012(b). Pursuant to their respective authority, the Secretary of State and the election records custodians may establish procedures as authorized by law to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots under the Election Code.

S U M M A R Y

Anonymous voted ballots are election records under the Election Code, and the Legislature has established procedures aimed at both preserving those records and granting public access to them.

Section 66.058 of the Election Code requires the anonymous ballots to be held in a locked ballot box during a 22-month preservation period, with entry only as authorized by the Election Code. Section 1.012 establishes these ballots as public information and requires the election records custodian to make the ballots available to the public. By expressly requiring the custodian to provide public access to such records, the Legislature authorized entry into the locked ballot box for such purpose during the 22-month period. Thus, members of the public and legislators may inspect or obtain copies of anonymous voted ballots during the 22-month preservation period.

Personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections is confidential and excepted from public disclosure. Any confidential information on an anonymous voted ballot must be redacted for purposes of disclosure in order to protect the constitutional right to a secret ballot.

The Election Code authorizes the Secretary of State and election records custodians to establish procedures to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots.

Very truly yours,



KEN PAXTON
Attorney General of Texas

BRENT E. WEBSTER
First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

D. FORREST BRUMBAUGH
Deputy Attorney General for Legal Counsel

AARON REITZ
Deputy Attorney General for Legal Strategy

AUSTIN KINGHORN
General Counsel

RALPH MOLINA
Special Counsel to the First Assistant Attorney General

CHARLOTTE M. HARPER
Deputy Chair, Opinion Committee

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Syretta Antwi-Boasiako on behalf of Stephen Lund

Bar No. 24086920

sjboasiako@tarrantcountytx.gov

Envelope ID: 67484043

Status as of 8/19/2022 2:55 PM CST

Associated Case Party: THETARRANT COUNTY TEXAS

Name	BarNumber	Email	TimestampSubmitted	Status
Leslie Hunt		llhunt@tarrantcountytx.gov	8/19/2022 2:46:56 PM	SENT
Mark Kratovil		mckratovil@tarrantcountytx.gov	8/19/2022 2:46:56 PM	SENT
Ann Diamond		adiamond@tarrantcountytx.gov	8/19/2022 2:46:56 PM	SENT

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Stephen A. Lund		salund@tarrantcountytx.gov	8/19/2022 2:46:56 PM	SENT

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Associated Case Party: HEIDERGARCIA

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Mark Kratovil		mckratovil@tarrantcountytx.gov	8/19/2022 2:46:56 PM	SENT
Ann Diamond		adiamond@tarrantcountytx.gov	8/19/2022 2:46:56 PM	SENT

From: [Elections Internet](#)
To: [Elections Internet](#)
Subject: MASS EMAIL--CC/EA(930)--Recommended Procedures for Access to Anonymous Voted Ballots (Attorney General Opinion No. KP-0411)
Date: Tuesday, September 6, 2022 3:25:51 PM
Attachments: [image001.png](#)
Sensitivity: Personal

EXTERNAL EMAIL ALERT! Think Before You Click!

Dear Election Officials,

On August 17, 2022, the Texas Attorney General's office issued Opinion No. [KP-0411](#). In an effort to clarify prior interpretations and in light of this opinion, our office is issuing the below guidance on recommended procedures for providing public access to anonymous voted ballots. These procedures will help ensure that you can maintain the security and integrity of voted ballots:

Public Inspection of Anonymous Voted Ballots

- The general custodian of election records should establish a written policy that specifies procedures for providing access to anonymous voted ballots through public inspection. This written policy should reflect "procedures as authorized by law to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots under the Election Code." (Opinion No. [KP-0411](#), p. 5).
- The general custodian's policy should, at a minimum, include the following provisions:
 - A defined time period for public inspection consistent with the Public Information Act.
 - A log of all individuals accessing the anonymous voted ballots during the defined time period.
 - General regulations regarding access to the ballots, including the following protocols:
 - **At least one member of the general custodian's staff must be present at all times in the room containing the voted ballots while public inspection is taking place.**
 - Pens, pencils, and other marking devices are prohibited in the room containing the voted ballots.
 - Food and beverages are prohibited in the room containing the voted ballots.
 - Voted ballots must be kept in the same stacks, containers, or boxes, whichever is applicable, while public inspection is taking place.
 - Voted ballots may not be removed from the room in which public inspection is taking place.
 - Imaging devices may be used to take photos or make copies of the voted ballots.
 - If you have video surveillance available, the SOS recommends that you utilize the surveillance system to monitor all activities in the inspection room during the time that the ballots are made available for public inspection.
 - In the space where you plan to provide public access to the anonymous voted ballots, you should ensure that all other materials unrelated to the ballot request are removed from that location.

Records Retention and Management

- Voted ballots containing personally identifiable information that could tie a voter's identity to their voting selections must be redacted before allowing public access to the ballots. As Opinion No. KP-0411 recognizes, "such information must be preserved, and the election records custodian must redact such personally identifiable information to protect the constitutional right to a secret ballot in Texas." (Opinion No. [KP-0411](#), p. 4).
- Voted paper ballots are the official ballot of record for recounts and election contests.
- If a county has maintained an electronic copy (e.g., ballot image, cast vote record) in addition to the voted paper ballot, copies of the electronic records should be made available upon request just as paper ballots are made available.
- If you do not already have anonymous voted ballots scanned or imaged, you may want to consider imaging them prior to public inspection to ensure that there is a record of the image prior to public inspection.
- If you are providing files in any electronic format, the SOS strongly recommends that you calculate a hash value to validate the integrity of the files and to ensure they are not altered in any way. The SOS will provide additional guidance on how to accomplish this security measure.
- At the conclusion of the retention period, contents of locked ballot boxes or secure containers may only be destroyed if there is no election contest, criminal investigation, or pending public information request that has yet to be fulfilled. (Secs. [1.012](#), [66.058](#)). You should also consult with your county attorney or district attorney and any county records management officers before disposing of such materials after the 22-month retention period.

As always, please let us know if you have any questions or concerns.

Keith Ingram
Director, Elections Division
Office of the Secretary of State
800-252-VOTE(8683)
www.sos.state.tx.us/elections/index.shtml
For Voter Related Information, please visit:



The information contained in this email is intended to provide advice and assistance in election matters per §31.004 of the Texas Election Code. It is not intended to serve as personal legal advice to you for any matter. Please review the law yourself, and consult with an attorney when your legal rights are involved.

From: [Elections Internet](#)
To: [Elections Internet](#)
Subject: MASS EMAIL--CC/EA(930)--Recommended Procedures for Access to Anonymous Voted Ballots (Attorney General Opinion No. KP-0411)
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- The general custodian's policy should, at a minimum, include the following provisions:
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 - **At least one member of the general custodian's staff must be present at all times in the room containing the voted ballots while public inspection is taking place.**
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 - Voted ballots must be kept in the same stacks, containers, or boxes, whichever is applicable, while public inspection is taking place.
 - Voted ballots may not be removed from the room in which public inspection is taking place.
 - Imaging devices may be used to take photos or make copies of the voted ballots.
 - If you have video surveillance available, the SOS recommends that you utilize the surveillance system to monitor all activities in the inspection room during the time that the ballots are made available for public inspection.
 - In the space where you plan to provide public access to the anonymous voted ballots, you should ensure that all other materials unrelated to the ballot request are removed from that location.

Records Retention and Management

- Voted ballots containing personally identifiable information that could tie a voter's identity to their voting selections must be redacted before allowing public access to the ballots. As Opinion No. KP-0411 recognizes, "such information must be preserved, and the election records custodian must redact such personally identifiable information to protect the constitutional right to a secret ballot in Texas." (Opinion No. [KP-0411](#), p. 4).
- Voted paper ballots are the official ballot of record for recounts and election contests.
- If a county has maintained an electronic copy (e.g., ballot image, cast vote record) in addition to the voted paper ballot, copies of the electronic records should be made available upon request just as paper ballots are made available.
- If you do not already have anonymous voted ballots scanned or imaged, you may want to consider imaging them prior to public inspection to ensure that there is a record of the image prior to public inspection.
- If you are providing files in any electronic format, the SOS strongly recommends that you calculate a hash value to validate the integrity of the files and to ensure they are not altered in any way. The SOS will provide additional guidance on how to accomplish this security measure.
- At the conclusion of the retention period, contents of locked ballot boxes or secure containers may only be destroyed if there is no election contest, criminal investigation, or pending public information request that has yet to be fulfilled. (Secs. [1.012](#), [66.058](#)). You should also consult with your county attorney or district attorney and any county records management officers before disposing of such materials after the 22-month retention period.

As always, please let us know if you have any questions or concerns.

Keith Ingram
Director, Elections Division
Office of the Secretary of State
800-252-VOTE(8683)
www.sos.state.tx.us/elections/index.shtml
For Voter Related Information, please visit:



The information contained in this email is intended to provide advice and assistance in election matters per §31.004 of the Texas Election Code. It is not intended to serve as personal legal advice to you for any matter. Please review the law yourself, and consult with an attorney when your legal rights are involved.

VOTE TEXAS.GOV
POWERED BY THE *TEXAS SECRETARY OF STATE*



From: [Elections Internet](#)
To: [Elections Internet](#)
Subject: MASS EMAIL--CC/EA--Attorney General Opinion No. KP-0411
Date: Friday, August 19, 2022 4:01:26 PM
Attachments: [image001.png](#)
Sensitivity: Personal

EXTERNAL EMAIL ALERT! Think Before You Click!

Dear Election Officials,

On August 17, 2022, the Attorney General issued Opinion No. [KP-0411](#) regarding whether a legislator or a member of the public may inspect or obtain copies of anonymous voted ballots.

If you have questions about fulfilling public information requests for voted ballots under Opinion No. KP-0411, please continue to consult with your county attorney and/or public information coordinator. In addition, you may wish to contact the Attorney General's Open Government Hotline at (877) 673-6839 for assistance regarding procedures for complying with the Public Information Act.

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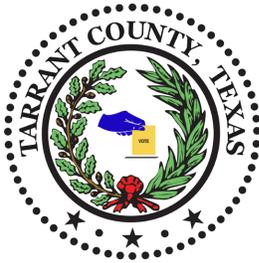
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From: [Heider I. Garcia](#)
To: [Michael Scarpello](#)
Subject: Policy for reviewing sensitive documents
Date: Friday, August 26, 2022 12:07:00 PM
Attachments: [EA-753991681-260822-1707.pdf](#)

Regards,

Heider Garcia, PMP, CERA
Tarrant County Elections Administrator
2700 Premier Street
Fort Worth, Texas 76111
(817) 831-8683



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Inspecting sensitive documents in-person.



Version	5
Last revision Date	July 2022

First and foremost, the integrity and condition of the documents must be maintained throughout the process. To that end, the Tarrant County Elections Administration adopts the following rules of procedure pursuant to Texas Government Code section 552.230 relating to the inspection of sensitive documents:

1. The term “documents” refers to any physical records being interacted with, to include paper ballots and printouts.
2. Requests to conduct an in-person inspection must be made a minimum of three (3) business days in advance of the desired date of inspection.
3. Dates will be scheduled based on availability of space and resources. Because the Elections Administration is consistently in the process of preparing for or conducting an election, it may be up to 90 days or more before an in-person inspection of documents at the Elections Administration can be scheduled. The Elections Administration will make every effort to allow an in-person inspection of documents as soon as practicable but cannot guarantee any specific turnaround time for every request.
4. Per Texas Government Code section 552.225(a), requestors have up to 10 business days to complete their inspection of documents and may only do so during normal business hours of the Elections Administration.
 - a. Normal business hours are Monday through Friday, 8 AM to 5 PM, excluding County holidays.
5. There will be specific tables designated for handling the documents:
 - a. No writing or marking instruments are allowed around the documents while they are on the inspection tables.
 - b. No food or drinks are allowed on the inspection tables.
6. All interaction with the documents by non-elections personnel may be subject to both video and in-person monitoring.
7. No more than two boxes or containers (inasmuch as the documents are in boxes or containers) may be simultaneously accessed per table. This constraint may be reduced to one box or container based on space and resource availability.
 - a. In the event that the documents are not boxed, the Elections Administration may limit the number of documents that may be accessed at the same time as allowed by physical restrictions and/or availability of said documents to avoid any potential issues.
8. The number of persons allowed simultaneous access to the documents is limited to the amount of space available in order to reasonably monitor such access but will not exceed the capacity as determined by Tarrant County Elections at any given time.
9. Laptops, tablets, or any other electronic devices which contain network capability are not allowed to be connected to any County network.
 - a. Ethernet cables are strictly prohibited in the inspection area.
 - b. Any attempt to plug a device into an ethernet jack in the Elections building at any time is prohibited.
 - c. Laptops, tables, cell phone, and other electronic devices that do not have ethernet ports may be brought into the inspection area.

Adherence to these guidelines is mandatory. Failure to comply with the policy can result in Elections asking the person to leave and the review of documents being rescheduled to a future date.

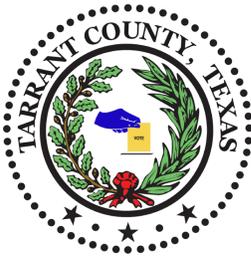
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To: [Karen Galicia - Navarro County \(Texas Association of Counties\)](#)
Subject: RE: [TAC-Elections] Court order Woohooo
Date: Thursday, November 17, 2022 2:16:00 PM
Attachments: [image001.png](#)

Karen,

What's your county email? I'll send you the ones we have used in the past.

Regards,

Heider Garcia, PMP, CERA
Tarrant County Elections Administrator
2700 Premier Street
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Sent: Thursday, November 17, 2022 10:28 AM
To: Heider I. Garcia <HIGarcia@tarrantcounty.com>
Cc: TAC-Elections-Community <tac-elections@groups.county.org>
Subject: [TAC-Elections] Court order Woohooo

EXTERNAL EMAIL ALERT! Think Before You Click!

Good Morningggg,

I've had a crazy week and my clock is ticking before the canvass deadline on Tuesday :')

Wanted to ask you guys if any of y'all had previous paperwork on a court order to get a ballot box open. One of our locations mistakenly placed a provisional ballot envelope inside a sealed ballot box and we barely found out about it earlier this week

Thanks in advance!

Karen Galicia - Navarro County___

Navarro County
Asst. Elections Administrator

Join conversation

Reply to chat privately with Karen or **Reply all** to discuss with everyone ___

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mob-#p9954010

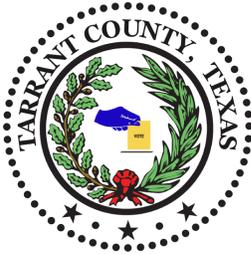
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From: [Heider I. Garcia](#)
To: [Crickett Miller](#)
Subject: RE: Article DUE 10am Today
Date: Wednesday, September 28, 2022 10:45:00 AM

Here it is!

As the election approaches, we're starting to see what we expected: a lot of activity around our offices and demands for changes to our processes. It has sort of become the fruit of the season, but I did want to talk about a few of them:

1. I've seen a lot of you dealing with the influx of Public Records Requests, most notably the campaign for requesting CVRs from all the counties. Kudos to all of you for your professionalism in dealing with this - all the responses I have seen have been timely and polite, even when the requests are outrageous and lack basic manners (looks like we are not even worth a "Good morning" line). In our case, the data from the 2020 Presidential election is in a server that is locked in vault because of a TRO resulting from a lawsuit. So, it is ironic that it was one of these "election integrity" groups that ended up making the records unavailable to the public by filing a baseless lawsuit and then filing for a TRO that resulted in the servers being sequestered and inaccessible.
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Last week, during public test, we did what we called an "Unscripted test", where we allowed anyone to come in and mark ballots any way they wanted, and we then hand-counted them to show that the system always counts accurately. The point of this test was to show that there is no such thing as an expected result. As you can imagine, our "election integrity" groups did not even bother to show up, but then again, they usually don't when they know their theories are going to be disproved. We did get plenty of coverage from the media, and we made some very good points during the event, most notably:

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Tarrant County Elections Administrator
2700 Premier Street
Fort Worth, Texas 76111
(817) 831-8683



From: Crickett Miller <crickett.miller@parkercountytx.com>
Sent: Wednesday, September 28, 2022 8:34 AM
To: Oldham, John <John.Oldham@fortbendcountytx.gov>; Heider I. Garcia <HIgarcia@tarrantcounty.com>; janderson@co.hays.tx.us; Remi Garza <remi.garza@co.cameron.tx.us> <remi.garza@co.cameron.tx.us>; Shannon Lackey <shannon.lackey@randallcounty.gov>; Trudy Hancock (thancock@brazoscountytx.gov) <thancock@brazoscountytx.gov>
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Fort Bend County, Texas
4520 Reading Road
Rosenberg, TX 77471
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Parker County Elections Administrator
Parkercountytexas.com
817-598-6185

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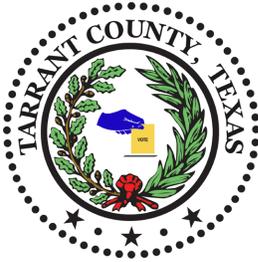
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From: Heider I. Garcia
To: Beth DiPaolo
Cc: Troy C. Havard
Subject: RE: Large file on the website
Date: Tuesday, August 16, 2022 3:00:00 PM
Attachments: image005.png
image006.png

Beth,

Here's the link for the PR20 ballot images: https://drive.google.com/drive/folders/1GkcQnKf7DI_Uurr1P986YPei2jstLb7on2usps?sharing

The text of the link should be:

Images of scanned voted ballots (Single zip file - Hash: EF7F1186CCE2C4D557AD2F9C559119FA357F452C47828BF30C4239A4E695D5CB)

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Fort Worth, Texas 76111
(817) 831-8683



From: Beth DiPaolo <ELDipaolo@TarrantCounty.com>
Sent: Friday, June 10, 2022 9:09 AM
To: Heider I. Garcia <HIGarcia@tarrantcounty.com>
Cc: Troy C. Havard <TCHavard@tarrantcounty.com>
Subject: RE: Large file on the website

Sample Ballots by Entity

- [View PDF of Democratic Party Primary Election Sample Ballot](#)
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Other Reports

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- [Texas SOS Information Candidate Information](#)
- [Texas SOS Candidate Ballot Order Information](#)
- [Images of scanned voted ballots \(Single zip file - Hash: EE4C1BD493B332057C63A684FAACA5F2920A98941A5098DF6A3117F28B1DEDC4\)](#)

Accessibility Notice: Due to the nature of these documents, they are provided as scanned images. If you require assistance in accessing the information, please contact Nieves Aguirre at 817-831-6491 or email electionday@tarrantcounty.com.

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Subject: RE: Large file on the website

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From: Beth DiPaolo <ELDipaolo@TarrantCounty.com>
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To: Heider I. Garcia <HIGarcia@tarrantcounty.com>
Cc: Troy C. Havard <TCHavard@tarrantcounty.com>
Subject: RE: Large file on the website

Ok --- the new text with link is live

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To: Beth DiPaolo <ELDipaolo@TarrantCounty.com>

Cc: Troy C. Havard <THavard@tarrantcounty.com>
Subject: RE: Large file on the website

Hi Beth,

We are ready to post the images. The text below should link to this: https://drive.google.com/drive/folders/1qTKC5eoyVMTemZb3_8ppubED9CovG1?usp=sharing

Thanks!

HG

From: Heider I. Garcia
Sent: Wednesday, June 8, 2022 3:37 PM
To: Beth DiPaolo <BDiPaolo@TarrantCounty.com>
Subject: Large file on the website

Hi Beth,

Any news on this?

Whenever it's ready, I'd like for the link to read like this:

[Images of scanned voted ballots \(Single zip file - Hash: EE4C1BD493832057C63A684FAACAS72920A98941A5098DF6A3117F28B1DED4\)](#)

Regards,

Heider Garcia, PMP, CERA
Tarrant County Elections Administrator
2700 Premier Street
Fort Worth, Texas 76111
(817) 831-8683



From: Heider I. Garcia
To: Beth DiPaolo
Cc: Troy C. Havard
Subject: RE: Large file on the website
Date: Tuesday, August 16, 2022 3:00:00 PM
Attachments: image005.png
image006.png

Beth,

Here's the link for the PR20 ballot images: https://drive.google.com/drive/folders/1GkCQnK7DI_Uurr1P986YPei2jstLb7on2usps?sharing

The text of the link should be:

Images of scanned voted ballots (Single zip file - Hash: EF7F1186CCE2C4D557AD2F9C559119FA357F452C47828BF30C4239A4E695D5CB)

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Browser tabs: https://tarra x | https://tarra x | https://tarra x | 2020 Archiv x | March 3,202 x | PM20 - Goo x | +

Address bar: tarrantcounty.com/en/elections/election-archives/2020-archives/March-3-2020-Primary-Elections.html

Browser controls: Back, Forward, Refresh, Home, Star, Extensions, Profile, Menu

Reading list

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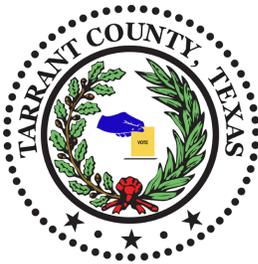
From: [Heider I. Garcia](#)
To: [Cindy Lum](#)
Subject: RE: PIR - Protocols
Date: Thursday, September 8, 2022 12:49:00 PM
Attachments: [EA-753991681-080922-1625.pdf](#)

Hi Cynthia,

The document attached is the policy we wrote. The number of people depends on the space where we do it, we may chose a different room every time if we need to.

Regards,

Heider Garcia, PMP, CERA
Tarrant County Elections Administrator
2700 Premier Street
Fort Worth, Texas 76111
(817) 831-8683



From: Cindy Lum <clum@co.houston.tx.us>
Sent: Thursday, September 8, 2022 10:27 AM
To: Heider I. Garcia <HIGarcia@tarrantcounty.com>
Subject: PIR - Protocols

EXTERNAL EMAIL ALERT! Think Before You Click!

Heider,

I know that your count has been going through a lot lately with audits and PIR request. I am interested in viewing any protocols that you may have in place for these in-"person inspections/audits".

- time frame to inspect
- number of people allowed

restrictions (pens, cell, photography, etc.)

- room rental
- security

Anything that you can share would be greatly appreciated.

Sincerely,

Cynthia Lum

Elections Administrator - Houston County

clum@co.houston.tx.us

Tel: (936) 544-3255 *243

Fax: (936) 544-0189

Webpage: http://www.co.houston.tx.us/default.aspx?Houston_County/Elections

STATEMENT OF CONFIDENTIALITY: This Email is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§2510-2521 and is legally privileged. The information contained in this electronic message and any attachments thereto are intended for the exclusive use of the addressees and may contain confidential and/or privileged information. Disclosure or use of any part of this message by persons other than the intended recipient is prohibited. If you are not the intended recipient, please inform the sender immediately via telephone, fax, or reply e-mail and delete all copies of this message and all attachments from your system.

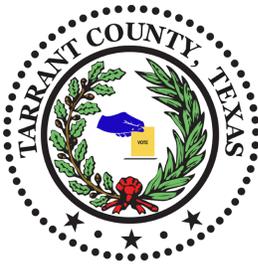
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Inspecting sensitive documents in-person.



Version	5
Last revision Date	July 2022

First and foremost, the integrity and condition of the documents must be maintained throughout the process. To that end, the Tarrant County Elections Administration adopts the following rules of procedure pursuant to Texas Government Code section 552.230 relating to the inspection of sensitive documents:

1. The term “documents” refers to any physical records being interacted with, to include paper ballots and printouts.
2. Requests to conduct an in-person inspection must be made a minimum of three (3) business days in advance of the desired date of inspection.
3. Dates will be scheduled based on availability of space and resources. Because the Elections Administration is consistently in the process of preparing for or conducting an election, it may be up to 90 days or more before an in-person inspection of documents at the Elections Administration can be scheduled. The Elections Administration will make every effort to allow an in-person inspection of documents as soon as practicable but cannot guarantee any specific turnaround time for every request.
4. Per Texas Government Code section 552.225(a), requestors have up to 10 business days to complete their inspection of documents and may only do so during normal business hours of the Elections Administration.
 - a. Normal business hours are Monday through Friday, 8 AM to 5 PM, excluding County holidays.
5. There will be specific tables designated for handling the documents:
 - a. No writing or marking instruments are allowed around the documents while they are on the inspection tables.
 - b. No food or drinks are allowed on the inspection tables.
6. All interaction with the documents by non-elections personnel may be subject to both video and in-person monitoring.
7. No more than two boxes or containers (inasmuch as the documents are in boxes or containers) may be simultaneously accessed per table. This constraint may be reduced to one box or container based on space and resource availability.
 - a. In the event that the documents are not boxed, the Elections Administration may limit the number of documents that may be accessed at the same time as allowed by physical restrictions and/or availability of said documents to avoid any potential issues.
8. The number of persons allowed simultaneous access to the documents is limited to the amount of space available in order to reasonably monitor such access but will not exceed the capacity as determined by Tarrant County Elections at any given time.
9. Laptops, tablets, or any other electronic devices which contain network capability are not allowed to be connected to any County network.
 - a. Ethernet cables are strictly prohibited in the inspection area.
 - b. Any attempt to plug a device into an ethernet jack in the Elections building at any time is prohibited.
 - c. Laptops, tables, cell phone, and other electronic devices that do not have ethernet ports may be brought into the inspection area.

Adherence to these guidelines is mandatory. Failure to comply with the policy can result in Elections asking the person to leave and the review of documents being rescheduled to a future date.

From: [Heider I. Garcia](#)
To: [Jessica Huseman](#)
Subject: RE: Public Records Request
Date: Friday, August 26, 2022 12:24:00 PM
Attachments: [SKM_C450i22080514030.pdf](#)
[doc09648820220818093838.pdf](#)
[SKM_C450i22070810350.pdf](#)
[doc09673420220826114646.pdf](#)

Ms. Husemann,

Given the current volume of Open Records Requests we have it will take several days for us to scan through all our requests and identify every document responsive to yours. However, I was able to gather 4 recent ones and provide you with a short but quick response.

Please let me know if this would satisfy the request and I can consider it closed, or if you would like us to provide you a full response in the future (our current backlog is such that I don't estimate another response for you in at least 30 days).

Regards,

Heider Garcia, PMP, CERA
Tarrant County Elections Administrator
2700 Premier Street
Fort Worth, Texas 76111
(817) 831-8683



From: Jessica Huseman [REDACTED] >
Sent: Thursday, August 25, 2022 11:19 AM
To: Heider I. Garcia <HIGarcia@tarrantcounty.com>
Subject: Fwd: Public Records Request

EXTERNAL EMAIL ALERT! Think Before You Click!

----- Forwarded message -----

From: **Jessica Huseman** [REDACTED] >
Date: Thu, Aug 25, 2022 at 11:17 AM
Subject: Public Records Request
To: <ElectionsInfo@tarrantcounty.com>

Mr. Garcia,

Under the Texas Public Information Act, Tex. Gov't Code §552.001 et seq. I am requesting access to any responses by the attorney general's office to open records inquiries by Tarrant County Elections concerning the release of ballots, ballot images, cast vote records and substantially similar records. Please provide any such opinions given to your office by the AG's office between Aug. 1 2021 to present.

I am willing to pay fees of up to \$50, but I request a fee waiver as Votebeat is a news organization that is not using these documents for commercial purposes. If you expect a significant delay in responding to this request, please contact me with information about when I might expect copies or the ability to inspect the requested records.

--

Warmly,

Jessica Huseman

Editorial Director, Votebeat

Cell/Signal: 972-268-1882

[@JessicaHuseman](#)

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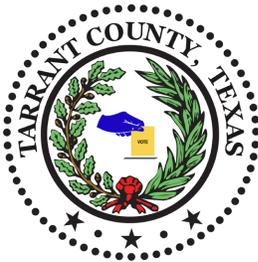
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Cell/Signal: 972-268-1882

[@JessicaHuseman](#)



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

RECEIVED

AUG 05 2022

CIVIL DIVISION
CRIMINAL DISTRICT ATTORNEY

August 1, 2022

Ms. Hannah Bell
Assistant Criminal District Attorney
Tarrant County
401 West Belknap Street, 9th Floor
Fort Worth, Texas 76196

OR2022-17146A

Dear Ms. Bell:

Our office issued Open Records Letter No. 2022-17146 (2022) on June 14, 2022. We have examined this ruling and determined we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on June 14, 2022. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Your request was assigned ID# 953340.

The Tarrant County Criminal District Attorney's Office (the "district attorney's office") received a request for eleven categories of information pertaining to election records. You state the district attorney's office will release some information. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the claimed exception and reviewed the submitted information, a portion of which consists of a representative sample of information.¹ We have received comments from the requestor. *See id.* § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from public 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:

- (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.

¹ We 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 that those records contain substantially different types of information than that submitted to this office.

(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. On the 61st day after election day, the general custodian of election records may:

(1) require a person who has possession of a key that operates the lock on a ballot box containing voted ballots to return the key to the custodian; and

(2) unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.

(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.

(c) If during the preservation period an authorized entry is made into a ballot box or other secure container containing voted ballots, when the purpose for the entry is fulfilled, the box or container shall be relocked or resecured, and the box and key or secure container returned to the custodian.

(d) A custodian of a ballot box or secure container 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 container; or

(2) fails to prevent another person from handling the box or container in an unauthorized manner or from making an unauthorized entry into the box or container.

(e) An offense under Subsection (d) is a Class A misdemeanor.

(f) The records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian. If the records are removed from the box, they may not be commingled with any other election records kept by the custodian.

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

(h) For the preservation of precinct election records in an election involving a federal office, the secretary of state shall instruct the affected authorities on the actions necessary to comply with federal law and otherwise implement this section.

Elec. Code § 66.058. “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). We understand the requested voted ballots are 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). You state the Election Code does not authorize access to the information at issue in this case. Therefore, pursuant to section 66.058(a) of the Election Code, the information at issue is confidential for at least 22 months after election day. *See* Elec. Code § 66.058(a). Accordingly, the district attorney’s office must withhold the information at issue under section 552.101 of the Government Code on that basis 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).

Section 552.101 of the Government Code also encompasses section 129.024 of the Election Code, which provides:

- (a) On completing each test, the general custodian of election records shall place the test materials in a container provided for that purpose and seal the container in a manner that prevents opening without breaking the seal. The general custodian of election records and at least two members of the testing board shall sign the seal.
- (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 or 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 § 129.024; *see also id.* § 129.021 (upon receiving a voting system from a vendor, the general custodian of election records shall verify the system delivered is certified by the secretary of state (the “secretary”), perform a hardware diagnostic test, a public test of logic and accuracy, and any additional tests the secretary may prescribe). You argue the requested test materials are made confidential by section 129.024(c), which prohibits the

unsealing of the container holding election test materials except in certain circumstances not present here. Furthermore, section 129.024(b) specifies the container must remain sealed for “the period for preserving the precinct election records.” The retention period of the November 3, 2020, election is, as noted above, at least 22 months. *Id.* § 66.058(a). Accordingly, because the district attorney’s office received this request during the retention period, the requested test materials are confidential pursuant to section 129.024(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 test materials are subject to public disclosure. *Cf.* ORD 505 at 4 (confidentiality conferred by section 66.058 of Election Code applies only during retention period).

Section 552.101 of the Government Code also encompasses section 86.014 of the Election Code, which states, in relevant part:

(a) A copy of an application for a ballot to be voted by mail is not available for public inspection, except to the voter seeking to verify that the information pertaining to the voter is accurate, until the first business day after the election day of the earliest occurring election for which the application is submitted.

(b) Originals of the applications and carrier envelopes are not available for public inspection until those materials are delivered to the general custodian of election records after the election.

Elec. Code § 86.014. You indicate the Applications for Ballot by Mail (“ABBMs”) at issue were submitted for the November 2020 general election. Upon review, we find the ABBMs at issue are now available for public inspection pursuant to section 86.014(a). *See id.* § 86.014(a).

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The court of appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). We note information that is specifically made public by statute may not be withheld under section 552.101 of the Government Code on the basis of common-law privacy. *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common-law principle); *Center Point Energy Houston Elec. LLC v. Harris County Toll Rd. Auth.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law). Accordingly, no information in the ABBMs may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the requested election records are confidential pursuant to section 66.058 of the Election Code and the requested test materials are confidential pursuant to section 124.029(c) of the Election Code for as long as the election records and test materials are

required to be preserved; thus, the election records and test materials at issue must be withheld under section 552.101 of the Government Code for the duration of the retention period. The district attorney's office must release the remaining requested 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Sarah E. Reese
Attorney
Open Records Division

SER/eb

Ref: ID# 937133

Enc. Submitted documents

c: Requestor
(w/o enclosures)



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

RECEIVED
AUG 22 2022
CIVIL DIVISION
CRIMINAL DISTRICT ATTORNEY

August 12, 2022

Ms. Hannah Bell
Assistant Criminal District Attorney
Tarrant County
401 West Belknap Street, 9th Floor
Fort Worth, Texas 76196

OR2022-24048

Dear Ms. Bell:

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# 965859.

The Tarrant County Criminal District Attorney's Office (the "district attorney's office") received a request for twelve categories of information pertaining to election records. You state the district attorney's office will release some information. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the claimed exception and reviewed the submitted representative sample of information.¹ We have received comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you state you will seek clarification of portions of the request for information. *See id.* § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request

¹ We 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 that those records contain substantially different types of information than that submitted to this office.

is clarified or narrowed). We understand you have not received a response to the request for clarification. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990). In this instance, you have submitted information you believe is responsive to the remaining portions of the request and made arguments against disclosure of this information. Thus, we assume you have made a good-faith effort to relate the request to information the district attorney's office holds, and we will address the applicability of the submitted arguments to the information. However, the district attorney's office has no obligation at this time to release any additional responsive information for which you have not received clarification. If the requestor responds to the request for clarification, the district attorney's office must seek a ruling from this office before withholding any additional responsive information from the requestor. *See* Gov't Code § 552.222(b); *City of Dallas*, 304 S.W.3d at 387.

Next, we note portions of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2022-17146A (2022). In that ruling, we concluded the following (1) the requested election records are confidential pursuant to section 66.058 of the Election Code and the requested test materials are confidential pursuant to section 124.029(c) of the Election Code for as long as the election records and test materials are required to be preserved; thus, the election records and test materials at issue must be withheld under section 552.101 of the Government Code for the duration of the retention period and (2) the district attorney's office must release the remaining submitted information. We have no indication the law, facts, and circumstances on which Open Records Letter No. 2022-17146A was based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, the district attorney's office must continue to rely on Open Records Letter No. 2022-17146A as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the previous ruling, we will address the submitted arguments.

We note the information at issue is subject to section 1.012 of the Election Code, which provides, in relevant part, the following:

(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.

...

(c) Except as otherwise provided by [the Election Code] or [the Act], all election records are public information.

(d) In this code, “election record” includes:

...

(3) a certificate, application, notice, report, or other document or paper issued or received by government under this code.

Elec. Code § 1.012(a), (c), (d)(3). Thus, under section 1.012(a), the information at issue constitutes “election records” and the district attorney’s office must make it available to the public, except as provided by the Act. *See id.* § 1.012(a), (c). Accordingly, we will address the district attorney’s office’s claimed exception to disclosure of the information at issue.

Section 552.101 of the Government Code excepts from public 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, which provides:

(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) 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. On the 61st day after election day, the general custodian of election records may:

(1) require a person who has possession of a key that operates the lock on a ballot box containing voted ballots to return the key to the custodian; and

(2) unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.

(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.

(c) If during the preservation period an authorized entry is made into a ballot box or other secure container containing voted ballots, when the purpose for the entry is fulfilled, the box or container shall be relocked or resecured, and the box and key or secure container returned to the custodian.

(d) A custodian of a ballot box or secure container 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 container; or

(2) fails to prevent another person from handling the box or container in an unauthorized manner or from making an unauthorized entry into the box or container.

(e) An offense under Subsection (d) is a Class A misdemeanor.

(f) The records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian. If the records are removed from the box, they may not be commingled with any other election records kept by the custodian.

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

(h) For the preservation of precinct election records in an election involving a federal office, the secretary of state shall instruct the affected authorities on the actions necessary to comply with federal law and otherwise implement this section.

Elec. Code § 66.058. “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). We understand the requested voted ballots are 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). You state the Election Code does not authorize access to the information at issue in this case. Therefore, pursuant to section 66.058(a) of the Election Code, the information at issue is confidential for at least 22 months after election day. *See* Elec. Code § 66.058(a). Accordingly, the district attorney’s office must withhold the information at issue under section 552.101 of the Government Code on that basis 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).

The district attorney’s office asserts the dates of birth are excepted from public disclosure

under section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The Third Court of Appeals has concluded public citizens' dates of birth are protected by common-law privacy pursuant to section 552.101. *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). Accordingly, the district attorney's office must generally withhold the public citizens' dates of birth under section 552.101 in conjunction with common-law privacy.

However, we note the requestor seeks, in part, voter registration data for all eligible voters in the specified election. Pursuant to subchapter A of chapter 18 of the Election Code, the registrar in each county must prepare for each precinct a certified list of registered voters in the precinct. *See* Elec. Code §§ 18.001-.004 (discussing original, supplemental, registration correction, and revised original lists of registered voters). Each original and supplemental list of registered voters must contain the voter's name, date of birth, and registration number, the voter's residence address, except as provided by subsections (b) and (c) or section 18.0051, and the notation required by section 15.111 of the Election Code. *See id.* § 18.005(a)(1)-(2), (4); *see also id.* §§ 18.0051 (discussing substitute addresses in list of registered voters), 15.111(a) (explaining registrar shall enter certain notation on registered voter's list beside voter's name on suspense list). Section 18.008 of the Election Code provides, in part, the following:

(a) The registrar shall furnish a copy of any list prepared under . . . subchapter [A of chapter 18] to any person requesting it. The copy shall be furnished without the names of voters whose names appear on a list with the notation "S", or a similar notation, if requested in that form.

Id. § 18.008(a). We note information that is specifically made public by statute may not be withheld under section 552.101 of the Government Code on the basis of common-law privacy. *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common law principle); *see also Center Point Energy Houston Elec. LLC v. Harris County Toll Rd. Auth.*, 436 F.3d 541, 544 (5th Cir. 2006) (common-law controls only where there is no conflicting or controlling statutory law). Accordingly, to the extent the submitted information consists of voter registration lists subject to section 18.008, the district attorney's office may not withhold the dates of birth in the voter registration lists under section 552.101 in conjunction with common-law privacy.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon by this office, the district attorney's office must continue to rely on Open Records Letter No. 2022-17146A as a previous determination and withhold or release the identical information in accordance with that ruling. The requested election records are confidential pursuant to section 66.058 of the Election Code for as long as the election records are required to be preserved; thus, the election records must be withheld under section 552.101 of the Government Code for the duration of the retention period. The district attorney's office must generally withhold the submitted public citizens'

dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy; however, pursuant to section 18.008 of the Elections Code, the district attorney's office may not withhold the dates of birth to the extent the information consists of voter registration lists subject to section 18.008 of the Election Code. The district attorney's office 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/jm

Ref: ID# 965859

Enc. Submitted documents

c: Requestor
(w/o enclosures)



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

RECEIVED

JUN 22 2022

CIVIL DIVISION
DISTRICT ATTORNEY

June 16, 2022

Ms. Hannah Bell
Assistant District Attorney
Tarrant County
401 West Belknap, 9th Floor
Fort Worth, Texas 76196-0201

OR2022-17424

Dear Mr. Belknap:

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# 954217.

The Tarrant County Commissioners Court and the Tarrant County Election Board (collectively, the “county”) received two requests from the same requestor for certain information, including results tapes and cumulative voting reports, pertaining to two specified elections. You state the county will release some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative sample of information.² Additionally, we have received and considered comments from the requestor. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial

¹ Although you also raise section 552.101 of the Government Code in conjunction with section 129.024 of the Election Code, you make no arguments to support the applicability of section 129.024. Therefore, we assume you have withdrawn your claim that the information at issue is made confidential under section 129.024 of the Election Code. *See* Gov’t Code §§ 552.301, .302. Additionally, we understand the requestor to claim the county did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See id.* § 552.301(b). Regardless of whether the county complied with section 552.301, because section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301 of the Government Code, we will consider the applicability of section 552.101 to the information at issue. *See id.* §§ 552.007, .302, .352.

² We 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.

decision.” *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 66.058 of the Election Code, which provides:

(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) 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. On the 61st day after election day, the general custodian of election records may:

(1) require a person who has possession of a key that operates the lock on a ballot box containing voted ballots to return the key to the custodian; and

(2) unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.

(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.

(c) If during the preservation period an authorized entry is made into a ballot box or other secure container containing voted ballots, when the purpose for the entry is fulfilled, the box or container shall be relocked or resecured, and the box and key or secure container returned to the custodian.

(d) A custodian of a ballot box or secure container 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 container; or

(2) fails to prevent another person from handling the box or container in an unauthorized manner or from making an unauthorized entry into the box or container.

(e) An offense under Subsection (d) is a Class A misdemeanor.

(f) The records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian. If the records are removed from the box, they may not be commingled with any other election records kept by the custodian.

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

(h) For the preservation of precinct election records in an election involving

a federal office, the secretary of state shall instruct the affected authorities on the actions necessary to comply with federal law and otherwise implement this section.

Elec. Code § 66.058. “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 explain the information at issue consists of “precinct election records” for purposes of 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 instance. Thus, pursuant to section 66.058(a) of the Election Code, the information at issue is confidential for at least 22 months after election day. *See* Elec. Code § 66.058(a). Accordingly, the county must withhold the information at issue under section 552.101 of the Government Code on that basis 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).

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/jm

Ms. Hannah Bell - Page 4

Ref: ID# 954217

Enc. Submitted documents

c: Requestor
(w/o enclosures)



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

RECEIVED
AUG 02 2022
CIVIL DIVISION
CRIMINAL DISTRICT ATTORNEY

July 26, 2022

Ms. Hannah Bell
Assistant District Attorney
Tarrant County Criminal District Attorney's Office
401 West Belknap, 9th Floor
Fort Worth, Texas 76196-0201

OR2022-21874

Dear Ms. Bell:

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# 962319.

The Tarrant County Criminal District Attorney's Office and the Tarrant County Elections Administration (collectively, the "county") received two requests from different requestors for specified election records. The county claims the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception the county claims and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from public 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, which provides:

- (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) 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

¹ We assume that 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 that those records contain substantially different types of information than that submitted to this office.

in which they are delivered to the general custodian of election records. On the 61st day after election day, the general custodian of election records may:

(1) require a person who has possession of a key that operates the lock on a ballot box containing voted ballots to return the key to the custodian; and

(2) unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.

(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.

(c) If during the preservation period an authorized entry is made into a ballot box or other secure container containing voted ballots, when the purpose for the entry is fulfilled, the box or container shall be relocked or resecured, and the box and key or secure container returned to the custodian.

(d) A custodian of a ballot box or secure container 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 container; or

(2) fails to prevent another person from handling the box or container in an unauthorized manner or from making an unauthorized entry into the box or container.

(e) An offense under Subsection (d) is a Class A misdemeanor.

(f) The records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian. If the records are removed from the box, they may not be commingled with any other election records kept by the custodian.

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

(h) For the preservation of precinct election records in an election involving a federal office, the secretary of state shall instruct the affected authorities on the actions necessary to comply with federal law and otherwise implement this section.

Elec. Code § 66.058. "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 state the submitted information 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 indication the Election Code authorizes access to the submitted information in this case. Therefore, pursuant to section 66.058(a) of the Election Code, the information at issue is confidential for at least 22 months after election day. *See* Elec. Code § 66.058(a). Accordingly, the county must withhold the information at issue under section 552.101 of the Government Code on that basis 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).

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/mo

Ref: ID# 962319

Enc. Submitted documents

c: Requestor
(w/o enclosures)

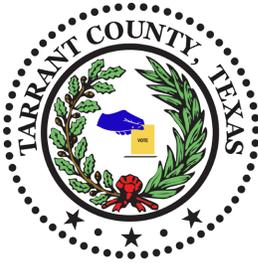
From: [Heider I. Garcia](#)
To: [Natalia Contreras](#)
Subject: RE: Updates on litigation for Votebeat
Date: Monday, September 12, 2022 12:23:00 PM

Hello,

I forwarded the message to counsel, have not heard from them. We'll start public test next Monday, and will have the "random pattern test" (still have not decided what to call this part) on Friday 9/23. Always glad to have y'all here!

Regards,

Heider Garcia, PMP, CERA
Tarrant County Elections Administrator
2700 Premier Street
Fort Worth, Texas 76111
(817) 831-8683



From: Natalia Contreras [REDACTED] >
Sent: Monday, September 12, 2022 12:02 PM
To: Heider I. Garcia <HIGarcia@tarrantcounty.com>
Subject: Re: Updates on litigation for Votebeat

EXTERNAL EMAIL ALERT! Think Before You Click!

Hey, Heider just checking in to see if you were able to forward my email. I'll reach out to the attorneys separately. I also wanted to ask you when you'd be having the logic and accuracy tests? I am attending one in Hays Co next week and Jessica might be able to attend in Tarrant if we haven't missed it. Thank you!

On Fri, Sep 9, 2022 at 9:56 AM Natalia Contreras <[REDACTED]> wrote:

Hey, Heider!

Can you refer me to the Tarrant County attorneys who are handling litigation related to the CVRs, the 22-month retention period, and the latest opinion on when ballots are public record from the

AG.

I'm specifically looking to get any updates from the case attached. I know you'll be busy in the coming months, so I'd rather contact the attorneys for any updates.

Thank you!

--

Natalia Contreras

Texas reporter | [Votebeat.org](https://www.votebeat.org)

C: 361-695-1553

Twitter, Facebook: @NataliaECG



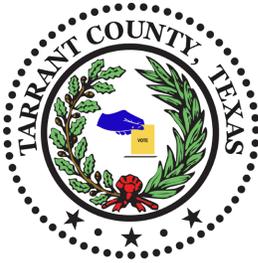
From: [Heider I. Garcia](#)
To: [Natalia Contreras](#)
Subject: RE: Updates on litigation for Votebeat
Date: Monday, September 12, 2022 12:23:00 PM

Hello,

I forwarded the message to counsel, have not heard from them. We'll start public test next Monday, and will have the "random pattern test" (still have not decided what to call this part) on Friday 9/23. Always glad to have y'all here!

Regards,

Heider Garcia, PMP, CERA
Tarrant County Elections Administrator
2700 Premier Street
Fort Worth, Texas 76111
(817) 831-8683



From: Natalia Contreras [REDACTED] >
Sent: Monday, September 12, 2022 12:02 PM
To: Heider I. Garcia <HIGarcia@tarrantcounty.com>
Subject: Re: Updates on litigation for Votebeat

EXTERNAL EMAIL ALERT! Think Before You Click!

Hey, Heider just checking in to see if you were able to forward my email. I'll reach out to the attorneys separately. I also wanted to ask you when you'd be having the logic and accuracy tests? I am attending one in Hays Co next week and Jessica might be able to attend in Tarrant if we haven't missed it. Thank you!

On Fri, Sep 9, 2022 at 9:56 AM Natalia Contreras <[REDACTED]> wrote:

Hey, Heider!

Can you refer me to the Tarrant County attorneys who are handling litigation related to the CVRs, the 22-month retention period, and the latest opinion on when ballots are public record from the

AG.

I'm specifically looking to get any updates from the case attached. I know you'll be busy in the coming months, so I'd rather contact the attorneys for any updates.

Thank you!

--

Natalia Contreras

Texas reporter | [Votebeat.org](https://www.votebeat.org)

C: 361-695-1553

Twitter, Facebook: @NataliaECG





KEN PAXTON
ATTORNEY GENERAL OF TEXAS

RECEIVED
JUN 22 2022
CIVIL DIVISION
DISTRICT ATTORNEY

June 16, 2022

Ms. Hannah Bell
Assistant District Attorney
Tarrant County
401 West Belknap, 9th Floor
Fort Worth, Texas 76196-0201

OR2022-17424

Dear Mr. Belknap:

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# 954217.

The Tarrant County Commissioners Court and the Tarrant County Election Board (collectively, the "county") received two requests from the same requestor for certain information, including results tapes and cumulative voting reports, pertaining to two specified elections. You state the county will release some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative sample of information.² Additionally, we have received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial

¹ Although you also raise section 552.101 of the Government Code in conjunction with section 129.024 of the Election Code, you make no arguments to support the applicability of section 129.024. Therefore, we assume you have withdrawn your claim that the information at issue is made confidential under section 129.024 of the Election Code. *See* Gov't Code §§ 552.301, .302. Additionally, we understand the requestor to claim the county did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See id.* § 552.301(b). Regardless of whether the county complied with section 552.301, because section 552.101 of the Government Code can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301 of the Government Code, we will consider the applicability of section 552.101 to the information at issue. *See id.* §§ 552.007, .302, .352.

² We 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.

decision.” *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 66.058 of the Election Code, which provides:

(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) 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. On the 61st day after election day, the general custodian of election records may:

(1) require a person who has possession of a key that operates the lock on a ballot box containing voted ballots to return the key to the custodian; and

(2) unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.

(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.

(c) If during the preservation period an authorized entry is made into a ballot box or other secure container containing voted ballots, when the purpose for the entry is fulfilled, the box or container shall be relocked or resecured, and the box and key or secure container returned to the custodian.

(d) A custodian of a ballot box or secure container 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 container; or

(2) fails to prevent another person from handling the box or container in an unauthorized manner or from making an unauthorized entry into the box or container.

(e) An offense under Subsection (d) is a Class A misdemeanor.

(f) The records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian. If the records are removed from the box, they may not be commingled with any other election records kept by the custodian.

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

(h) For the preservation of precinct election records in an election involving

a federal office, the secretary of state shall instruct the affected authorities on the actions necessary to comply with federal law and otherwise implement this section.

Elec. Code § 66.058. “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 explain the information at issue consists of “precinct election records” for purposes of 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 instance. Thus, pursuant to section 66.058(a) of the Election Code, the information at issue is confidential for at least 22 months after election day. *See* Elec. Code § 66.058(a). Accordingly, the county must withhold the information at issue under section 552.101 of the Government Code on that basis 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).

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/jm

Ms. Hannah Bell - Page 4

Ref: ID# 954217

Enc. Submitted documents

c: Requestor
(w/o enclosures)



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

RECEIVED
AUG 02 2022
CIVIL DIVISION
CRIMINAL DISTRICT ATTORNEY

July 26, 2022

Ms. Hannah Bell
Assistant District Attorney
Tarrant County Criminal District Attorney's Office
401 West Belknap, 9th Floor
Fort Worth, Texas 76196-0201

OR2022-21874

Dear Ms. Bell:

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# 962319.

The Tarrant County Criminal District Attorney's Office and the Tarrant County Elections Administration (collectively, the "county") received two requests from different requestors for specified election records. The county claims the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception the county claims and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from public 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, which provides:

- (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) 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

¹ We assume that 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 that those records contain substantially different types of information than that submitted to this office.

in which they are delivered to the general custodian of election records. On the 61st day after election day, the general custodian of election records may:

(1) require a person who has possession of a key that operates the lock on a ballot box containing voted ballots to return the key to the custodian; and

(2) unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.

(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.

(c) If during the preservation period an authorized entry is made into a ballot box or other secure container containing voted ballots, when the purpose for the entry is fulfilled, the box or container shall be relocked or resecured, and the box and key or secure container returned to the custodian.

(d) A custodian of a ballot box or secure container 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 container; or

(2) fails to prevent another person from handling the box or container in an unauthorized manner or from making an unauthorized entry into the box or container.

(e) An offense under Subsection (d) is a Class A misdemeanor.

(f) The records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian. If the records are removed from the box, they may not be commingled with any other election records kept by the custodian.

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

(h) For the preservation of precinct election records in an election involving a federal office, the secretary of state shall instruct the affected authorities on the actions necessary to comply with federal law and otherwise implement this section.

Elec. Code § 66.058. "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 state the submitted information 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 indication the Election Code authorizes access to the submitted information in this case. Therefore, pursuant to section 66.058(a) of the Election Code, the information at issue is confidential for at least 22 months after election day. *See* Elec. Code § 66.058(a). Accordingly, the county must withhold the information at issue under section 552.101 of the Government Code on that basis 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).

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/mo

Ref: ID# 962319

Enc. Submitted documents

c: Requestor
(w/o enclosures)



SHAREN WILSON
Criminal District Attorney
Tarrant County

December 13, 2022

Honorable Ken Paxton
Texas Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

C.M./R.R.R. # 7021 1970 0002 1758 3838

Re: Public Information Act request to the Tarrant County District Clerk's Office from Dylan Winters for emails from Heider Garcia and Mary Louise Nicholson

Dear General Paxton:

On November 21, 2022, Tarrant County Clerk's Office ("County Clerk") received a Public Information Act request from Dylan Winters seeking emails from Heider Garcia and Mary Louise Nicholson. See copy of the request, attached as Exhibit A. The request was received by e-mail and the date of receipt is reflected in the "Sent" row of the e-mail header.¹ On December 6, 2022, the Tarrant County Criminal District Attorney's Office ("CDA") sent correspondence to the Office of the Attorney General ("OAG") announcing its intent to request a ruling regarding the documents sought in the request. See correspondence to the OAG, attached as Exhibit B.

Pursuant to Texas Government Code sections 552.301 and 552.308, a request for a ruling to the Office of the Attorney General ("OAG") is timely if mailed on or before December 14, 2022. Because this request for a ruling has been mailed to the OAG and the requestor on December 13, 2022, it is therefore timely.

Some of the responsive documents will be released to the requestor. The CDA, on behalf of the County Clerk asserts some of the documents sought by the requestor may be withheld from public release pursuant to TEXAS GOVERNMENT CODE sections 552.107, 552.139, and 552.111.

¹ Please note that all Tarrant County offices closed on November 24 and 25, 2022 in observance of Thanksgiving

I. Some of the requested documents include communications protected by the attorney-client privilege and should be withheld under GOVERNMENT CODE sections 552.107

The CDA submits that a portion of the responsive information is exempt from public disclosure pursuant to section 552.107 of the TEXAS GOVERNMENT CODE. In part, this section exempts the release of information if:

- (1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct.

The Texas Attorney General has interpreted this exemption to except from disclosure information that falls within the attorney-client privilege. *See* Tex. Att’y Gen. ORD No. 676 (2002). The attorney-client privilege protects from disclosure confidential communications made for the purpose of facilitating the rendition of professional legal services. TEX. R. EVID. 503(b)(1). In order for the attorney-client privilege to apply, (1) the information must constitute or document a communication, (2) the communication must have been made to facilitate the rendition of professional legal services to the client governmental body, (3) the communication must have been between or among clients; client representatives, lawyers and lawyers’ representatives, (4) that the communication was confidential, *i.e.*, not intended to be disclosed to third persons; and (5) that the communication has remained confidential. Tex. Att’y Gen. ORD No. 676, at 7-10 (2002).

Further, it is important to note that the attorney-client privilege includes communications (1) between the client/representative and the client’s lawyer/representative, (2) between the lawyer and lawyer’s representative, (3) by the client/representative or lawyer/representative to a lawyer/representative of a lawyer that represents another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client; or, (5) among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1).

For purposes of the documents contained in Exhibit C, the attorney-client communications occurred between the elected County Clerk of Tarrant County, the appointed Elections Administrator, and Assistant Criminal District Attorneys (“ACDAs”) in the civil division of the CDA. The civil division of the CDA provides legal advice and other professional legal services to all Tarrant County officials and departments. These communications were made to facilitate the rendition of legal services. Specifically, legal issues surrounding Public Information Act requests and guidance regarding different issues

pertaining to elections. These communications were not intended to be disclosed to third parties and have remained confidential.

To the extent the communications in Exhibit C consist of attorney-client privileged documents and communications, the CDA seeks to withhold that information under section 552.107.

II. One of the requested documents has screenshots, passwords, and other sensitive information and may be withheld under section 552.139

In relevant part, Section 552.139 (a) protects “information that relates to computer network security [or] to restricted information under Section 2059.055.” Section 2059.055 (b) of the Government Code provides that “network security information is confidential under this section if the information is . . . related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a governmental entity.” The responsive records contain access codes, pertaining to the Election Officials meetings. The public disclosure of such information could subject the Elections Administration’s network to unauthorized access by third parties.

Under these circumstances, the CDA, on behalf of the Elections Administration, seeks to withhold the requested documents pursuant to Texas Government Code Section 552.139.

III. One of the documents responsive to the request contain draft versions of documents intended for later public release and should be withheld under the deliberative process privilege found in GOVERNMENT CODE section 552.111

Section 552.111 of the TEXAS GOVERNMENT CODE provides that “[A]n interagency or intragency memorandum or letter that would not be available by law to a party in litigation with the agency is excepted from the requirements of Section 552.021.” The purpose of this section is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonino*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

The OAG determined in Open Records Decision No. 615 (1993) that section 552.111 excepts from disclosure internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. However, this exception does not encompass routine internal administrative or personnel matters. *Id.*, at 6-5. In addition, the OAG has concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter’s advice, opinion, and recommendation with regard to the form and content of the final

Honorable Ken Paxton
Re: Dylan Winters PIA request
December 13, 2022
Page 4

document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Therefore, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *Id.* at 2.

In this case, one of the responsive documents contains a preliminary draft version a newsletter article. The finalized version of this autopsy report is intended for later public release.

Because this communication contains a draft versions of a newsletter article intended for later public release in its final form, the CDA seeks to withhold theses draft documents from public release pursuant to GOVERNMENT CODE section 552.111.

IV. Conclusion

Documents responsive to the request which the CDA seeks to withhold are attached as Exhibit C. This letter will serve as notice to the requestor that the CDA is seeking a ruling regarding this Public Information Act request. I may be reached at (817) 884-1233 if you any questions arise.

Sincerely,

Sharen Wilson
Criminal District Attorney
Tarrant County, Texas



HANNAH BELL
Assistant Criminal District Attorney

HLB/kl

Attachments

- Exhibit A- Copy of the Public Information Act request
- Exhibit B - Correspondence to the OAG

Honorable Ken Paxton
Re: Dylan Winters PIA request
December 13, 2022
Page 5

Exhibit C - Documents sought to be withheld

cc w/att. (Exs. A and B only):

Dylan Winters
1030 15th Street NW
Suite B255
Washington, DC 20005

Via E-mail Only - records@americanoversight.org

From: AO Records <records@americanoversight.org>
Sent: Monday, November 21, 2022 11:46 AM
To: Norma Gorena <NGorena@tarrantcounty.com>
Subject: Re: Public Information Request (TX-TARRANT-22-1154)

You don't often get email from records@americanoversight.org. [Learn why this is important](#)
EXTERNAL EMAIL ALERT! Think Before You Click!

My apologies. Please find the request attached.

Dylan Winters
Paralegal | American Oversight
records@americanoversight.org | 202-492-8276
www.americanoversight.org | @weareoversight

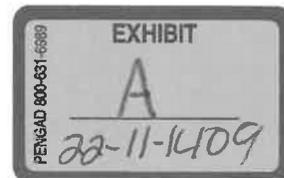
From: Norma Gorena <NGorena@tarrantcounty.com>
Date: Monday, November 21, 2022 at 12:41 PM
To: AO Records <records@americanoversight.org>, Elections - Info External <ElectionsInfo@tarrantcounty.com>
Subject: RE: Public Information Request (TX-TARRANT-22-1154)

EXTERNAL SENDER

To Whom it May Concern:

There is no attachment on the email.

Norma Gorena
Executive Assistant to County Clerk Mary Louise Nicholson
Tarrant County Clerk's Office
100 W. Weatherford St., Room 130 Fort Worth, TX 76196
P: 817.884.1070
F: 817.212.3068
E: ngorena@tarrantcounty.com



From: AO Records <records@americanoversight.org>

Sent: Monday, November 21, 2022 11:40 AM

To: Norma Gorena <NGorena@tarrantcounty.com>; Elections - Info External <ElectionsInfo@tarrantcounty.com>

Subject: Public Information Request (TX-TARRANT-22-1154)

EXTERNAL EMAIL ALERT! Think Before You Click!

Dear Public Information Officer:

Please find attached a request for records under the Texas Public Information Act.

Sincerely,

Dylan Winters

Paralegal | American Oversight

records@americanoversight.org | 202-492-8276

www.americanoversight.org | @weareoversight

PIR: TX-TARRANT-22-1154



November 21, 2022

VIA EMAIL

Norma Gorena
Executive Assistant to County Clerk Mary Louise Nicholson
Tarrant County Clerk's Office
100 W. Weatherford St., Room 130
Fort Worth, TX 76196
ngorena@tarrantcounty.com

Heider Garcia
Tarrant County Election Administrator
2700 Premier Street
Fort Worth, TX 76111
ElectionsInfo@tarrantcounty.com

Re: Public Information Request

Dear Public Information Officer:

Pursuant to the Texas Public Information Act, as codified at Tex. Code ch. 552, American Oversight makes the following request for public records.

On August 17, 2022, Attorney General Ken Paxton issued an opinion enabling broad third-party access to anonymous voted ballots almost immediately after counting. Public reporting has indicated that just days before issuing that opinion, the Office of the Attorney General had been providing contradictory guidance to counties.¹ American Oversight seeks records related to the changing standards regarding third-party access to voted ballots.

Requested Records

American Oversight requests that Tarrant County promptly produce the following:

All email communications (including emails, email attachments, calendar invitations, and calendar invitation attachments) sent or received by any of the county officials listed below containing any of the search terms listed below.

¹ Jessica Huseman & Natalia Contreras, *Paxton's Legal Guidance on Ballots Contradicts Advice He Gave Counties Five Days Earlier*, Votebeat (Aug. 26, 2022, 5:44PM), <https://texas.votebeat.org/2022/8/26/23323982/ken-paxton-ballots-public-records-legal>.

 1030 15th Street NW, Suite B255, Washington, DC 20005 | AmericanOversight.org

County Officials:

- i. Heider Garcia, Elections Administrator
- ii. Mary Louise Nicholson, County Clerk

Search Terms:

- | | |
|-----------------------------|----------------------------|
| i. KP-0411 | ix. "Chain of custody" |
| ii. "Anonymous voted" | x. "Ballot access" |
| iii. Inspect* | xi. Hancock |
| iv. "Obtain copies" | xii. Krause |
| v. "Public access" | xiii. "Unauthorized entry" |
| vi. "Voted ballots" | xiv. "Authorized entry" |
| vii. "22 month" | xv. "ballot box" |
| viii. "Preservation period" | xvi. "ballot boxes" |

Please note that American Oversight is using the asterisk (*) to designate the standard use of "wildcards" in the search for responsive records. For example, a search for "separat*" would return all of the following: separate, separates, separated, separation, etc. If your office is unable to search for wildcards, please advise so that we may specifically include the variations that we would like searched.

Please provide all responsive records from August 10, 2022, through the date the search is conducted.

American Oversight insists that your office use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; governmental authorities may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Please search all records regarding official business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Emails conducting government business sent or received on the personal account of a governmental authority's officer or employee constitutes a record for purposes of the Texas Public Information Act.²

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. If a request is denied in

² Tex. Code § 552.002(a-2); see also *Adkisson v. Paxton*, 459 S.W.3d 761, 773 (Tex. App. 2015).

whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Please take appropriate steps to ensure that records responsive to this request are not deleted by your office before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your office can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

Fee Waiver Request

In accordance with Tex. Code § 552.267(a), American Oversight requests a waiver of fees associated with processing this request for records, because such a waiver “is in the public interest because providing the copy of the information primarily benefits the general public.” The requested records are directly related to the work of state and county officials, with the potential to shed light on the ability of third parties to review voted ballots. This matter is a subject of substantial public interest in Texas.³ Accordingly, release of records that may help the public understand the operations and activities of state and county officials is in the public interest.

Release of the requested records will primarily benefit the public.⁴ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the requested records is not in American Oversight’s financial interest, but is rather in the public interest. American Oversight is committed to transparency and makes the responses governmental authorities provide to public records requests publicly available. As noted, the subject of this request is a matter of public interest, and the public would benefit from an enhanced understanding of the government’s activities through American Oversight’s analysis and publication of these records. American Oversight’s mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials.

³ Natalia Contreras, *Right-Wing Group Is Quietly Conducting Review of 300,000 Tarrant County Ballots from 2020 Primary*, Votebeat & Texas Trib. (July 22, 2022, 7PM), <https://www.texastribune.org/2022/07/22/texas-elections-tarrant-county/>.

⁴ Tex. Code § 552.267(a).

American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.⁵

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⁶ *News*, American Oversight, <https://www.americanoversight.org/blog>.

⁷ *State Investigations*, American Oversight, <https://www.americanoversight.org/states>.

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¹⁰ *See generally Audit the Wall*, American Oversight, <https://www.americanoversight.org/investigation/audit-the-wall>; *see, e.g., Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, American Oversight, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

¹¹ *DOJ Records Relating to Solicitor General Noel Francisco's Recusal*, American Oversight, <https://www.americanoversight.org/document/doj-civil-division-response-noel-francisco-compliance>; *Francisco & the Travel Ban: What We Learned from the DOJ Documents*, American Oversight, <https://www.americanoversight.org/francisco-the-travel-ban-what-we-learned-from-the-doj-documents>.

taxpayer dollars to charter private aircraft or use government planes for unofficial business.¹²

Accordingly, American Oversight qualifies for a fee waiver. If your office denies our request for a fee waiver, please notify American Oversight of any anticipated fees or costs in excess of \$40 prior to incurring such costs or fees.

Conclusion

We share a common mission to promote transparency in government. American Oversight looks forward to working with your county on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Emma Lewis at records@americanoversight.org or (202) 919-6303. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Sincerely,

/s/ Emma Lewis
Emma Lewis
on behalf of
American Oversight

¹² See generally *Swamp Airlines: Chartered Jets at Taxpayer Expense*, American Oversight, <https://www.americanoversight.org/investigation/swamp-airlines-private-jets-taxpayer-expense>; see, e.g., *New Information on Pompeo's 2017 Trips to His Home State*, American Oversight, <https://www.americanoversight.org/new-information-on-pompeos-2017-trips-to-his-home-state>.



SHAREN WILSON
Criminal District Attorney
Tarrant County

December 6, 2022

Honorable Ken Paxton
Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

CM/RRR# 70211970000217582855

Re: Public Information Act request from Dylan Winters

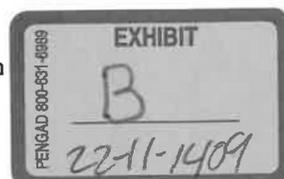
Dear General Paxton:

Pursuant to TEXAS GOVERNMENT CODE Section 552.301 the Tarrant County Criminal District Attorney's Office will be seeking an Attorney General's decision regarding a Public Information Act request originally received on November 21, 2022, from Dylan Winters; thereby, making the response to the Requestor and/or submission of written comments regarding this request for a ruling to your office due on Wednesday, December 7, 2022¹. See Attachment No. 1. This Office, believes that a portion of the information sought may be exempt from public disclosure pursuant to Sections 552.022, 552.0225, 552.026, 552.101, 552.102, 552.103, 552.104, 552.105, 552.106, 552.107, 552.108, 552.1085, 552.109, 552.110, 552.111, 552.112, 552.113, 552.114, 552.115, 552.116, 552.117, 552.1175, 552.1176, 552.118, 552.119, 552.120, 552.121, 552.122, 552.123, 552.1235, 552.124, 552.125, 552.126, 552.127, 552.128, 552.129, 552.130, 552.131, 552.132, 552.1325, 552.133, 552.134, 552.135, 552.136, 552.137, 552.138, 552.139, 552.140, 552.141, 552.142, 552.1425, 552.143, 552.144, 552.145, 552.146, 552.147, 552.148, 552.149, 552.150, 552.151, 552.152, 552.153 and 552.154 of the TEXAS PUBLIC INFORMATION ACT. By copy of this letter, this Office is informing the Requestor and your office of the intention to seek an Attorney General's ruling on this matter.

In light of this request for an extension, on or before Wednesday, December 14, 2022, this Office will:

- (1) submit to the attorney general:
 - (A) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld;
 - (B) a copy of the written requests for information;
 - (C) a signed statement as to the date on which the written requests for

¹ On November 24 & 25, 2022, all Tarrant County offices were closed in observance of the Thanksgiving holiday and the day after Thanksgiving.



Honorable Ken Paxton
Re: Dylan Winters - PIA Request
December 6, 2022
Page 2

information was received by the governmental body or evidence sufficient to establish that date; and
(D) a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested; and

(2) label that copy of the specific information, or of the representative samples, to indicate which exceptions apply to which parts of the copy.

See TEX. GOV'T CODE § 552.301(e).

If you should have any questions, please feel free to contact me at (817) 884-1233.

Sincerely,

Sharen Wilson
Criminal District Attorney
Tarrant County, Texas



Hannah Bell
Assistant Criminal District Attorney

HB/kl
Attachment (Att. 1)

cc w/att:

Dylan Winters (*Requestor*)

VIA E-Mail: records@americanoversight.org

From: AO Records <records@americanoversight.org>
Sent: Monday, November 21, 2022 11:46 AM
To: Norma Gorena <NGorena@tarrantcounty.com>
Subject: Re: Public Information Request (TX-TARRANT-22-1154)

You don't often get email from records@americanoversight.org. [Learn why this is important](#)
EXTERNAL EMAIL ALERT! Think Before You Click!

My apologies. Please find the request attached.

Dylan Winters
Paralegal | American Oversight
records@americanoversight.org | 202-492-8276
www.americanoversight.org | @weareoversight

From: Norma Gorena <NGorena@tarrantcounty.com>
Date: Monday, November 21, 2022 at 12:41 PM
To: AO Records <records@americanoversight.org>, Elections - Info External <ElectionsInfo@tarrantcounty.com>
Subject: RE: Public Information Request (TX-TARRANT-22-1154)

EXTERNAL SENDER

To Whom it May Concern:

There is no attachment on the email.

*Norma Gorena
Executive Assistant to County Clerk Mary Louise Nicholson
Tarrant County Clerk's Office
100 W. Weatherford St., Room 130 Fort Worth, TX 76196
P: 817.884.1070
F: 817.212.3068
E: ngorena@tarrantcounty.com*



ATTACHMENT 1

From: AO Records <records@americanoversight.org>

Sent: Monday, November 21, 2022 11:40 AM

To: Norma Gorena <NGorena@tarrantcounty.com>; Elections - Info External <ElectionsInfo@tarrantcounty.com>

Subject: Public Information Request (TX-TARRANT-22-1154)

EXTERNAL EMAIL ALERT! Think Before You Click!

Dear Public Information Officer:

Please find attached a request for records under the Texas Public Information Act.

Sincerely,

Dylan Winters

Paralegal | American Oversight

records@americanoversight.org | 202-492-8276

www.americanoversight.org | @weareoversight

PIR: TX-TARRANT-22-1154



November 21, 2022

VIA EMAIL

Norma Gorena
Executive Assistant to County Clerk Mary Louise Nicholson
Tarrant County Clerk's Office
100 W. Weatherford St., Room 130
Fort Worth, TX 76196
ngorena@tarrantcounty.com

Heider Garcia
Tarrant County Election Administrator
2700 Premier Street
Fort Worth, TX 76111
ElectionsInfo@tarrantcounty.com

Re: Public Information Request

Dear Public Information Officer:

Pursuant to the Texas Public Information Act, as codified at Tex. Code ch. 552, American Oversight makes the following request for public records.

On August 17, 2022, Attorney General Ken Paxton issued an opinion enabling broad third-party access to anonymous voted ballots almost immediately after counting. Public reporting has indicated that just days before issuing that opinion, the Office of the Attorney General had been providing contradictory guidance to counties.¹ American Oversight seeks records related to the changing standards regarding third-party access to voted ballots.

Requested Records

American Oversight requests that Tarrant County promptly produce the following:

All email communications (including emails, email attachments, calendar invitations, and calendar invitation attachments) sent or received by any of the county officials listed below containing any of the search terms listed below.

¹ Jessica Huseman & Natalia Contreras, *Paxton's Legal Guidance on Ballots Contradicts Advice He Gave Counties Five Days Earlier*, Votebeat (Aug. 26, 2022, 5:44PM), <https://texas.votebeat.org/2022/8/26/23323982/ken-paxton-ballots-public-records-legal>.

 1030 15th Street NW, Suite B255, Washington, DC 20005 | AmericanOversight.org

County Officials:

- i. Heider Garcia, Elections Administrator
- ii. Mary Louise Nicholson, County Clerk

Search Terms:

- | | |
|-----------------------------|----------------------------|
| i. KP-0411 | ix. "Chain of custody" |
| ii. "Anonymous voted" | x. "Ballot access" |
| iii. Inspect* | xi. Hancock |
| iv. "Obtain copies" | xii. Krause |
| v. "Public access" | xiii. "Unauthorized entry" |
| vi. "Voted ballots" | xiv. "Authorized entry" |
| vii. "22 month" | xv. "ballot box" |
| viii. "Preservation period" | xvi. "ballot boxes" |

Please note that American Oversight is using the asterisk (*) to designate the standard use of "wildcards" in the search for responsive records. For example, a search for "separat*" would return all of the following: separate, separates, separated, separation, etc. If your office is unable to search for wildcards, please advise so that we may specifically include the variations that we would like searched.

Please provide all responsive records from August 10, 2022, through the date the search is conducted.

American Oversight insists that your office use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched. American Oversight is available to work with you to craft appropriate search terms. **However, custodian searches are still required; governmental authorities may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.**

Please search all records regarding official business. **You may not exclude searches of files or emails in the personal custody of your officials, such as personal email accounts.** Emails conducting government business sent or received on the personal account of a governmental authority's officer or employee constitutes a record for purposes of the Texas Public Information Act.²

In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. If a request is denied in

² Tex. Code § 552.002(a-2); see also *Adkisson v. Paxton*, 459 S.W.3d 761, 773 (Tex. App. 2015).

whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Please take appropriate steps to ensure that records responsive to this request are not deleted by your office before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

To ensure that this request is properly construed, that searches are conducted in an adequate but efficient manner, and that extraneous costs are not incurred, American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your office can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in electronic format by email or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

Fee Waiver Request

In accordance with Tex. Code § 552.267(a), American Oversight requests a waiver of fees associated with processing this request for records, because such a waiver “is in the public interest because providing the copy of the information primarily benefits the general public.” The requested records are directly related to the work of state and county officials, with the potential to shed light on the ability of third parties to review voted ballots. This matter is a subject of substantial public interest in Texas.³ Accordingly, release of records that may help the public understand the operations and activities of state and county officials is in the public interest.

Release of the requested records will primarily benefit the public.⁴ As a 501(c)(3) nonprofit, American Oversight does not have a commercial purpose and the release of the requested records is not in American Oversight’s financial interest, but is rather in the public interest. American Oversight is committed to transparency and makes the responses governmental authorities provide to public records requests publicly available. As noted, the subject of this request is a matter of public interest, and the public would benefit from an enhanced understanding of the government’s activities through American Oversight’s analysis and publication of these records. American Oversight’s mission is to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials.

³ Natalia Contreras, *Right-Wing Group Is Quietly Conducting Review of 300,000 Tarrant County Ballots from 2020 Primary*, Votebeat & Texas Trib. (July 22, 2022, 7PM), <https://www.texastribune.org/2022/07/22/texas-elections-tarrant-county/>.

⁴ Tex. Code § 552.267(a).

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¹⁰ See generally *Audit the Wall*, American Oversight, <https://www.americanoversight.org/investigation/audit-the-wall>; see, e.g., *Border Wall Investigation Report: No Plans, No Funding, No Timeline, No Wall*, American Oversight, <https://www.americanoversight.org/border-wall-investigation-report-no-plans-no-funding-no-timeline-no-wall>.

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taxpayer dollars to charter private aircraft or use government planes for unofficial business.¹²

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We share a common mission to promote transparency in government. American Oversight looks forward to working with your county on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Emma Lewis at records@americanoversight.org or (202) 919-6303. Also, if American Oversight's request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

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/s/ Emma Lewis
Emma Lewis
on behalf of
American Oversight

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Karen Wiseman,

Plaintiff,

v.

**Tarrant County, Texas, and
Heider Garcia, in his capacity as
Elections Administrator for
Tarrant County, Texas,**

Defendants.

IN THE DISTRICT COURT

96th JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

Supplemental Brief in Support of Motion for Summary Judgment

As requested by the Court at the August 5, 2022 summary judgment hearing, the Defendants offer the additional briefing below concerning election records.

Election records and confidentiality

The Election Code provides that “an election record that is public information shall be made available to the public during the regular business hours of the record’s custodian.” Tex. Election Code Ann. § 1.012(a). Election records are “the precinct election returns, voted ballots, and other records of an election[.]” Tex. Election Code Ann. § 66.002. All election records—except as otherwise provided in the Election Code or the Public Information Act—are public information. Tex. Election Code Ann. § 1.012(c). The Public Information Act provides that information is excepted from public disclosure when it is considered confidential by law. Tex. Gov’t Code Ann. § 552.101. This law can include both the PIA and other statutes. *Id.*

The Election Code requires the election authority to preserve election records for at least 22 months after election day. Tex. Election Code Ann. § 65.058(a). During the preservation period, voted ballots must be kept in a locked ballot box or secured container. Tex. Election Code Ann. § 66.058(b). If ballots are electronic, those must be kept in a secure container. Tex. Election Code Ann. § 66.058(g). During the preservation period, “a ballot box or other secure container containing

voted ballots may not be opened” unless otherwise permitted in the Election Code. Tex. Election Code Ann. § 66.058(b-1) (emphasis added). To access ballots during the preservation period (unless authorized in the Election Code) is a crime. Tex. Election Code Ann. § 66.058(d). Tarrant County contends that Section 66.058 makes voted ballots (whether paper or electronic) confidential for 22 months following an election.

Established rules of statutory construction show that voted ballots are confidential

The Attorney General consistently ruled as such since Open Records Decision No. 505 (1988) (**Exh. A**), including as recently as July 26, 2022 (**Exh. B**). But, on August 17, 2022, the Attorney General issued a formal opinion concluding for the first time in almost 40 years that voted ballots are not confidential. *See*, Op. Att’y Gen. KP-0441 (**Exh. C**). For the reasons below, the Attorney General’s most recent interpretation is erroneous, and the Court should not follow it.

A court is to construe a statute as a whole rather than viewing individual parts in isolation. *Johnson v. Simmons*, 597 S.W.3d 538, 541 (Tex. App.—Fort Worth 2020, pet. denied). The court must also avoid an interpretation that renders any portion of the statute meaningless. *Id.*

Considering Sections 1.012 and 66.058 together, while all election records are public information, voted ballots are confidential during the 22-month preservation period. This gives effect to Section 1.012’s command that election records be made available except as otherwise provided in the Election Code or the PIA. It also gives effect to Section 66.058’s prohibition on accessing voted ballots except as otherwise authorized in the Election Code.

If the Legislature intended to include PIA requests as an authorized reason to access voted ballots, it would have explicitly stated as such. It has in other instances, such as recounts, Tex. Election Code Ann. § 213.007 (when presented with a recount order, custodian shall make ballots available to recount committee), and election contests. Tex. Election Code Ann. § 221.008 (tribunal hearing election contest may cause secured ballots to be accessed to determine any issue relevant to the contest). Section 1.012 has no such language about accessing secured ballots. Tex. Election Code Ann. § 1.012. The lack of such language shows that the Legislature did not include PIA requests as one of the

permissible reasons to access voted ballots. *City of Richardson v. Oncor Electric Delivery Co., LLC*, 539 S.W.3d 252, 261 (Tex. 2018) (term used in one provision but excluded in another should not be implied where excluded). Because the Attorney General’s opinion conflicts with both the Election Code and the rules of statutory construction, the Court should decline to follow it. Instead, the Court should follow Section 66.058’s plain language, which prohibits disclosure of voted ballots.

Conclusion and Prayer

All of the items at issue in Wiseman’s September PIA request and item 7 in her November PIA request are ballots. *See*, Exh. A to Reply in Support of Motion for Summary Judgment. Because ballots are confidential for the 22 months following the election, Wiseman is not entitled to them. Hence, the Court should grant the Defendants judgment as a matter of law denying Wiseman’s claim for mandamus for those ballots.

Respectfully submitted,

SHAREN WILSON
Criminal District Attorney
Tarrant County, Texas

s/ Stephen A. Lund

LESLIE L. HUNT
State Bar No. 24046126
STEPHEN A. LUND
State Bar No. 24086920
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llhunt@tarrantcountytx.gov
salund@tarrantcountytx.gov
mckratovil@tarrantcountytx.gov

Attorneys for Defendants

Certificate of Service

On August 19, 2022, I served the above document on all counsel of record in accordance with Tex. R. Civ. P. 21a.

s/ Stephen A. Lund

STEPHEN A. LUND



Exhibit A

**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.¹ 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).² 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

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

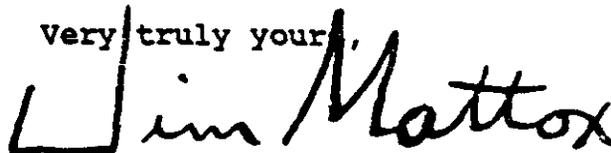
MW-307 (1981). Release of copies of computer programs protected by copy-right would violate federal law.

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,



J I M M A T T O X
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

LOU MCCREARY
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

JENNIFER S. RIGGS
Chief, Open Government Section
of the Opinion Committee

Prepared by Karen C. Gladney
Assistant Attorney General



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

RECEIVED
Exhibit B
AUG 02 2022
CIVIL DIVISION
CRIMINAL DISTRICT ATTORNEY

July 26, 2022

Ms. Hannah Bell
Assistant District Attorney
Tarrant County Criminal District Attorney's Office
401 West Belknap, 9th Floor
Fort Worth, Texas 76196-0201

OR2022-21874

Dear Ms. Bell:

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# 962319.

The Tarrant County Criminal District Attorney's Office and the Tarrant County Elections Administration (collectively, the "county") received two requests from different requestors for specified election records. The county claims the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception the county claims and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from public 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, which provides:

- (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) 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

¹ We assume that 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 that those records contain substantially different types of information than that submitted to this office.

in which they are delivered to the general custodian of election records. On the 61st day after election day, the general custodian of election records may:

(1) require a person who has possession of a key that operates the lock on a ballot box containing voted ballots to return the key to the custodian; and

(2) unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.

(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.

(c) If during the preservation period an authorized entry is made into a ballot box or other secure container containing voted ballots, when the purpose for the entry is fulfilled, the box or container shall be relocked or resecured, and the box and key or secure container returned to the custodian.

(d) A custodian of a ballot box or secure container 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 container; or

(2) fails to prevent another person from handling the box or container in an unauthorized manner or from making an unauthorized entry into the box or container.

(e) An offense under Subsection (d) is a Class A misdemeanor.

(f) The records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian. If the records are removed from the box, they may not be commingled with any other election records kept by the custodian.

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

(h) For the preservation of precinct election records in an election involving a federal office, the secretary of state shall instruct the affected authorities on the actions necessary to comply with federal law and otherwise implement this section.

Elec. Code § 66.058. "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 state the submitted information 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 indication the Election Code authorizes access to the submitted information in this case. Therefore, pursuant to section 66.058(a) of the Election Code, the information at issue is confidential for at least 22 months after election day. *See* Elec. Code § 66.058(a). Accordingly, the county must withhold the information at issue under section 552.101 of the Government Code on that basis 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).

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/mo

Ref: ID# 962319

Enc. Submitted documents

c: Requestor
(w/o enclosures)



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

Exhibit C

August 17, 2022

The Honorable Kelly Hancock
Chair, Senate Committee on Veteran Affairs & Border Security
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

The Honorable Matt Krause
Chair, House Committee on General Investigating
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0411

Re: Whether a legislator or a member of the public may inspect or obtain copies of anonymous voted ballots (RQ-0424-KP)

Dear Senator Hancock and Representative Krause:

You ask whether a member of the public or a legislator may inspect or obtain copies of anonymous voted ballots.¹ To be clear, you explain that the subject of your inquiry is “anonymous voted ballots” or other voted ballots that have had any voter-identifying data redacted. Krause Letter at 1. You explain that members of the public and individual members of the Legislature desire to audit the results of Texas elections, but election administrators cite section 66.058 of the Election Code as precluding the release of voted ballots. Hancock Letter at 1; Krause Letter at 1. Thus, the question presented is whether the information contained within a voted ballot *that has been stripped of any information that could be used to reveal the identity of the voter* is public information subject to disclosure.

¹See Letter from Honorable Kelly Hancock, Chair, Senate Comm. on Veteran Affairs & Border Sec., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Sept. 28, 2021) (“Hancock Letter”); Letter from Honorable Matt Krause, Chair, House Comm. on Gen. Investigating, to Honorable Ken Paxton, Tex. Att’y Gen. at 1–2 (Aug. 16, 2021) (“Krause Letter”); <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2021/RQ0424KP.pdf>.

To fulfill the Texas Constitution’s mandate that Texas preserve election integrity, the Legislature has designated anonymous voted ballots as election records under the Election Code and has established procedures aimed at both preserving those records and granting public access to them.

Article VI, section 4 of the Texas Constitution provides:

In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box; and the Legislature shall provide by law for the registration of all voters.

TEX. CONST. art. VI, § 4. This provision requires the Legislature to “pass laws as necessary to deter fraud and protect ballot purity [and] is addressed to the sound discretion of the Legislature.” *Andrade v. NAACP*, 345 S.W.3d 1, 16 (Tex. 2011) (quoting *Wood v. State ex rel. Lee*, 126 S.W.2d 4, 9 (Tex. 1939) (quotation marks omitted)).

Your question involves access to “election records” which include “anything distributed or received by government under [the Election Code].” TEX. ELEC. CODE § 1.012(d)(1). Voted ballots are expressly designated as “precinct election records.” *Id.* § 66.002 (defining “precinct election records” as “the precinct election returns, *voted ballots*, and other records of an election that are assembled and distributed” under chapter 66 of the Election Code (emphasis added)). The Election Code contains provisions aimed at both preserving election records and granting access to review those records. *See id.* §§ 1.012, 66.058.

To fulfill its constitutional mandate, the Legislature created the position of general custodian of election records and charged that office with, among other things, preserving precinct election records.² *See id.* §§ 66.001, .058. Subsection 66.058(a) requires “the precinct election records [to] be preserved by the authority to whom they are distributed for at least 22 months after election day.” *Id.* § 66.058(a); *see also* 52 U.S.C. § 20701 (establishing 22-month preservation period for election records in certain federal elections). For at least 60 days after an election, voted ballots must be kept in a locked room, in the locked ballot box delivered to the custodian. TEX. ELEC. CODE § 66.058(b).³ On the 61st day, the custodian may require the return of the key that unlocks the ballot box containing voted ballots and may “unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.” *Id.* § 66.058(b)(1), (2).

“Except as permitted by [the Election Code], a ballot box or other secure container containing voted ballots may not be opened during the preservation period.” *Id.* § 66.058(b-1).

²Depending on the type of election, the general custodian of election records is either the county clerk, the city secretary, or the secretary or presiding officer of a political subdivision’s governing body. TEX. ELEC. CODE § 66.001.

³Due to potential recounts and provisional ballots, the Legislature requires the election record custodian to keep voted ballots secure for the 60-day period. *Id.* § 66.058(b)

Id. § 66.058(d), (e). If anonymous voted ballots are disclosable public information, then the custodian’s entry into the box to fulfill the state’s disclosure obligations is authorized.

The Election Code designates all election records, including anonymous voted ballots, as public information.

Alongside the goal of ballot preservation, the Election Code also recognizes the importance of granting access to the public to review election records and ensure transparency and confidence in Texas elections. To that end, section 1.012 of the Election Code provides: “Except as otherwise provided by [the Election Code] or [the Public Information Act], all election records are public information.” *Id.* § 1.012(c). Voted ballots become public information once “the custodian completes the unofficial tabulation of the results for that precinct.” *Id.* § 66.057(a). “[A]n election record that is public information shall be made available to the public during the regular business hours of the record’s custodian.” *Id.* § 1.012(a).

Because the Legislature designated anonymous voted ballots as public information and required public access to those records, a custodian’s entry into the locked box for such purposes is an authorized entry under the Election Code.

Section 66.058 recognizes the existence of exceptions that authorize entry into the locked ballot box during the preservation period provided the box or container is relocked or resecured after the authorized purpose has been fulfilled. *Id.* § 66.058(b-1), (c); *see, e.g., id.* §§ 213.007 (authorizing the custodian to make ballots available for a recount), 273.042 (authorizing the custodian to make the ballots available to a grand jury for purposes of a criminal investigation). Section 1.012 of the Election Code establishes one such exception by generally requiring the custodian to make election records available to the public, unless such records are expressly excepted by the Public Information Act or the Election Code.⁴ *Id.* § 1.012(c); *see also* TEX. GOV’T CODE § 552.006 (providing that the Public Information Act “does not authorize the withholding of public information or limit the availability of public information to the public, except as expressly provided” within the Act).

Subchapter C of the Public Information Act establishes the exceptions to the general rule that public information shall be made available to the public. *See* TEX. GOV’T CODE §§ 552.101–.162 (“Information Excepted from Required Disclosure”). No section within that subchapter addresses anonymous voted ballots or expressly excepts them from disclosure. Furthermore, no

⁴Thirty-four years ago, in Open Records Decision 505, a previous Attorney General considered public access to voted ballots under the Public Information Act. Tex. Att’y Gen. ORD 505 (1988) at 1–2. The decision concluded that section 66.058’s prohibition on unauthorized entry into the locked ballot box during the preservation period fell within the Public Information Act’s disclosure exceptions for privileged or confidential information. Tex. Att’y Gen. ORD 505 (1988) at 2–3. However, in-depth review by this office of the issues raised in that decision results in the opposite conclusion. No language in either the Election Code nor the Public Information Act makes the entirety of a voted ballot privileged or confidential. Open Records Decision 505 is therefore overruled to the extent inconsistent with this opinion.

provision in the Election Code designates anonymous voted ballots as confidential or otherwise prohibits their disclosure to the public. By demanding that the public have access to election records, including anonymous voted ballots, the Legislature thereby authorized the election records custodian's entry to the locked ballot box during the 22-month preservation period for such purposes.

Any personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections must be redacted for purposes of disclosure to protect the constitutional right to a secret ballot in Texas.

While you ask specifically about *anonymous* voted ballots, it is important to note that Texas law has long established that all elections shall be by secret ballot. *Wood*, 126 S.W.2d at 9. This requirement of secrecy is mandatory—"that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy *in regard to the persons for whom he votes*["*Id.* at 8; *Carroll v. State*, 61 S.W.2d 1005, 1007 (Tex. Crim. App. 1933) (emphasis added). In order to protect the secret ballot, "[p]ublic policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it["*Carroll*, 61 S.W.2d at 1008. The right of nondisclosure belongs to the individual voter. *See Oliphint v. Christy*, 299 S.W.2d 933, 939 (Tex. 1957). Your question appears to acknowledge this requirement by only inquiring about voted ballots that (1) have no information that could be used to identify the voter or (2) have been redacted to exclude any information that could be used to identify the voter. Krause Letter at 1.

Information is excepted from public disclosure under the Public Information Act "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE § 552.101. No statutory provision generally designates election records or their contents to be confidential. However, the right to a secret ballot has been held to protect personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections. *See generally Wood*, 126 S.W.2d at 9; *Carroll*, 61 S.W.2d at 1008. Therefore, a court would likely find that personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections is excepted from public disclosure. As a result, such information must be preserved, and the election records custodian must redact such personally identifiable information to protect the constitutional right to a secret ballot in Texas. TEX. GOV'T CODE § 552.007 (providing that a governmental body has no discretion to release information deemed confidential by law). To be clear, the presence of some confidential information on a ballot does not provide a basis to withhold the ballot in its entirety.

The Election Code authorizes the Secretary of State and election records custodians to establish procedures to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots.

The Secretary of State is the chief elections officer of the state and is required to "assist and advise all election authorities with regard to the application, operation, and interpretation" of the Election Code and any other election laws. TEX. ELEC. CODE §§ 31.001(a), .004(a). In furtherance of the preservation of precinct election records in particular, the Legislature directed the Secretary of State to "instruct the affected authorities on the actions necessary to comply" with

section 66.058. *Id.* § 66.058(h). Thus, the Secretary of State has the authority to instruct elections administrators as to how to comply with both the ballot preservation requirements in section 66.058 and the public access requirements in section 1.012.

With the Secretary of State’s oversight, the Legislature expressly authorized the election records custodian to “adopt reasonable rules limiting public access” under section 1.012 to further the purposes of “safeguarding the election records or economizing the custodian’s time.” *Id.* § 1.012(b). Pursuant to their respective authority, the Secretary of State and the election records custodians may establish procedures as authorized by law to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots under the Election Code.

S U M M A R Y

Anonymous voted ballots are election records under the Election Code, and the Legislature has established procedures aimed at both preserving those records and granting public access to them.

Section 66.058 of the Election Code requires the anonymous ballots to be held in a locked ballot box during a 22-month preservation period, with entry only as authorized by the Election Code. Section 1.012 establishes these ballots as public information and requires the election records custodian to make the ballots available to the public. By expressly requiring the custodian to provide public access to such records, the Legislature authorized entry into the locked ballot box for such purpose during the 22-month period. Thus, members of the public and legislators may inspect or obtain copies of anonymous voted ballots during the 22-month preservation period.

Personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections is confidential and excepted from public disclosure. Any confidential information on an anonymous voted ballot must be redacted for purposes of disclosure in order to protect the constitutional right to a secret ballot.

The Election Code authorizes the Secretary of State and election records custodians to establish procedures to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots.

Very truly yours,



KEN PAXTON
Attorney General of Texas

BRENT E. WEBSTER
First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

D. FORREST BRUMBAUGH
Deputy Attorney General for Legal Counsel

AARON REITZ
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Syretta Antwi-Boasiako on behalf of Stephen Lund

Bar No. 24086920

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Envelope ID: 67484043

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