



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 27, 2019

Ms. Jennifer Smith
Assistant District Attorney
Hidalgo County
100 East Cano
Edinburg, Texas 78539

OR2019-05504

Dear Ms. Smith:

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# 752518 (PIR# 2018-0181-DA.CO).

The Hidalgo County Elections Administration Office (the "county") received a request for twenty-eight categories of information pertaining to specified elections and county election office operations. You state the county will release some information. You also state the county does not maintain information responsive to portions of the request.¹ You assert some of the submitted information is not subject to the Act. In the alternative, you claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also inform us the county has notified interested third parties of their right to submit comments to this office as to why their information should not be released. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information). We have received comments from the city of Weslaco. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

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

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

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

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

(1) by a governmental body;

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

(A) owns the information;

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

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

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

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

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

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

You have provided the contract for election services between the county and the cities of Donna, Edcouch, Edinburg, Elsa, Hidalgo, Mission, Palmhurst, Palmview, and Weslaco (collectively the “cities”). These contracts reflect the county agreed to perform election services for the cities, including conducting and supervising elections on May 5, 2018, and November 6, 2018. *See* Elec. Code § 31.092 (county election officer may contract with

governing body of political subdivision to perform election services); *see also id.* § 1.005(13) (defining “political subdivision” to include county, city, or school district or any other governmental entity that embraces a geographic area with a defined boundary; exists for the purpose of discharging functions of government; and possess authority for subordinate self-government through officers selected by it). Section 31.096(3) of the Election Code states “[a]n election services contract may not change . . . the authority to serve as custodian of voted ballots or other election records, except that a contract with a political subdivision *other than a city* may provide that the county election officer will be the custodian of voted ballots.” *Id.* § 31.096(3) (emphasis added). Furthermore, pursuant to section 66.001 of the Election Code, the city secretary is the general custodian of election records with regards to a city election. *Id.* § 66.001. Thus, although the county contracted to serve as the administrator of the cities’ elections, each city’s respective city secretary remains the general custodian of election records for that city’s election records. Thus, we agree the information at issue pertaining to the cities does not constitute “information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the county. *See Gov’t Code* § 552.002. Therefore, we conclude the information at issue pertaining to the cities is not subject to the Act and need not be released in response to the present request for information.

You have also provided the contracts for election services the county executed with the Agua Special Utility District, Donna Irrigation District, McAllen Independent School District, Mission Consolidated Independent School District, Shadyland Independent School District, and South Texas College (collectively the “entities”). The county also contracted with the entities to perform election services, including conducting and supervising each entity’s May 5, 2018, election and McAllen Independent School District’s September 6, 2018, election. *See Elec. Code* § 31.092. We note the contracts for election services with the entities state the county election officer shall serve as the custodian of voted ballots for a specified time period, and the county received the requests for information after the specified time period. Therefore, the county was not the custodian of the records at the time the request was received. Thus, we agree the information at issue pertaining to the entities does not constitute “information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the county. *See Gov’t Code* § 552.002. Therefore, we conclude the information at issue pertaining to the entities is not subject to the Act and need not be released in response to the present request for information.

Finally, you have provided the contracts for election services the county executed with the remaining parties (the “parties”) in Exhibit F. The county also contracted with the parties to perform election services for the parties, including conducting and supervising each party’s November 6, 2018, election. *See Elec. Code* § 31.092. We note the contracts for election services with the parties state the county election officer shall serve as the custodian of voted ballots for a specified time period, and the county received the requests for information during the specified time period. Pursuant to section 31.096(3) of the Election Code, an election services contract with a political subdivision, other than a city, may provide the county election officer will be the custodian of voted ballots. *Id.* § 31.096(3);

see also id. § 1.005(13). In this instance, the political subdivisions at issue are school districts and a drainage district, not cities. *Id.* § 1.005(13). Accordingly, we find the county is holding the information at issue pertaining to the parties pursuant to the contracts executed between the county and the parties. Therefore, we find the information at issue pertaining to the parties constitutes “information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for the county. *See* Gov’t Code § 552.002. Therefore, the information at issue pertaining to the parties constitutes public information subject to the Act and may only be withheld if an exception to disclosure under the Act applies.

Next, you state portions of the requested information were the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2018-07321 (2018), 2018-12593 (2018), and 2019-03605 (2019). You state the law, facts, and circumstances on which the prior rulings were based have not changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the county must continue to rely on Open Records Letter Nos. 2018-07321, 2018-12593, and 2019-03605 as previous determinations and withhold the identical information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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 information is or is not excepted from disclosure).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, such as section 66.058 of the Election Code, which provides, in relevant part:

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

...

(b-1) Except as permitted by this code, a ballot box or other secure container containing voted ballots may not be opened during the preservation period.

...

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

Elec. Code § 66.058 (a)-(b-1), (g). “Precinct election records” means the precinct election returns, voted ballots, and other records of an election that are assembled and distributed under chapter 66 of the Election Code. *See id.* § 66.002; *see also id.* §§ 121.001 (noting other provisions of this code apply to an election in which a voting system is used), 127.132 (explaining voted ballots, election returns, and other election records of an electronic voting system shall be delivered to authorities who receive corresponding records from precinct polling places using regular paper ballots), 129.001 (stating chapter 129 applies to voting system that uses direct recording electronic voting machines and, to extent possible, procedures applicable to electronic voting system under chapter 127 are applicable to voting system under chapter 129). You assert the remaining information constitutes precinct election records made confidential by section 66.058. Upon review, we agree the information at issue is subject to section 66.058.

The Election Code authorizes access to election records during the preservation period for several purposes, including, for example, recounts, election contests, criminal investigations, and counts conducted pursuant to chapter 127 of the Election Code. *See* Open Records Decision No. 505 at 2 n.2 (1988). We have no indication the Election Code authorizes access to the 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 remaining information 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).

In summary, the information we have indicated is not subject to the Act and need not be released in response to the instant request. The county must continue to rely on Open Records Letter Nos. 2018-07321, 2018-12593, and 2019-03605 as previous determinations and withhold the identical information in accordance with those rulings. The county must withhold the remaining information 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.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

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

Sincerely,



Kelly McWethy
Assistant Attorney General
Open Records Division

KSM/som

Ref: ID# 752518

Enc. Submitted documents

c: Requestor
(w/o enclosures)

27 Third Parties
(w/o enclosures)