



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 8, 2023

Ms. Erica Rosales Nigaglioni
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2022-36158A

Dear Ms. Nigaglioni:

Our office issued Open Records Letter No. 2022-36158 (2022) on November 18, 2022. Since that date, we have determined an error was made in the issuance of this ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on November 18, 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# 041389 (File No. 593-PIA).

The El Paso County Elections Department (the "department") received a request for twenty-eight categories of information pertaining to the 2020 General Election. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. In addition, you state release of the submitted information may implicate the proprietary interests of Election Systems & Software, L.L.C. ("ESS"). Accordingly, you state, and provide documentation showing, you notified ESS of the request for information and of the right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from ESS. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

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.

Initially, the department informs us it sought clarification of portions of the request for information. *See* Gov't Code § 552.222 (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, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). The department also informs us it has not yet 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, the department has submitted information it believes is responsive to the request and made arguments against disclosure of this information. Thus, we assume the department has made a good-faith effort to relate the request to information it holds, and we will address the applicability of the arguments to the information. However, the department has no obligation at this time to release any additional responsive information for which it has not received clarification.² If the requestor responds to the request for clarification, the department 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.

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. Section 552.101 encompasses the doctrine of constitutional privacy. Article VI of the Texas Constitution is entitled “Suffrage.” Section 4 of article VI states:

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. Texas courts have construed article VI, section 4 as providing a right to a secret ballot. *See* *Wood v. State ex rel. Lee*, 126 S.W.2d 4 (Tex. 1939); *Oliphint v. Christy*, 299 S.W.2d 933, 939 (Tex. 1957); *In re Talco-Bogata Consol. Indep. Sch. Dist. Bond Election*, 994 S.W.2d 343 (Tex. App.—Texarkana 1999, no pet.). You indicate the information at issue contains information that could be used to identify a voter. We note the election records custodian must redact such personally identifiable information to protect the constitutional right to a secret ballot in Texas. *See* Attorney General Opinion KP-411 at 4 (2022); *see also* Gov't Code § 552.007 (providing that a governmental body has no discretion to release information deemed confidential by law). To the extent any personally identifiable information of voters is contained in the information at issue, this information must be redacted. The department must release the remaining information.

² As we are able to make this determination, we need not address ESS' submitted arguments against disclosure of this 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,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/jxd

Ref: ID# 041389

c: Requestor

Third Party