



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 12, 2022

Mr. J. Eric Magee
Counsel for Panola County
Allison, Bass & Magee, L.L.P.
402 West 12th Street
Austin, Texas 78701

OR2022-38472

Dear Mr. Magee:

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# 986420.

Panola County (the "county"), which you represent, received three requests from the same requestor for multiple points of information pertaining to the November 2020 elections. You state the county does not possess some of the requested information and will release some of the requested information.¹ You assert some of the requested information is not subject to the Act and claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state release of the information at issue may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the county notified KnowInk and Election Systems & Software, LLC ("ES&S") of the requests for information and of their right to submit arguments stating why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have reviewed the submitted information and the arguments submitted by ES&S. We have

¹ The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, ES&S seeks to withhold certain information the county did not submit because the county states it does not possess information responsive to those categories of the requests. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the county. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Next, we address your assertion that some of the requested information is not subject to the Act. Section 552.002(a) of the Government Code defines "public information" as the following:

[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.

Id. § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. ES&S explains the requested "definition files" are part of and not able to be separated from the election software. You state such information is used for the purpose of maintenance, manipulation, or protection

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

of public property. Based on these representations and our review, we find this information is not public information under section 552.002 and need not be released in response to these requests.³

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from KnowInk explaining why its information should not be released to the requestor. Thus, we have no basis to conclude the release of the information would implicate KnowInk's interests, and none of the information may be withheld on that basis. *See, e.g., id.* § 552.110 (requiring provision of specific factual evidence demonstrating applicability of exception).

You assert some of the requested information cannot be released in response to the present requests under the Act pursuant to section 66.058 of the Election Code. Section 66.058 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). The term "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.* § 66.02; *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 the 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 the extent possible, procedures applicable to electronic voting system under chapter 127 are

³ As our ruling is dispositive, we need not address ES&S's arguments against disclosure.

applicable to voting system under chapter 129). Although you assert the information pertaining to the 2020 elections at issue may not be released until the expiration of the 22-month preservation period set out in section 66.058(a), we note, as of the date of this letter, the 22-month period has since passed with respect to the 2020 elections at issue. Accordingly, we need not determine whether this information cannot be released in response to a request under the Act pursuant to section 66.058.

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 common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. The Third Court of Appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *See 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.).

Upon review, we find the county must withhold the public citizens’ dates of birth under section 552.101 in conjunction with common-law privacy. However, we find you have failed to demonstrate the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Therefore, the county may not withhold the remaining information under section 552.101 on that basis.

In summary, the requested “definition files” are not public information under section 552.002 of the Government Code and need not be released in response to these requests. The county must withhold the public citizens’ dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. The county must release the remaining information.⁴

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->

⁴ Although you claim the requested information “may contain” social security numbers and driver’s license information, upon our review, we find the submitted information does not include such information. However, section 552.130(c) of the Government Code allows a governmental body to redact motor vehicle record information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. Gov’t Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Additionally, section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. *Id.* § 552.147(b).

[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,

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/eb

Ref: ID# 986420

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)