

DAVID A. ESCAMILLA
COUNTY ATTORNEY

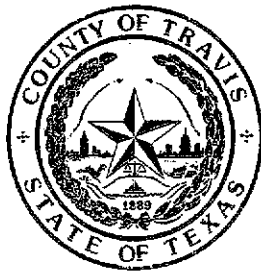
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FIRST ASSISTANT

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TRANSACTIONS DIVISION

JOHN C. HILLE, JR., DIRECTOR †

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JULIE JOE

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of the State Bar of Texas
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Commercial Real Estate Law
Texas Board of Legal Specialization

January 11, 2006

Via Hand Delivery

Ms. Katherine Minter Cary, Division Chief
Office of the Attorney General of Texas—Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Requests from **Karen Renick** and **Kathleen Wynne**—Supplemental
Brief; **ID#240883**

Dear Ms. Cary:

On November 21, 2005, we submitted a letter to your office asking for a decision regarding the attached open records requests received by the Travis County Clerk's Office (the "Clerk's Office") on **November 4, 2005 from Karen Renick**. In our cover letter of November 21, 2005, we informed you that the County Clerk's Office had already released some information to Ms. Renick and that we were seeking clarification from Ms. Renick regarding her request. Enclosed is a copy of our letter to Ms. Renick seeking clarification of part of her request. In our November 21, 2005 letter, we also asserted that all images of ballots are confidential under section 66.058 of the Election Code during the preservation period set forth in subsection (a) of section 66.058 and are thus excepted from disclosure under the Texas Public Information Act (the "Act"), chapter 552 of the Government Code. The County Clerk's Office received the attached open records request on November 29, 2005 from Kathleen Wynne. Ms. Wynne's request is for "digital images of all ballots" from the November 2005 election. Because Ms. Renick and Ms. Wynne are both seeking ballot images, we ask that you address both requests in the same ruling. By copy of this letter, we are informing Ms. Wynne that the County Clerk's Office has previously requested a ruling from your office regarding ballot images. We are also providing Ms. Wynne with a copy of our November 21, 2005 letter to your office.

The instant document is our supplemental brief setting forth the applicability of

the above-referenced exceptions to disclosure with respect to the requested information.¹

All images of ballots are confidential during the preservation period set forth in section 66.058 of the Election Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses information made confidential by other statutes. We believe that section 66.058 of the Election Code requires the Travis County Clerk, as the custodian of election records, to securely preserve voted ballots in a locked room in the locked ballot box in which they are delivered. *See* Elec. Code § 66.058(b). Furthermore, except as permitted by the Election Code, a ballot box containing voted ballots may not be opened during the preservation period. *See id.*

Section 66.058 reads as follows:

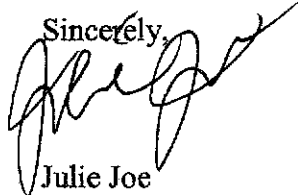
- (a) Except as otherwise provided by this code, the precinct election records shall be preserved by the authority to whom they are distributed for 22 months after election day.
- (b) The voted ballots shall be preserved securely in a locked room in the locked ballot box in which they are delivered to the general custodian of election records. Except as permitted by this code, a ballot box 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 containing voted ballots, when the purpose for the entry is fulfilled, the box shall be relocked, and the box and key returned to the custodian.
- (d) A custodian of a ballot box 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
 - (2) fails to prevent another person from handling the box in an unauthorized manner or from making an unauthorized entry into the box.
- (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) The precinct election records in an election involving a federal office shall be preserved by the authority to whom they are distributed for at least 22 months after election day in accordance with federal law. The secretary of state shall instruct the affected authorities on the actions necessary for compliance with federal law.

Id. § 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. We believe that digital images of voted ballots,

¹ We acknowledge that we are not timely in submitting our supplemental brief, but section 552.101 is a mandatory exception to disclosure that cannot be waived.

which we believe are responsive to Ms. Wynne's request and to I.D., II.D., and possibly III.A., IV.A., and IV.B. of Ms. Renick's request are "precinct election records." Accordingly, we believe that the County Clerk's Office is prohibited from releasing the requested records to the requestors or any other members of the public during the twenty-two month preservation mandated by section 66.058.

In conclusion, we ask that you render a decision as to whether the requested information must be released to the requestor under the Texas Public Information Act. If you have any questions, please do not hesitate to contact me at 854-4835.

Sincerely,

Julie Joe
Assistant County Attorney

Enclosures

Cc w/enclosure of letter seeking clarification:

Ms. Karen Renick—via U.S. mail

Cc w/enclosure of November 21, 2005 letter requesting a ruling:

Ms. Kathleen Wynne—via U.S. mail

Cc: Ms. Gail Fisher, Travis County Clerk's Office

Requesting a ruling
from County Atty. on the
basis of Election Code 66-058

DAVID A. ESCAMILLA
COUNTY ATTORNEY

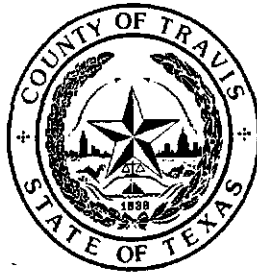
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COPY
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Texas Board of Legal Specialization

November 21, 2005

Via Hand Delivery

Ms. Katherine Minter Cary, Division Chief
Office of the Attorney General of Texas—Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

RECEIVED
NOV 21 2005
OPEN RECORDS DIVISION

Re: Request from **Karen Renick** regarding the **November 8, 2005 Joint Special Elections**--Request for Ruling

Dear Ms. Cary:

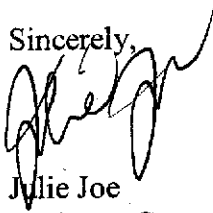
On behalf of the Travis County Clerk's Office (the "Clerk's Office") we hereby request a decision regarding the status of information sought in the attached open records request received by the Clerk's Office on **November 4, 2005**. Some of the requested information has been released to the requestor. We are seeking clarification from the requestor regarding a portion of her request. We assert that all images of ballots are confidential under section 66.058 of the Election Code during the preservation set forth in subsection (a) of section 66.058 and are thus excepted from disclosure under the Texas Public Information Act (the "Act"), chapter 552 of the Government Code. Specifically, the Clerk's Office invokes all of the exceptions provided by, and the exceptions incorporated into, sections 552.101-552.147 of the Act, including sections 552.101 and 552.110. Accordingly, we are asking for a decision from your office with respect to the images of cast ballots pursuant to section 552.301 of the Act.¹ By copy of this letter, we are informing the requestor that the Clerk's Office wishes to withhold some of the requested information and is asking for a decision from your office about whether that information is within an exception to public disclosure.

A supplemental brief setting forth the applicability of the above-referenced exceptions will be submitted within fifteen business days after receipt of the request enclosed.

¹ November 11, 2005 was a Travis County holiday. All County offices were closed that day.



Sincerely,



Julie Joe
Assistant County Attorney

Enclosure

cc w/o enclosures: Ms. Karen Renick—U.S. mail
Ms. Gail Fisher, Travis County Clerk's Office





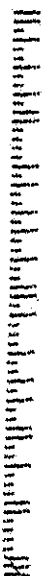
DAVID A. ESCAMILLA
COUNTY ATTORNEY, TRAVIS COUNTY

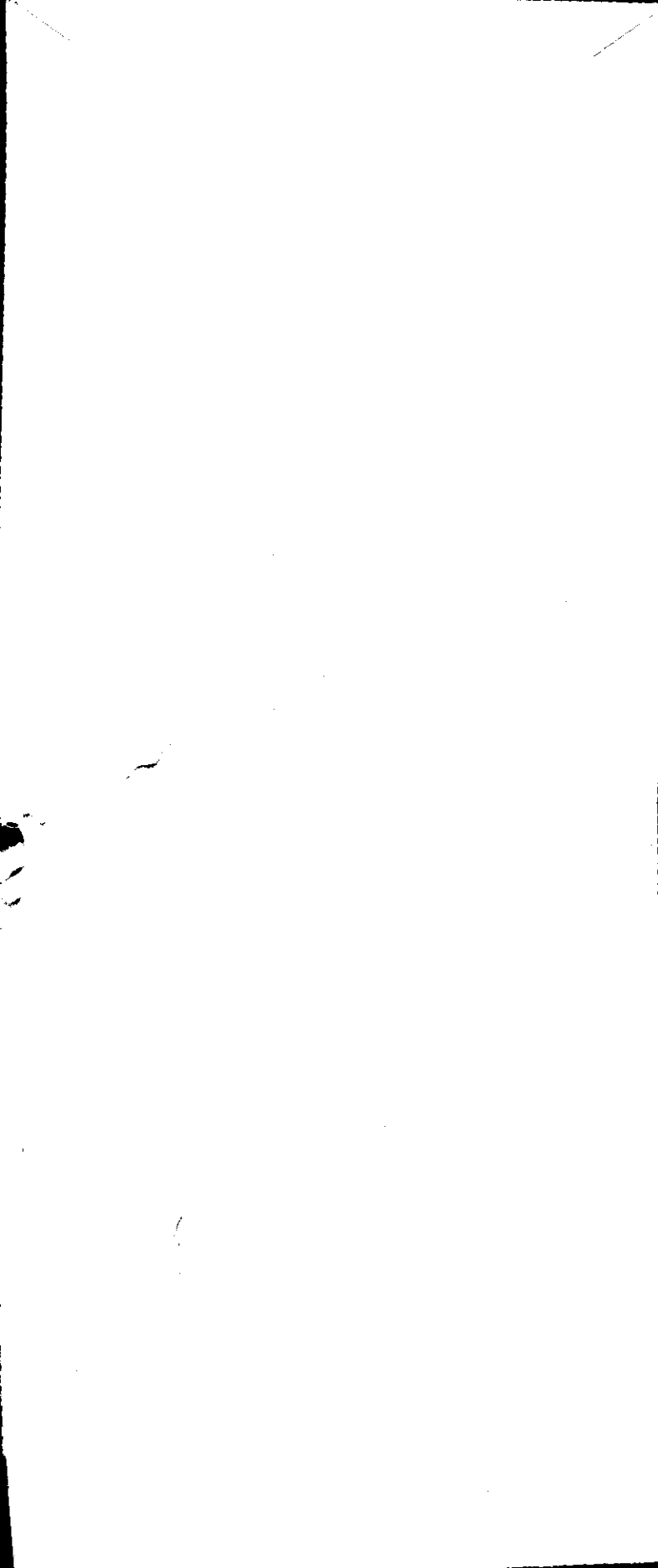
P.O. BOX 1748
AUSTIN, TEXAS 78767

FORWARDING AND ADDRESS CORRECTION REQUESTED

Ms. Kathleen Wynne
Black Box Voting, Inc.
330 SW 43rd St.
Suite K, Box 547
Renton, WA 98055

36053+4344-63 0005







ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 30, 2006

Ms. Julie Joe
Assistant County Attorney
Travis County Attorney's Office
P.O. Box 1748
Austin, Texas 78767

OR2006-00981

Dear Ms. Joe:

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# 241100.

The Travis County Clerk's Office (the "county clerk") received a request for various categories of information, including ballot images, related to the Joint Special Elections held on November 8, 2005. The county clerk subsequently received another request for the digital images of all ballots cast in the elections. You state that you have released some information responsive to the first request. You claim that the requested ballot images are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim.

Initially, we note that you sought clarification from the first requestor because you believe that certain categories of her request are unclear.¹ See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). A governmental body has a duty to make a good faith effort to relate a request to information that the governmental body holds. Open Records Decision No. 561 (1990). In this case, you have identified

¹Specifically, you sought clarification regarding the requested "data dumps," "back-up files," and "internal memory tapes."

information that is possibly responsive to the requested categories of information for which you sought clarification and claimed an exception to disclosure for such information. Therefore, we consider you to have made a good faith effort to relate the request at issue to information the county clerk maintains. Accordingly, we will address the applicability of the exception you claim to the requested information at issue.

Next, we note, and you acknowledge, that the county clerk has failed to comply with the deadlines prescribed by 552.301 of the Government Code in seeking an open records decision from this office. *See* Gov't Code § 552.301. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). The county clerk's claim under section 552.101 of the Government Code can provide a compelling reason to withhold information, and we will therefore address your arguments under that exception.

Section 552.101 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. You state that the requested ballot images are "precinct election records" that are confidential under section 66.058 of the Election Code, which states 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) 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. Except as permitted by this code, a ballot box containing voted ballots may not be opened during the preservation period.

...

(d) A custodian of a ballot box 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

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

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

Elec. Code § 66.058 (a)-(b), (d)-(e). "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. You assert, and we agree, that the requested images of voted ballots are within this meaning of "precinct election records."

The Election Code authorizes access to voted ballots 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 information that the Election Code authorizes access to the records at issue in this case. Thus, this information is not subject to disclosure under the Act until the preservation period has run. The preservation period in the instant case is at least 22 months after the November 8, 2005 election. *See Elec. Code § 66.058(a)*. Therefore, the responsive ballot records are confidential as long as the records are required to be preserved. After this period, the records are subject to public disclosure. *See Open Records Decision No. 505 at 4 (1988)* (a request made during the preservation period to inspect voted ballots must be treated as a request to inspect the ballots when the retention period expires).

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 241100

c: Ms. Karen Renick
2500 Tower Drive
Austin, Texas 78703

Ms. Kathleen Wynne
Black Box Voting, Inc.
330 SW 43rd Street, Suite K, Box 547
Renton, Washington 98055



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

POST OFFICE BOX 12548

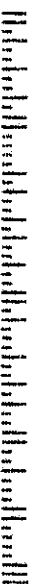
AUSTIN TEXAS 78711-2548

Return Service Requested

MC - 014

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BLACK BOX VOTING INC
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RENTON WA 98055

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 RECYCLED