Cause No, D-1-GN-23-001725

Dallas County, Texas	IN THE DISTRICT COURT
Plaintiff	200th JUDICIAL DISTRICT
V.	
Ken Paxton, Attorney General of the State of Texas	TRAVIS COUNTY, TEXAS
Defendant	

Intervenor Petition for Declaratory Judgment

To the Honorable Judge of Said Court

Introduction

Here comes D. M. “Mike” Brewster, Pro Se Intervenor, requesting a declaratory judgment be issued to the County of Dallas Texas to produce election documents that are expressly public information under the Texas Election Code.

This intervenor requested documents that are generated by the electronic voting systems operated by Dallas County, Texas; he did not request access to voted ballots which justifiably have the most stringent public access controls placed upon them. Since I did not request those documents, my filing will not cover gaining their access, however I am prepared to discuss those issues if need be. I will show how the documents I requested are differentiated from voted ballots and there is no allowable exception to their release.

This is a simple case that could be settled in a few paragraphs, unfortunately the plaintiff has conflated terms, misquoted the law, and insinuated that the law states things it does not. This intervenor will examine the plaintiffs’ claims in detail and compare them to exact and complete quotes from relevant sections of the Texas Election Code and Federal Law which will not support the plaintiffs claims. Some of these issues will require going into somewhat complicated detail in order to show a complete picture of current law.

The records I request do not rely upon the Attorney Generals KP-011 opinion to be recognized as public documents. KP-0411 would apply to the original voted ballots, which are the only election document that is not accessible without opening ballot box no. 3. KP-0411 recognizes section 1.012 of the election code as the authority to open the box. The Election Code is explicit in describing the documents stored in that box and the documents I have requested are not among them.

The Texas Election Code seems to be unique among Texas statutes in that it contains authority separate from Public Information Act in recognizing that documents created under its authority are public in nature. While this is unusual, it should not be unexpected. There is no government process that involves or interests the public more than elections.

Facts

This intervenor did not request voted ballots. This fact is verified by the plaintiffs' exhibit D1 and E1 of their original filing. Per the plaintiffs' exhibits, this intervenor requested audit logs, cast vote records, a ballot review report, an EL45A report, and ballot images as captured by the scanners or tabulators operated by Dallas County Texas. These reports and records are generated by the County's electronic voting system and such documents are addressed in Section 125.064 of the Texas Election Code.

The three key sections of law to this case are quoted in their entirety:

"Sec. 1.012. PUBLIC INSPECTION OF ELECTION RECORDS. (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.
(c) Except as otherwise provided by this code or Chapter 552, Government Code, all election records are public information.
(d) In this code, "election record" includes:
(1) anything distributed or received by government under this code;
(2) anything required by law to be kept by others for information of government under this code; or
(3) a certificate, application, notice, report, or other document or paper issued or received by government under this code.
(e) An election record shall be available not later than the 15th day after election day in an electronic format for a fee of not more than $50."

"Sec. 1.002. APPLICABILITY OF CODE. (a) This code applies to all general, special, and primary elections held in this state.

(b) This code supersedes a conflicting statute outside this code unless this code or the outside statute expressly provides otherwise."

"*Sec 125.064 RECORDS AVAILABLE FOR PUBLIC INSPECTION. Any documents or records used in the preparation of or prepared for use in an electronic voting system for the operation of the system for a particular election and any documents or records generated by the system in that election shall be made available for public inspection in the office of the general custodian of election records for the period for preserving the precinct election records."*

Arguments

The documents this Intervenor requested easily meet the definition of election documents found in section 1.012 of the Texas Election Code and according to that statute, they are public documents unless excepted. The is no expressed exception to the release of the requested documents. Since these documents are generated by components of the electronic voting system, they also meet the refined definition of documents found in Section 125.064 of the Election Code. Section 125.064 EC is unequivocal in stating the public nature of these documents, it also states that they ***shall*** be available ***for*** the preservation period, and notably, this section makes no allowance for exceptions.

These documents do not meet the definition for precinct election records found in section 66.002 of the election code. That definition is very specific and states:

"Sec. 66.002. PRECINCT ELECTION RECORDS. In this chapter, "precinct election records" means the precinct election returns, voted ballots, and other records of an election that are assembled and distributed under this chapter."

Chapter 66 of the Election Code makes no mention of the requested records therefore it doesn't say they are to be collected and more importantly, it doesn't state how they are to be distributed. This will become an important fact as we examine the plaintiffs' argument.

One of the plaintiffs' main points is that the box containing voted ballots cannot be opened during the preservation period, but the legislature never told anybody to put the requested documents into a box with voted ballots. Section 66.025 of the Election Code is very clear about what documents should be in that box:

"*Sec. 66.025. CONTENTS OF BALLOT BOX NO. 3. (a) Ballot box no. 3 must contain:*
(1) the voted ballots;
(2) a copy of the precinct returns;
(3) a tally list; and
(4) a copy of the poll list.

(b) The copy of the poll list may be placed in a container other than ballot box no. 3 on approval by the secretary of state if the secretary determines that placement in the other container is more suitable for a particular election."

The documents that I requested are not on that list. Furthermore, three of them are unquestionably public in nature. The documents are: ***a copy*** of the precinct returns which assuredly are public documents, and ***a copy*** of the poll list, which according to sections 66.024 and 66.057(c) of the Election Code, become public records when the delivery of precinct election records is complete, and ***a*** tally list. Other copies of the tally lists are kept by counting team members and are sent to the canvasing authority. They would hardly be confidential.

The only election document that cannot be accessed without opening the box described in section 66.058(b-1) of the Election Code are the original voted ballots themselves. Their access could be a bit more contentious, and access to them would involve the AG's KP-0411 interpretation of the law, but they are not what this intervenor requested. Every other document specified to be in that box is one of several copies. Although I did not request access to voted ballots, there are additional sections of the Election Code that could reinforce the Attorney General's opinion.

The plaintiff has provided a litany of arguments that must be countered. All of them either misrepresent the law, or fail to consider pertinent facts or statutes. Perhaps the most egregious misrepresentation and misquoting of law can be found in the Paragraph 23 of the plaintiffs 1st amended filing. When quoting section 66.002 of the EC, the plaintiff carefully ellipses away the part of the definition that would demonstrate why these documents are not precinct election records. *""[P]recinct election records" include "the precinct election returns, voted ballots, and other records of an election . . . ."* The plaintiff has to artificially conflate the requested documents with precinct election records, then conflate them with voted ballots, because that is the only way to claim they should be locked in a box. This is a transparent effort to get around the very clear provisions of section 125.064 of the election code.

This paragraph also makes a pointed mention of the retention period. The idea that an election document can't be released due to a retention period is an indefensible position. Every election document has a retention period. In fact every government document has a retention period. Retention laws do not bar public access to documents, they make such access possible. Without a requirement to retain, there would be no assurance that given documents would be accessible. Government employees could destroy documents at will destroying any hope of transparency. Retention periods are synonymous with public information law. Section 552.102 of

the Public Information Act tells us that the requirement to maintain a document is a factor in it being a public document. That code section will be quoted in its entirety below.

Although the plaintiff did not make the following argument in his filings with the court, in his request for an opinion from the Attorney General, the plaintiff attempted to raise a conflict between section 66.058 and section 1.012 of the Election Code, but as I have already demonstrated, Chapter 66 does not apply to the documents that I have requested. The most specific section in the election code concerning them is section 125.064 which is overwhelmingly clear. The plaintiff also made another statement in his plea to the AG that I have seen several times, that if the legislature had intended certain documents to be public they would have stated as such. This is as an upside down statement as I can imagine. It turns public information law on its head. Documents are presumed to be public unless exempted, and that is a fact made very clear in section 552.001 of the Government Code which I will quote in its entirety in my conclusion. This is true of Federal law as well. In Federal law there are "exceptions" to the release of information. Not permissions.

In paragraph 35 of the 1st Amended Petition, the plaintiff claims: "Here, both Texas and Federal Law clearly state that the requested information is confidential." The plaintiff does not provide us with a reference to those "clear statements". In two years of researching this issue, I have never seen such a statement. The only statement concerning the public nature of the documents that I requested is found in section 125.064 of the EC, which I have quoted in full above, and it states the exact opposite of the plaintiffs' position. I will explore federal law below.

In paragraph 36 the plaintiff equates Cast Vote Records to being a precinct election record. I have demonstrated that they are not, but even so they are still subject to the same retention requirement. I have also shown that section 125.064 of the EC states that documents generated by an electronic voting system are public ***for*** the period of preservation. It should be noted that in this paragraph, the plaintiff quotes the wrong section of law and then misrepresents what the law says. It is clearly shown that the requested documents are not precinct election records or required to be placed in a box with voted ballots.

In paragraph 37 the plaintiff states that there is nothing authorizing the box to be opened and I have clearly demonstrated that the legislature didn't specify for these documents to be placed in a box with voted ballots.

In Paragraph 38 the plaintiff references 66.058(g) I will address the argument, but I

will also point out that in accordance with section section 552.326 of the Government Code, this is likely an illegitimate argument as it was not previously raised with the Attorney General in the plaintiffs otigonal request for a decision:

"*Sec. 552.326. FAILURE TO RAISE EXCEPTIONS BEFORE ATTORNEY GENERAL. (a) Except as provided by Subsection (b), the only exceptions to required disclosure within Subchapter C that a governmental body may raise in a suit filed under this chapter are exceptions that the governmental body properly raised before the attorney general in connection with its request for a decision regarding the matter under Subchapter G.*
(b) Subsection (a) does not prohibit a governmental body from raising an exception:
(1) based on a requirement of federal law; or
(2) involving the property or privacy interests of another person."

Even though it appears to be an illegitimate argument, I will address it as I have seen it proffered in other venues without considering relevant facts. Section 66.058(g) of the Election Code states:

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

*A*ll opinions that I'm aware of concerning this issue have been superseded by subsequent legislation. It is a bit of an involved task, but I will show why Chapter 129 is inapplicable to this case. Chapter 129 only applies to Direct Recording Electronic voting machines or "DRE's". This is stated in the heading of the chapter which is not a limiting factor, but more importantly, it is also stated in section 129.001 of the Election Code which states:

"*Sec. 129.001. APPLICABILITY. (a) This chapter applies only to a voting system that uses direct recording electronic voting machines.*
(b) To the extent possible, the procedures applicable to an electronic voting system under Chapter 127 are applicable to a voting system under this chapter."

This makes the DRE limitation of Chapter 129 into law. It makes clear that when possible, Chapter 127 requirements apply to these machines, but precludes the inverse.

Dallas County does not operate DRE's. This is a specific type of voting equipment that is defined in section 121.003(12) of the Texas EC. Dallas County operates "Ballot Marking Devices" which are defined in 121.003(13) and "Automatic Tabulating Equipment" which is defined in section 121.003(5) of the Election Code respectively. The operation of the devices operated by Dallas County, are largely covered in Chapter 127 of the Election Code. Hence the reference to that section.

In 2009, the 81st legislature passed HB 2524 authored by Senator Anchia of Dallas. The bill did several relevant things such as restricting Chapter 129 to DRE's only, (129.001). The bill also created testing requirements for DRE's (129.023) and provided a storage place for those test materials (66.058(g). The legislative notes on this particular bill are excellent[1]. Despite the plaintiffs' claims and references, chapter 129 nor 66.058(g) have any bearing on my requests. I have not requested testing materials from DRE's, nor have I requested testing materials as mentioned in chapter 127 of the Election Code

Definitions were added to section 121.003 of the Election Code by the 79th and the 86th legislatures, which added badly needed clarity to this issue. These definitions and separate chapters are needed because DRE's are vastly different in operation than the more modern equipment used by Dallas County.

DRE's are confounding devices, and as some of the first computerized voting devices there was much confusion in dealing with them. As time has passed, legislation has clarified many of these issues, but old ideas sometimes die hard. Current law makes clear that DRE's are a specific type of device and Dallas County does not operate them.

In paragraph 39, the plaintiff brings Federal Law into the picture and makes claims without providing specific references to support them. 52 US § 20701:

"§20701. Retention and preservation of records and papers by officers of elections; deposit with custodian; penalty for violation
Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Federal law does not make any differentiation between types of election documents. It is an all-encompassing definition, stating that all records and papers that come into an elections official's possession shall be maintained. If we were to follow the

[1] https://capitol.texas.gov/tlodocs/81R/analysis/pdf/HB02524H.pdf#navpanes=0
see pragraph 2 page 2 also para 3 page 3

plaintiffs theory, we wouldn't be able to publish the election order, the returns, the poll lists or any of a myriad of other documents that necessarily must be released. The plaintiff also fails to fully consider 52 US Code § 20702 which states that it is a crime to conceal election documents

"§20702. Theft, destruction, concealment, mutilation, or alteration of records or papers; penalties
Any person, whether or not an officer of election or custodian, who willfully steals, destroys, conceals, mutilates, or alters any record or paper required by section 20701 of this title to be retained and preserved shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Conceal means to prevent disclosure or recognition of.[2] There is no stated prohibition of public access to these documents.

The only statement relating to election document access is in granting the Attorney General the right of access on demand to documents that belong to and are under the control of state and county governments, thus overriding any potential state objection to such release. 52 US Code § 20703 and § 20704:

"§20703. Demand for records or papers by Attorney General or representative; statement of basis and purpose
Any record or paper required by section 20701 of this title to be retained and preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying at the principal office of such custodian by the Attorney General or his representative. This demand shall contain a statement of the basis and the purpose therefor."

"§20704. Disclosure of records or papers

Unless otherwise ordered by a court of the United States, neither the Attorney General nor any employee of the Department of Justice, nor any other representative of the Attorney General, shall disclose any record or paper produced pursuant to this chapter, or any reproduction or copy, except to Congress and any committee thereof, governmental agencies, and in the presentation of any case or proceeding before any court or grand jury."

Congress is obviously quite capable of writing a restriction on release of documents, but the only restriction they specified was for the Attorney General and his staff. Nowhere is a prohibition on release to the public even hinted. If a law is going to prohibit something the legislature has a duty to be clear in stating the prohibition. They have shown that they are capable of doing so.

In paragraph 40, the plaintiff continues to search for an argument that might stick, and again raises an argument not previously made to the Attorney General in asking for an opinion. He raises section section 552.103 of the Texas Government Code which is

[2] "Conceal." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/conceal. Accessed 28 Jul. 2023.

an exception due to litigation. This fails in two ways. The first is that the Election Code is currently defended from this exception by section 1.002 of the of the EC. This exception is in clear conflict with section 125.064 of the election code and neither explicitly expresses that an exception.

The second method is in its lack of specification. The idea that the simple act of filing litigation could deny 31M Texas citizens access to any and all of their election documents is more than a bit problematic. Should Dallas County take down their results page of the election from their website due to this litigation? The 88th Legislature has now amended that section of the Government Code to explicitly exclude election records from that provision, and that will soon be in effect. The election code currently has protection against this claim, the Government Code will soon add redundant protection. The legislature has spoken clearly on this subject.

The following should be a moot point as I have clearly shown that the documents I request are public in nature, but as I worked through the plaintiffs arguments, I had the distinct impression that the plaintiff was desperately searching for support to deny access to these documents rather than simply clarifying the law. The plaintiff sealed that opinion when they filed an amended petition that was pointed in declaring that the newly passed legislation should not be considered retrospectively. Unless they are attempting to conceal something, there is absolutely no compelling public or government interest in taking such a position. The documents this intervenor requested are electronic documents not voted ballots. Once the documents are produced, a relatively simple act, they can be put on the web so that others can access them with little to no load on the elections staff as is already done with the returns and a myriad of other election records. I believe it has been proven that the legislature intended access to these documents all along, and now the legislature has reinforced that opinion. This attitude against delivery of the documents is disingenuous at best and should not be rewarded.

Additional Point of Interest

Among the documents requested by this intervenor were audit logs from the electronic voting systems. There is actually no reason to differentiate that document

from other documents generated by such a system, yet the Secretary of State has made clear that these documents are to be released. In Election Advisory 2019-23, Section 7-3[3], the SoS makes clear that watchers may request the document at various times during the election. There has never been any contention about these being public documents, and they have been released many times by various county governments. The Attorney General has instructed them to be released yet the plaintiff has failed to comply. This issue was caused and exacerbated when the plaintiff equated each and every request by each and every requester to a voted ballot. This may be subject to sanctions according to 552.203 of the Government Code.

Conclusion

The plaintiff has misstated the law, and conflated terms and definitions in an effort to make a case to deny these documents. They went to those extremes because the legislature did not expressly deny public access to them. The legislature didn't deny that access because there is no valid reason to withhold these documents from the public. In fact the legislature could not have been more specific in granting access.

In the early days of computerized voting the legislature seemed to sense the need for public trust in the systems, and made very clear unassailable statements as to the public nature of electronic voting system documents. This intervenor does not have to stretch or misrepresent anything to make his case.

Section 1.012 of the Election Code is clear that all election documents are public unless excepted. There is no stated exception and various parts of the law tell us that exceptions should be expressly made. Section 125.064 of the Election Code is even more clear in that anything generated by an electronic voting system is a public document for the period of preservation, and it makes no provision for exceptions. Section 1.002 of the Election Code bars any exceptions from outside the Election Code unless the applicability of that exception is expressly stated and there is not one.

While the Election Code bars outside conflicts, it makes no such exclusion of outside complimentary statements. Section 552.001 of the Government Code is very complimentary. It states:

"*Sec. 552.001. POLICY; CONSTRUCTION. (a) Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that*

[3] https://www.sos.state.tx.us/elections/laws/advisory2019-23.shtml

government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. The provisions of this chapter shall be liberally construed to implement this policy.
(b) This chapter shall be liberally construed in favor of granting a request for information."

The word expressly is found again in this statement. The legislature has a duty to expressly state that the public is not entitled to information, and it has not done so for the requested documents. It stated the inverse. The law as written by the Texas Legislature strictly states that the documents I request are public documents. There is no expressed statement to the contrary.

Additionally, the definition of a public document which is found in Section 552.002 of the Texas Public Information Act pretty well puts a nail in the coffin of the idea that precinct election records are somehow confidential. Please compare the two statutes.

"Sec. 66.002. PRECINCT ELECTION RECORDS. In this chapter, "precinct election records" means the precinct election returns, voted ballots, and other records of an election that are assembled and distributed under this chapter."

"*Sec. 552.002. DEFINITION OF PUBLIC INFORMATION; MEDIA CONTAINING PUBLIC INFORMATION.*
(a) In this chapter, "public information" means information 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;***"**

To this intervenor, it appears that the definition of precinct election record matches the definition of a public document found in the public information act.

When you read the entirety of the election code, there is no room for doubt as to the public nature of almost every election document and this Intervenors' requested documents are clearly among them.

Prayer

This intervenor prays that the Court render a declaratory judgment that the information sought is specifically public information as identified in Sections 1.012

and 125.064 of the Election Code, and that the plaintiff be ordered to produce such documents forthwith. Additionally that the Intervenor be allowed to recover court costs and other legal or equitable relief as the law might allow and the Court deem appropriate.

Respectfully Submitted,

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