



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 16, 2020

The Honorable Mayes Middleton
Co-Chair, Joint Interim Committee to Study a Coastal Barrier System
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0346

Re: Extension of filing deadlines for elections postponed pursuant to the Governor's proclamation allowing for the postponement of the May 2020 local elections (RQ-0363-KP)

Dear Representative Middleton:

You ask about the candidate filing periods and deadlines under the Election Code for local elections moved from May to November pursuant to gubernatorial proclamation.¹ In conjunction with his March 13, 2020 COVID-19 disaster declaration, Governor Abbott suspended provisions of the Election Code to allow political subdivisions to postpone their May 2, 2020 elections to November 3, 2020.² Many did so.³ The Governor authorized the postponement of the May 2 elections after the filing deadlines for those elections had passed.⁴ You ask us to clarify the

¹See Letter from the Honorable Mayes Middleton, Co-Chair, Joint Interim Comm. to Study a Coastal Barrier System, to the Honorable Ken Paxton, Tex. Att'y Gen. at 1 (July 2, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0363KP.pdf> ("Request Letter").

²See OFFICE OF THE TEXAS GOVERNOR, PROCLAMATION ALLOWING POSTPONEMENT OF MAY 2, 2020 GENERAL AND SPECIAL ELECTIONS (Mar. 18, 2020), https://gov.texas.gov/uploads/files/press/PROC_COVID-19_May_2_Election_Date_IMAGE_03-18-2020.pdf ("March 18, 2020 Proclamation"); see also OFFICE OF THE TEXAS GOVERNOR, DISASTER PROCLAMATION (Mar. 13, 2020), <https://gov.texas.gov/news/post/governor-abbott-declares-state-of-disaster-in-texas-due-to-covid-19>, and <https://gov.texas.gov/news/post/governor-greg-abbott-renews-covid-19-disaster-declaration> (renewing the disaster declaration).

³See, e.g., GEORGETOWN, TEX., RESOLUTION NO. 032420-M (Mar. 24, 2020), <https://government.georgetown.org/?s=RES-032420-M>; PFLUGERVILLE, TEX., INDEP. SCH. DIST., ORDER TO POSTPONE MAY 2, 2020 ELECTION (Apr. 17, 2020), https://countyclerk.traviscountytexas.gov/images/pdfs/notice_of_elections/2020.05.02/PflugervilleISD.pdf; SACHSE, TEX., ORDINANCE NO. 3974 (Apr. 6, 2020), <https://www.cityofsachse.com/DocumentCenter/View/7558/Ord-3974-Postpoing-May-2-2020-General-Election-to-November-3-2020---April-2020>.

⁴The Governor issued his proclamation on March 18, 2020, and the deadline to file an application for a place on the ballot for most offices was February 14, 2020, seventy-eight days before the May 2, 2020 election.

timeline for the filing periods for elections that political subdivisions moved from May 2020 to November 2020 pursuant to the Governor's authorization. Request Letter at 1.

As a general matter, candidates for elected office in Texas must file an application for a place on the ballot. *See, e.g.*, TEX. ELEC. CODE §§ 141.031–.041 (subchapter B “Application for a Place on the Ballot”); *see also id.* §§ 143.001–.008 (applying to a candidate for city office), 144.001–.006 (applying to candidate for office of political subdivision other than county or city), 172.021–.029 (applying to candidates in the primary election for offices of state and county government); TEX. EDUC. CODE §§ 11.055 (applying to candidates for independent school district trustee), 130.082(g) (applying to candidates for the governmental body of a junior college district other than an independent school district). For most offices, the deadline for a candidate to file an application for a place on the ballot is the “78th day before election day.” *E.g.*, TEX. ELEC. CODE §§ 143.007(c) (providing, for city offices, that “[f]or an election to be held on a uniform election date, the day of the filing deadline is the *78th day before election day*” (emphasis added)), 144.005(d) (providing, for offices in political subdivisions other than a county or city, that “[f]or an election to be held on a uniform election date, the day of the filing deadline is the *78th day before election day*” (emphasis added)); TEX. EDUC. CODE § 11.055(a) (providing, for an office on the board of trustees of an independent school district, that “[a]n application of a candidate for a place on the ballot must be filed not later than 5 p.m. of the *78th day before the date of the election*” (emphasis added)). For other offices, the deadline for an application for a place on the ballot is the 45th day before the date of the election. *E.g.*, TEX. EDUC. CODE § 130.082(g) (“Any resident, qualified elector of the district may have his or her name placed as a candidate on the official ballot for any position to be filled at each regular election by filing with the secretary of the board a written application therefor signed by the applicant, not later than 5 p.m. of the *45th day before the date of the election.*” (emphasis added)). Thus, the statutes tie the “filing deadline” directly to the “election day.”

Despite this, the Secretary of State concluded that the filing deadlines did not track with the revised election dates when postponed to November. On the same day the Governor issued his March 18, 2020 proclamation, the Secretary of State issued an election advisory opinion explaining that the Governor's proclamation did not reopen the candidate filing deadlines. *See* Election Advisory Op. No. 2020-12, Sec. of State (March 18, 2020). The opinion declared that “[b]y postponing their election date, the political subdivision is preserving all candidate filings and ballot order actions that have already been taken. The postponement does not have the effect of reopening candidate filings.” *Id.* at 1. Thus, under that opinion, the candidate filing deadlines, having already passed when the Governor issued his proclamation, could not be extended. In advising political subdivisions on how to move May elections to November, the Secretary of State said to include in their postponement orders “[c]onfirmation that the candidate filings for the election will remain valid for the election held on the November date and that the filing period will not be re-opened for the November election date.” *Id.* at 3. Thus, by the terms of the election advisory opinion, an order of a local political subdivision relying on the authority granted in the Governor's proclamation to postpone its May election to November could not provide for a re-opening of the filing periods. In the advisory opinion, the Secretary of State did not expressly provide a statutory basis under which this conclusion was reached.

Nevertheless, the Secretary of State is the “state’s chief election officer responsible for ensuring the uniform application and interpretation of election laws throughout Texas.” *Cascos v. Tarrant Cnty. Democratic Party*, 473 S.W.3d 780, 786 (Tex. 2015). The Legislature charged the Secretary of State with maintaining “uniformity in the application, operation, and interpretation of” the Election Code, and authorized the Secretary to “prepare detailed and comprehensive written directives and instructions relating to and based on” the Election Code. *See* TEX. ELEC. CODE §§ 31.003–.004. A court addressing your question would need to reconcile the language of the statutes, the Secretary of State’s express authority to apply and interpret election law in a uniform manner, and the lack of specific statutory instruction on the reopening of filing deadlines when an election is postponed after those deadlines pass. Given the unprecedented nature of this question, we cannot predict with certainty whether a court would accept the Secretary’s conclusion, contained in Election Advisory Opinion 2020-12, that the candidate filing deadlines are not reopened by operation of the Governor’s suspension of elections. *See generally* Tex. Att’y Gen. Op. No. DM-168 (1992) at 4. But if the Legislature intends for the filing deadlines to follow election dates no matter how or when or by whom they are changed, the Legislature may choose to amend the Election Code with additional clarity.

S U M M A R Y

In conjunction with his COVID-19 disaster declaration, Governor Abbott suspended provisions of the Election Code to allow political subdivisions to postpone their May 2, 2020 elections to November 3, 2020. Alongside the Governor's suspension, the Secretary of State's office simultaneously issued an Election Advisory Opinion explaining that the order to allow for postponing the May election did not reopen the candidate filing deadlines.

A court addressing your question would need to reconcile the language of the statutes tying the filing deadlines to election dates, the Secretary of State's express authority to apply and interpret election law in a uniform manner, and the lack of specific statutory instruction on the reopening of filing deadlines when an election is postponed after those deadlines pass. We cannot predict with certainty whether a court would accept the Secretary's conclusion, contained in Election Advisory Opinion 2020-12, that the candidate filing deadlines are not reopened by operation of the Governor's suspension of elections. To the extent the Legislature intends for election filing deadlines to move in such circumstances, the Legislature may choose to clarify in the forthcoming legislative session by amendment to the Election Code.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

KEN PAXTON
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