



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 15, 2022

The Honorable Matthew A. Mills
Hood County Attorney
1200 West Pearl Street
Granbury, Texas 76048

Opinion No. KP-0422

Re: Procedure for numbering election ballots and which officials are authorized to select the method for numbering ballots (RQ-0405-KP)

Dear Mr. Mills:

You ask several questions regarding a ballot-numbering requirement in section 52.062 of the Election Code to Hood County (the “County”) in light of the County’s recent purchase of new voting equipment.¹

Background

Article VI, section 4 of the Texas Constitution provides that “[i]n 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[.]” TEX. CONST. art. VI, § 4; *see also Wood v. State ex rel. Lee*, 126 S.W.2d 4, 8–9 (Tex. 1939) (explaining that the word “ticket” in article VI, section 4 refers to a ballot). Consistent with the Constitution, the Election Code provides for voting by traditional paper ballots and by use of alternative voting systems. *See* TEX. ELEC. CODE §§ 52.061–.075 (subchapter C, “Form of Ballot”), 121.001–129.057 (Title 8, “Voting Systems”). Ballots used in a Texas election must be: (1) numbered consecutively, beginning with the number “1”; (2) numbered so that a specific range can be linked to a specific polling place; and (3) distributed to voters non-sequentially in order to preserve ballot secrecy. *See id.* §§ 51.006–.008, 52.062, 62.009.

You explain that the County recently switched from “electronic voting machines with no paper ballots, aside from mail-in ballots” to “a hybrid voting system, whereby voters scan a paper

¹*See* Letter and Appendix from Honorable Matthew A. Mills, Hood Cnty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (May 3, 2021), <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2021/RQ0405KP.pdf> (“Request Letter” and “Appendix,” respectively).

ballot, and votes are then registered electronically.”² Request Letter at 1. With the new voting system in place, you raise specific questions about the application of section 52.062, the section providing that “[t]he ballots prepared by each authority responsible for having the official ballot prepared shall be numbered consecutively beginning with the number ‘1.’” *See id.* at 2–3; TEX. ELEC. CODE § 52.062.

Permissible Methods for Numbering Ballots

Your first question concerns the method by which a number is printed on the ballot. *See* Request Letter at 2. According to the materials you submit, the Texas Secretary of State’s office instructed county election officials that they can achieve compliance with the numbering requirement of section 52.062 by either ordering “blank ballot stock with pre-printed numbers” or, specific to users of the Hart Verity Touchwriter ballot-marking device or Verity Print ballot-on-demand system, having the machine print the ballot with “a unique identifier.” Appendix at 1–2; *see also* Request Letter at 2. You also point us to an internal memorandum from the Secretary of State’s office concluding that the Hart Verity 2.4 voting system meets the ballot-numbering requirements of section 52.062.³ Nonetheless, you question whether the statute’s numbering requirement for “ballots prepared by each authority responsible for having the official ballot prepared” can be satisfied solely by using pre-printed numbers on blank stock, ruling out the option of machine-generated number printing. *See* Request Letter at 2; TEX. ELEC. CODE § 52.062.

Section 52.062 refers to “ballots prepared by each authority responsible for having the official ballot prepared” but does not require the preparation authority to personally number the ballots or otherwise specify a particular method for making the numbers appear on the ballot. TEX. ELEC. CODE § 52.062; *see also id.* § 52.002 (specifying that the authority identified for specified elections “shall have the official ballot prepared”). In chapter 52, concerning ballot form, content, and preparation, the Legislature expressly authorized the Secretary of State to “prescribe the form and content of a ballot for an election using a voting system, including . . . a voting system that uses direct recording electronic voting machines or ballot marking devices, to conform to the formatting requirements of the system.” *Id.* § 52.075(a); *see also id.* § 31.003 (directing the Secretary of State to provide “detailed and comprehensive written directives and instructions . . . to the appropriate . . . local authorities”). The Secretary of State’s interpretation of the law as allowing machine-generated numbering of ballots does not contradict section 52.062, given that the wording of the statute neither requires nor rules out any particular method of printing numbers on a ballot. *See Reynolds v. Dallas Cnty.*, 203 S.W.2d 320, 324 (Tex. Civ. App.—Amarillo 1947), *certified question answered*, 207 S.W.2d 362 (Tex. 1948) (acknowledging that various methods of ballot numbering may be utilized); *cf. Andrade v. NAACP of Austin*, 345 S.W.3d 1, 15 (Tex. 2011) (noting that the paperless electronic voting system under consideration numbered the ballots).

²You specify that Hood County purchased the Hart Verity 2.4 voting system. *See* Request Letter at 2. You also state that the purchased equipment “is essentially the same system” discussed in Attorney General Opinion KP-0170. *Id.* at 1; *see also* Tex. Att’y Gen. Op. No. KP-0170 (2017) (discussing electronic voting machines that also produce marked paper ballots).

³Memorandum to Keith Ingram, Dir. of Elections, Tex. Sec’y of State (May 18, 2020), <https://www.sos.state.tx.us/elections/forms/sysexam/chuck-pinney-hart-2.4.pdf>.

Thus, a court could find that the machine-generation method of numbering ballots, like the option of pre-printing numbers on blank ballot stock, complies with section 52.062.

Authority to Decide Ballot Numbering Method

Your second question is whether the decision for selecting the ballot-numbering method belongs “solely” to the elections administrator or whether the commissioners court has a role to play. *See* Request Letter at 2–3. You explain that “Hood County currently employs an elections administrator, as authorized under Election Code [section] 31.031.” *Id.* at 1; *see also* TEX. ELEC. CODE §§ 31.031 (authorizing the commissioners court to create the position of elections administrator), 31.032(a) (providing that a county election commission, made up of several county officials and others, appoints the elections administrator). Among other duties, an elections administrator performs “the duties and functions placed on the county clerk by [the Election Code][.]” TEX. ELEC. CODE § 31.043(2). For an election ordered by the Governor or a county authority, the county clerk is the “authority [that] shall have the official ballot prepared” except “as otherwise provided by law.” *Id.* § 52.002(1). Thus, for such elections taking place in Hood County, the elections administrator is the authority responsible for having the official ballot prepared, including selecting the ballot numbering method in accordance with section 52.062 and guidance from the Secretary.⁴

Under the Election Code, the commissioners court has the authority to adopt a particular voting system. *See id.* § 123.001(a); *see also id.* § 123.001(b)(1), (3)(A) (naming the commissioners court as the designated authority for certain elections). But ballot preparation is a separate duty. The statutes do not assign the commissioners court ballot preparation or general ballot oversight responsibilities. Instead, the Election Code places the duty of having ballots prepared on the elections administrator. *See id.* §§ 31.043(2), 52.002(1). Further, unlike with other duties, the Legislature directed the numbering of ballots “by each authority responsible for having the official ballot prepared” without indicating the necessity of approval by others. *Compare id.* § 52.062, *with id.* § 51.003(1) (directing the county clerk in an election ordered by the Governor or a county authority to procure election supplies and determine the quantity of the various types of supplies to provide to polling places “subject to the approval of the county election board”). Because the statutes do not vest ballot-preparation or supervisory authority in any other entity, the elections administrator has sole authority to select the numbering method.⁵

⁴The authority responsible for having the official ballot prepared depends on the type of election. *See* TEX. ELEC. CODE § 52.002 (authorizing different officials for an election ordered by the Governor or a county authority, a primary election, an election ordered by a city authority, and an election ordered by a non-city or non-county political subdivision). Because your question focuses on the authority of the elections administrator, we assume the context to be an election ordered by the Governor or a county authority, and thus we limit our analysis accordingly.

⁵You suggest that the elections administrator’s status as an employee, as opposed to an officer, has some bearing on the administrator’s authority to choose a numbering method. *See* Request Letter at 2. You cite *Krier v. Navarro*, which held that an elections administrator is a public employee rather than an officer for purposes of the constitutional limitation on the duration of a term of office. *See id.*; *Krier v. Navarro*, 952 S.W.2d 25, 30 (Tex. App.—San Antonio 1997, writ denied) (considering in an unrelated context whether an elections administrator exercised functions largely independent of the control of others); *see also* TEX. CONST. art. XVI, § 30(a). While an elections administrator may be an employee for some purposes, that does not affect the statutes’ delegation of ballot preparation responsibilities.

Statutory Directive that Ballots Begin with the Number “1”

Your last question concerns the statutory directive in section 52.062 that ballots be numbered consecutively “beginning with the number ‘1.’” Request Letter at 3; TEX. ELEC. CODE § 52.062. Your question is prompted by Election Advisory 2019-23, issued by the Secretary of State to all election officials on October 23, 2019, concerning procedures for electronic voting systems.⁶ Subsection 13.1 of the Advisory addresses several ballot numbering provisions of the Election Code, including section 52.062, as they apply to jurisdictions using ballot marking devices. *See* Advisory § 13.1. In the section about which you inquire, relating to the use of blank ballot stock with pre-printed numbers or a hand-numbering machine to number blank ballot stock, the Secretary of State has authorized the following modified numbering procedure, pursuant to section 52.075 of the Election Code:

iv. The jurisdiction can pre-number ballots and split them into batches for each election, with each batch beginning with a number *that ends in* the number “1.” Those batches must be no smaller than units of 100, though a jurisdiction could batch in larger units if needed (1000, 10,000, etc.).

1. **Example:** For the November election, the jurisdiction could use ballots 1-1500, and for the May election that jurisdiction could then use ballots 1501-2400, and for the following November election the jurisdiction could use ballots 2401-4200, etc.

2. To use this batching method the jurisdiction will need to track which batches are assigned to each election through a master log that identifies the range of ballots that were used for each election. The jurisdiction must then track which ballots from that election’s particular range are distributed to each polling place through the normal procedures.

Advisory § 13.1.a.iv. (emphasis added). You question whether “jurisdictions may conduct subsequent elections with ballot numbers starting higher than ‘1’” or whether ballots “should . . . begin with the number ‘1’ for each election” to comply with section 52.062. Request Letter at 3.

Article VI, section 4 of the Texas Constitution requires the Legislature to provide for the numbering of ballots. TEX. CONST. art. VI, § 4. The Legislature has done so through subchapter C (“Form of Ballot”) of Election Code chapter 52 (“Ballot Form, Content, and Preparation”). Within subchapter C, section 52.062 expressly requires the ballots to “be numbered consecutively beginning with the number ‘1.’” TEX. ELEC. CODE § 52.062. “[F]or an election using a voting system, including . . . a voting system that uses direct recording electronic voting machines or ballot marking devices” section 52.075, also in subchapter C, authorizes the secretary of state to

⁶Tex. Sec’y State Election Advisory No. 2019-23, <https://www.sos.state.tx.us/elections/laws/advisory2019-23.shtml> (“Advisory”).

“prescribe the form . . . of a ballot . . . to conform to the formatting requirements of the system.” *Id.* § 52.075(a). Thus, the Legislature designated the numbering of a ballot as part of its form, and provided a general rule as well as an alternate avenue, through the Secretary of State, for an election using a voting system.

Here, the modified ballot numbering procedure in the Advisory states that if batching is utilized, each ballot batch for a subsequent election must begin with a number “that *ends in* the number ‘1.’” Advisory § 13.1.a.iv. (emphasis added). Whether numbering each split ballot batch for subsequent elections with a number that ends in “1” is necessary to conform to the formatting requirements of the voting system is an inquiry that involves fact questions, which is beyond the scope of an Attorney General opinion. *See* Tex. Att’y Gen. Op. No. KP-0336 (2020) at 3. Accordingly, we cannot answer as a matter of law whether a jurisdiction may number split ballot batches for subsequent elections as proposed in the Advisory. But the language of section 52.075 makes it clear that there must be a connection between any ballot form or content modification and the formatting requirements of the voting system. *See* TEX. ELEC. CODE § 52.075.

S U M M A R Y

Section 52.062 of the Election Code provides that “[t]he ballots prepared by each authority responsible for having the official ballot prepared shall be numbered consecutively beginning with the number ‘1.’” A court could find that the machine-generation method of numbering ballots complies with section 52.062.

The Hood County elections administrator selects the ballot-numbering method for certain elections while the commissioners court selects the voting system.

We cannot answer as a matter of law whether a jurisdiction using a voting system for an election may number split ballot batches in certain instances as proposed by the Secretary of State in Advisory 2019-23 because it is a fact question beyond the scope of an Attorney General opinion. But pursuant to section 52.075 of the Election Code, there must be a connection between any ballot form or content modification such as the one set forth in the Advisory, and the formatting requirements of the voting system.

Very truly yours,

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

K E N P A X T O N
Attorney General of Texas

BRENT E. WEBSTER
First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

D. FORREST BRUMBAUGH
Deputy Attorney General for Legal Counsel

CHARLOTTE M. HARPER
Acting Chair, Opinion Committee