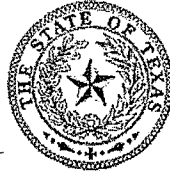


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OCT 06 2017

OPINION COMMITTEE



STATE REPRESENTATIVE  
LYLE LARSON

FILE # RQ-0169-KP  
ID. # 48217

RQ-0169-KP

DISTRICT 122

October 6, 2017

Office of the Attorney General  
Attention: Opinions Committee  
P.O. Box 12548  
Austin, TX 78711-2548

Re: The meaning of "direct recording electronic voting machine" in section 121.003(12) of the Texas Election Code

Dear General Paxton:

We are writing to request an opinion on the scope of Texas Election Code § 121.003(12), which defines a "direct recording electronic voting machine" for purposes of state law. Specifically, we ask you to opine that this term encompasses electronic voting machines that also produce marked paper ballots.

Electronic voting machines have made it easier for citizens to cast their ballots and for election officials to count them. But there have always been concerns that purely electronic voting systems may become vulnerable to tampering. And the mere perception of such a risk, even if conjectural or theoretical, can undermine public confidence in the election process.

In response these concerns, manufacturers have developed electronic voting systems that allow citizens to choose their candidates on an electronic screen—but that also produce a marked paper ballot that a device will read and record on an electronic storage component. Sometimes these paper ballots are fed into a physically separate device; other times the same device that marks the paper ballot also collects and reads that ballot. In either case, the paper ballots are kept and preserved if needed for a future audit or recount.

We respectfully ask you to opine that a voting apparatus of this sort qualifies as a "direct recording electronic voting machine" (or "DRE") under section 121.003(12) of the Texas Election Code. We also ask you to opine that these systems, as DREs, are eligible to participate in the countywide polling place program. *See* Tex. Elec. Code § 43.007(d)(4) (limiting participation in the countywide polling place program to counties that "use[] direct recording electronic voting machines.>").

## I. Direct Recording Electronic Voting Machines

Section 121.003(12) of the Election Code defines "direct recording electronic voting machine" as follows:

"Direct recording electronic voting machine" or "DRE" means a voting machine that is designed to allow a direct vote on the machine by the manual touch of a screen, monitor, or other device and that records the individual votes and vote totals electronically.

Tex. Elec. Code § 121.003(12).

So a "direct recording electronic voting machine" must satisfy two criteria. First, it must be "designed to allow a direct vote on the machine by the manual touch of a screen, monitor, or other device." Tex. Elec. Code § 121.003(12). Second, it must "record[] the individual votes and vote totals electronically." *Id.* Each of these criteria is satisfied when an electronic voting device produces marked paper ballots as an added security measure.

Both traditional DREs and the systems that produce marked paper ballots are "designed to allow a direct vote on the machine." Under either system, the voter approaches an electronic device and records his choices directly on that electronic component, either by touching the screen or by operating buttons or other tools on the device itself. The only difference is that a traditional DRE device immediately records the voter's choices on a removable data-storage component, usually located inside the machine, which is taken elsewhere for tabulation after voting has concluded. The paper-ballot-producing machines, by contrast, first record the voter's choices on a marked paper ballot, which the voter feeds into a device that scans and reads the ballot. Then, as with traditional DREs, the voter's choices are recorded on an electronic data-storage component, whose data will be taken and tabulated at the end of voting.

The presence of a marked paper ballot does nothing to change what these electronic devices are "designed to allow." Under either system, the voter marks his choices on an electronic device, and the vote is recorded for counting and tabulation at the close of voting. Both systems are "designed to allow a direct vote on the machine," as the electronic device is the component on which the voter directly marks his choices. The paper ballot provides an additional method of memorializing the person's vote, but the vote itself is cast on the electronic device, not on the paper ballot. The electronic device is what marks the paper ballot—and it does so only after the voter has designated all of his choices on the device.

The electronic voting devices that produce marked paper ballots also satisfy section 121.003(12) by "record[ing] the individual votes and vote totals electronically." When the device collects and scans the marked paper ballots, it records the votes on those ballots electronically on a removable data-storage component. And the electronic data stored on that component is taken elsewhere for tabulation after the conclusion of voting, just like the electronic data stored by the traditional DRE machines. The marked paper ballots serve as

an additional safeguard against tampering or voting fraud, but they do not act as substitutes for the electronic recording of votes.

A slightly more difficult question arises when a voter enters his choices on an electronic voting device and receives a marked paper ballot, but is directed to submit that paper ballot into a physically separate device. Some of the devices that produce marked paper ballots collect and record those ballots themselves, but others require a physically separate scanner and tabulator for the marked paper ballots. In these situations, someone might try to claim that this arrangement fails to satisfy section 121.003(12), because the statute implies that a DRE must constitute a single "machine." *See* Tex. Elec. Code § 121.003(12) ("Direct recording electronic voting machine" or "DRE" means *a voting machine* that is designed to allow a direct vote on the machine by the manual touch of a screen, monitor, or other device and that records the individual votes and vote totals electronically." (emphasis added)). We do not think this argument has merit, and we urge you to reject it.

A single "machine" will always comprise multiple component parts, and sometimes those parts can be physically separate or separable from each other. Consider a traditional DRE apparatus. These systems typically will store voting data on a removable memory component such as a flash drive, but they can also store data on external devices.<sup>1</sup> That these data-storage devices are removable or (in some cases) entirely separate from the electronic device that voters use to mark their choices does not cause the voting system to fall outside the scope of section 121.003(12). The data-storage devices remain part of the DRE "machine," even if they are physically separate components of that machine. The same goes for a physically separate scanning device. It is a component part of a voting "machine" that enables voters to enter their choices and record their votes electronically, while preserving a paper record for security and accuracy in the case of a recount.

Indeed, the State of Texas has already certified DRE voting "machines" that comprise physically separate components. The Hart system, for example, requires voters to enter their choices on a terminal called Vertity Touch, which is connected by cable to a separate device called the Vertity Controller. The Controller is what contains the multiple ballot styles for voters to use, and it generates the reports and vote totals at the voting site. If your office were to insist that a DRE "machine" must exist entirely within in a single, self-contained physical device, then this would effectively revoke the Secretary of State's previous approval of the Hart system.

Finally, normal use of the English language supports this understanding of the word "machine." Dictionary definitions recognize that the word "machine" can encompass systems with physically separate but closely related components. *See* <http://>

<sup>1</sup> *See, e.g.,* Texas Secretary of State, Electronic Voting System Procedures § 9.7, available at <http://www.sos.state.tx.us/elections/laws/electronic-voting-system-procedures.shtml> (last visited on October 6, 2017) ("Electronic data on a DRE, a DRE component *and any external memory storage device used in conjunction with a DRE* shall not be cleared until a backup of the electronic records has been performed. Also, the electronic data on a DRE *and any external memory store* shall be preserved for 10 days after Election Day unless the DRE is required for another election before that time expires." (emphasis added)).

www.dictionary.com/browse/machine?s=t (last visited on October 6, 2017) (defining “machine” to include “an apparatus consisting of interrelated parts with separate functions, used in the performance of some kind of work,” “a mechanical apparatus or contrivance; mechanism,” or “any complex agency or operating system”). A personal computer is accurately described a single “machine” that comprises the CPU, the monitor, the keyboard, and the wireless mouse—even when these component devices are physically separate from each other. There is nothing at all anomalous or unnatural about interpreting section 121.003(12) in a similar fashion to allow DREs to have a physically separate device for collecting and recording the votes on marked paper ballots. Indeed, this is the most sensible construction of the statute, as it furthers the statutory purpose of deterring fraud and promoting integrity and confidence in the election process.

## II. Countywide Polling Place Program

Section 43.007 of the Election Code creates a “countywide polling place program,” which allows participants to eliminate precinct voting by establishing polling places on a countywide basis. To participate in this program, however, a county must “use[] direct recording electronic voting machines,” as defined in section 121.003(12). *See* Tex. Elec. Code § 43.007(d)(4).

If you conclude that electronic voting systems that produce marked paper ballots qualify as DREs under section 121.003(12), then it follows that these systems may be used in the countywide polling place program. We respectfully urge you to opine that these arrangements qualify as DREs, and are therefore eligible for use on a countywide basis.

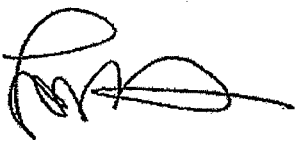

These voting systems, like the traditional DREs, accommodate multiple ballot styles on a single device, which is what enables voters from every precinct and locale to vote at any countywide location. The presence of a marked paper ballot does nothing to undermine the rationale for requiring DREs in the countywide polling place program, and these electronic devices are entirely appropriate for countywide use.

\* \* \*

In asking for your opinion on this question, we are not in any way seeking to supplant the Secretary of State’s role in certifying and approving voting systems for use Texas elections. *See* Tex. Elec. Code § 122.031 *et seq.* We are simply asking for your legal opinion and advice, which you are authorized to provide under section 402.042 of the Texas Government Code. Given the need to resolve this question before the next primaries and the needed time to prepare for conducting the elections, I request that this matter be determined in an expedited schedule that would allow for the response by the end of July. I also reserve the right to provide additional briefing if other parties offer comments.

Thank you for considering our opinion request.

Sincerely,



Lyle Larson