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**ASSISTANT COUNTY
ATTORNEYS**

Venisa McLaughlin
Katy Spraberry

PARALEGAL
Justin Stobaugh

**ADMINISTRATIVE
ASSISTANT**
Roberta Stringer

HOOD COUNTY ATTORNEY'S OFFICE

HOOD COUNTY
JUSTICE CENTER

1200 W. PEARL STREET
GRANBURY, TEXAS 76048



WWW.CO.HOOD.TX.US

PHONE
(817) 579-3215
(817) 579-3216

FAX
(817) 579-3218
(817) 579-3257

VICTIM ASSISTANCE
Maria Bustamante

CRIMINAL DIVISION
Marsha Dickens

MATTHEW A. MILLS, COUNTY ATTORNEY

May 3, 2021

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I.D.# 48949

The Honorable Ken Paxton
Office of the Attorney General of Texas
Attention: Opinion Committee
P.O. Box 12548
Austin, TX 78711-2548

Re: Proper procedure for numbering ballots and a commissioners court's authority to mandate a voting system to an elections administrator

Dear Attorney General Paxton,

With this letter, I respectfully ask that you provide a formal written opinion regarding the aforementioned issue.

Background

Hood County currently employs an elections administrator, as authorized under Election Code § 31.031. Since 2004, the county has used electronic voting machines with no paper ballots, aside from mail-in ballots. During that time, Election Code § 52.062 regarding numbered ballots has not applied to Hood County, since we have used strictly electronic voting machines. Under Election Code §121.001, ballot numbering could not feasibly be applied to that voting system.

On February 9, 2021, the Hood County Commissioners Court voted to purchase new voting equipment from Hart InterCivic, Inc, costing the county approximately \$549,476. This new equipment is a hybrid voting system, whereby voters scan a paper ballot, and votes are then registered electronically. This is essentially the same system discussed in Tex. Att'y Gen. Op. No. KP-0170 (2017). The purpose of this system is to prevent fraud by ensuring a more secure, auditable election. Questions now arise about compliance with Election Code § 52.062 and who has authority to select the method for numbering ballots.

Question #1

According to an e-mail sent by the legal director of the elections division for the Texas Secretary of State, elections administrators have two ways to comply with the requirement to number ballots beginning with the number “1.” (See Appendix A.) The first method is pre-printed numbers on blank ballot stock, which the e-mail deems as the “simplest and easiest way.” The other method is for the machines to generate random numbers on blank ballots. A memorandum from a staff attorney in the elections division to their director, dated May 18, 2020, addresses machine-generated numbering on the Hart Verity 2.4 system. This memo may be found at the following web address: <https://www.sos.state.tx.us/elections/forms/sysexam/chuck-pinney-hart-2.4.pdf>. The staff attorney’s conclusion is that this system, which Hood County has purchased, complies with Texas ballot numbering requirements.

The relevant language in § 52.062 is the following: “[t]he ballots prepared by each authority responsible for having the official ballot prepared.” Does this indicate that using pre-printed numbers on blank ballot stock is the only legal way to comply with the statute? Or does the machine generation method also comply with the numbering requirement?

Question #2

If the answer to the previous question is that both methods of numbering ballots are legal, is the decision regarding which method to employ solely the elections administrator’s? Under § 31.032, the election commission has the authority to appoint an elections administrator. They may also suspend or terminate the administrator under § 31.037. The commissioners court maintains authority over various budgetary issues, such as salary and staffing, under § 31.039.

In 1988, your office opined that the elections administrator should be “largely independent of both the commissioners court and election commission.” Tex. Att’y Gen. Op. No. LO-88-62 (1988). However, this opinion may have been rendered partially moot by Senate Bill 1233 in 2011, which amended § 31.037 to give new authority to election commissions to suspend elections administrators. (The question presented in that opinion was whether the election commission may suspend the elections administrator. Prior to the change in the law, your office wrote that election commissions do not possess that authority.)

In 1997, the San Antonio Court of Appeals came to a somewhat different conclusion regarding an elections administrator’s independence in *Krier v. Navarro*, 952 S.W.2d 25 (Tex. App.--San Antonio 1997, writ denied). This opinion was also cited by your office in 2005, albeit in an opinion dealing with other matters. Tex. Att’y Gen. Op. No. GA-0361 (2017). In *Krier*, the election commission lacked the requisite four votes to remove the elections administrator. *Krier*, 952 S.W.2d at 26. So they instead deemed him a “public official,” rather than a “public employee.” *Id.* In doing so, the commission declared that Navarro had already completed his two-year term, they declared the position vacant, and then they appointed a new administrator by majority vote. *Id.* The ousted administrator successfully sued, arguing that he was an employee without the ability to act independently. *Id.* at 30. The following is the court’s analysis of that issue:

“The testimony of Navarro indicates, however, that he was greatly restricted in the exercise of his duties. While an elections administrator generally has authority to contract with political subdivisions and political parties to perform election services

under TEX. ELEC. CODE ANN. §§ 31.093-.094 (Vernon 1988), Navarro testified that he needed approval from Commissioners Court on many basic decisions regarding elections. For example, Navarro stated he needed the approval of Commissioners Court for selecting polling places and early voting sites, issuing orders calling for elections, adopting a voting system, selecting election judges and phone bank clerks and establishing their compensation rates, establishing a central counting station, leasing voting equipment and polling facilities, and selecting a supplemental list of election judges and alternates. The evidence presented establishes that the governmental functions performed by Navarro were not exercised ‘largely independent of the control of others.’” *Id.*

Assuming the reasoning in *Krier* is correct, is the method of ballot numbering akin to “adopting a voting system,” which is controlled by the commissioners court? Or has the commissioners court already determined the voting system by purchasing voting equipment, and the elections administrator may then determine which method of ballot numbering is appropriate?

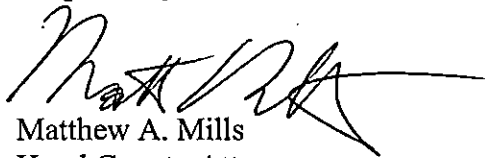
Question #3

On October 23, 2019, the director of elections for the Texas Secretary of State published Election Advisory 2019-23, which may be found at the following web address: <https://www.sos.texas.gov/elections/laws/advisory2019-23.shtml>. Under Section 13(1)(a)(iv)(1), the director suggests that jurisdictions may start with the number “1” and then start subsequent elections with ballots with much higher starting numbers. The language reads as follows: “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.”

Chapter 52 of the Election Code contains various provisions for the preparation of ballots. Under § 52.001, ballots are for the “vote in *an election*.” (emphasis added) Does the suggestion in the director’s advisory that jurisdictions may conduct subsequent elections with ballot numbers starting higher than “1” comply with § 52.062? Or should ballots begin with the number “1” for each election?

Thank you very much for your time and attention to this matter. Should your office require further information to clarify the nature of this request, please do not hesitate to contact me.

Respectfully,


Matthew A. Mills
Hood County Attorney

Appendix A

Dear County Election Officials:

The purpose of this email is to provide guidance to our counties that are using a ballot marking device (“BMD”) or ballot on demand (“BOD”) system in conjunction with either a precinct scanner or a central scanner. Counties that are using this equipment are doing so either as traditional ballot marking devices for accessibility purposes, as a standalone ballot marking device that all voters may use to vote, or as a Texas-specific definition of a DRE as defined by [Advisory 2017-21](#).

We have received a number of questions related to how this type of equipment meets certain requirements of the Texas Election Code. As these ballot marking devices and ballot on demand systems are part of an electronic voting system, most of the relevant provisions are located in Title 8 of the Texas Election Code. However, under Section 121.001 of the Texas Election Code, the other titles of the code apply to all voting systems except to the extent that a provision is “inconsistent with this title or cannot feasibly be applied” in an election using a voting system. Under Section 122.001(c) of the Texas Election Code, the Secretary of State has the authority to prescribe procedures related to voting systems. This email will serve as guidance to our counties on how to use this equipment in a way that is consistent with state law. Please note that we are not issuing a formal election law advisory at this time. We have another system from Hart, Intercivic similar in configuration to ES&S’s ExpressVote that is awaiting Texas certification. After that system has completed the certification process, we will be issuing a formal advisory on proper use of these paper based systems. Additionally, we hope to obtain feedback from you all with respect to these procedures and any other issues you would like us to provide guidance on prior to issuing the formal advisory.

Guidelines for Compliance with Texas Law for Ballot Marking Devices/Ballot on Demand Systems.

1. **Ballot Numbering:** Section 52.062 of the Texas Election Code provides that ballots prepared by each authority responsible for having the official ballot prepared shall be numbered consecutively beginning with the number “1”. The purpose of this requirement is to track and account for the total number of ballots used in an election, how they were used, in what locations, and to account for the ballot stock that was unused. There are two ways that counties can meet this requirement.
 - a. **Pre-printed numbers on blank ballot stock:** The simplest and easiest way to meet this requirement is to order your blank ballot stock with pre-printed numbers. The ballots shall be tracked, distributed, and retained just as you would with a traditional pre-printed full ballot in accordance with Sections 51.006, 51.007, 51.008. The remaining ballot stock cannot be used in a subsequent elections and must be retained with your precinct election records for the duration of the preservation period. With this system, you will continue to have your presiding judges fill out the [Ballot Register](#) and the original and duplicate forms will be returned in the applicable envelopes. We have approved modifications to the Ballot Register form upon request. If you would like to modify our standard form, please send the form to elections@sos.texas.gov for review.
 - b. **ES&S ExpressVote BMD -- Tracking ballot numbers through the ExpressVote Activation Card Printer/Expresslink Software:** As the intention of 52.062 is to track and monitor ballot use and distribution, we have approved an alternate way to do so with the ExpressVote. Each ExpressVote Activation card printer that is assigned to a specific polling place will be given a two to three digit alpha code. This code will be printed on each Ballot Card as it is generated for the voter. In addition to the alpha code, each

record **must** be rescanned. An electronic recount cannot simply consist of rereading the electronic media containing device totals. If a manual recount is requested, the paper ballot or cast vote record will be hand tallied.

4. **Preservation of Voted Ballots:** The paper ballots or cast vote records are required to be preserved for a period of at least 60 days after the date of the election in a locked ballot box in accordance with Section 66.058(b) of the Texas Election Code. On the 61st day, the general custodian of election records may transfer them to another secure container for the remainder of the preservation period in accordance with Section 66.058(b) of the Texas Election Code. Additionally, the electronic media that contains the vote totals must also be preserved for the duration of the 22 month preservation period.

These are the procedures that will be in place for the May 4, 2019 uniform election and any ensuing runoffs. If you have any questions or concerns please let us know. Additionally, we welcome your feedback on these procedures before they are formally prescribed in an election law advisory.

Thank you for all that you do for Texas elections!

Christina Worrell Adkins

Legal Director – Elections Division

Office of the Texas Secretary of State

1019 Brazos Street | Rudder Building, 2nd Floor | Austin, Texas 78701

1.800.252.VOTE (8683)

elections@sos.texas.gov | www.sos.texas.gov

For Voter Related Information, please visit:



The information contained in this email is intended to provide advice and assistance in election matters per §31.004 of the Texas Election Code. It is not intended to serve as a legal opinion for any matter. Please review the law yourself, and consult with an attorney when your legal rights are involved.