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The Honorable Kelly Hancock
Chair, Senate Committee on Veteran Affairs & Border Security
Texas State Senate
Post Office Box 12068
Austin, Texas 78711-2068

The Honorable Matt Krause
Chair, House Committee on General Investigating
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0411

Re: Whether a legislator or a member of the public may inspect or obtain copies of anonymous voted ballots (RQ-0424-KP)

Dear Senator Hancock and Representative Krause:

You ask whether a member of the public or a legislator may inspect or obtain copies of anonymous voted ballots.¹ To be clear, you explain that the subject of your inquiry is “anonymous voted ballots” or other voted ballots that have had any voter-identifying data redacted. Krause Letter at 1. You explain that members of the public and individual members of the Legislature desire to audit the results of Texas elections, but election administrators cite section 66.058 of the Election Code as precluding the release of voted ballots. Hancock Letter at 1; Krause Letter at 1. Thus, the question presented is whether the information contained within a voted ballot *that has been stripped of any information that could be used to reveal the identity of the voter* is public information subject to disclosure.

¹See Letter from Honorable Kelly Hancock, Chair, Senate Comm. on Veteran Affairs & Border Sec., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Sept. 28, 2021) (“Hancock Letter”); Letter from Honorable Matt Krause, Chair, House Comm. on Gen. Investigating, to Honorable Ken Paxton, Tex. Att’y Gen. at 1–2 (Aug. 16, 2021) (“Krause Letter”); <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2021/RQ0424KP.pdf>.

To fulfill the Texas Constitution’s mandate that Texas preserve election integrity, the Legislature has designated anonymous voted ballots as election records under the Election Code and has established procedures aimed at both preserving those records and granting public access to them.

Article VI, section 4 of the Texas Constitution provides:

In 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; and the Legislature shall provide by law for the registration of all voters.

TEX. CONST. art. VI, § 4. This provision requires the Legislature to “pass laws as necessary to deter fraud and protect ballot purity [and] is addressed to the sound discretion of the Legislature.” *Andrade v. NAACP*, 345 S.W.3d 1, 16 (Tex. 2011) (quoting *Wood v. State ex rel. Lee*, 126 S.W.2d 4, 9 (Tex. 1939) (quotation marks omitted).

Your question involves access to “election records” which include “anything distributed or received by government under [the Election Code].” TEX. ELEC. CODE § 1.012(d)(1). Voted ballots are expressly designated as “precinct election records.” *Id.* § 66.002 (defining “precinct election records” as “the precinct election returns, *voted ballots*, and other records of an election that are assembled and distributed” under chapter 66 of the Election Code (emphasis added)). The Election Code contains provisions aimed at both preserving election records and granting access to review those records. *See id.* §§ 1.012, 66.058.

To fulfill its constitutional mandate, the Legislature created the position of general custodian of election records and charged that office with, among other things, preserving precinct election records.² *See id.* §§ 66.001, .058. Subsection 66.058(a) requires “the precinct election records [to] be preserved by the authority to whom they are distributed for at least 22 months after election day.” *Id.* § 66.058(a); *see also* 52 U.S.C. § 20701 (establishing 22-month preservation period for election records in certain federal elections). For at least 60 days after an election, voted ballots must be kept in a locked room, in the locked ballot box delivered to the custodian. TEX. ELEC. CODE § 66.058(b).³ On the 61st day, the custodian may require the return of the key that unlocks the ballot box containing voted ballots and may “unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.” *Id.* § 66.058(b)(1), (2).

“Except as permitted by [the Election Code], a ballot box or other secure container containing voted ballots may not be opened during the preservation period.” *Id.* § 66.058(b-1).

²Depending on the type of election, the general custodian of election records is either the county clerk, the city secretary, or the secretary or presiding officer of a political subdivision’s governing body. TEX. ELEC. CODE § 66.001.

³Due to potential recounts and provisional ballots, the Legislature requires the election record custodian to keep voted ballots secure for the 60-day period. *Id.* § 66.058(b)

The custodian commits a criminal offense if, during the preservation period, the custodian makes an unauthorized entry into the box or container or “fails to prevent another person from handling the box or container in an unauthorized manner or from making an unauthorized entry into the box or container.” *Id.* § 66.058(d), (e). If anonymous voted ballots are disclosable public information, then the custodian’s entry into the box to fulfill the state’s disclosure obligations is authorized.

The Election Code designates all election records, including anonymous voted ballots, as public information.

Alongside the goal of ballot preservation, the Election Code also recognizes the importance of granting access to the public to review election records and ensure transparency and confidence in Texas elections. To that end, section 1.012 of the Election Code provides: “Except as otherwise provided by [the Election Code] or [the Public Information Act], all election records are public information.” *Id.* § 1.012(c). Voted ballots become public information once “the custodian completes the unofficial tabulation of the results for that precinct.” *Id.* § 66.057(a). “[A]n election record that is public information shall be made available to the public during the regular business hours of the record’s custodian.” *Id.* § 1.012(a).

Because the Legislature designated anonymous voted ballots as public information and required public access to those records, a custodian’s entry into the locked box for such purposes is an authorized entry under the Election Code.

Section 66.058 recognizes the existence of exceptions that authorize entry into the locked ballot box during the preservation period provided the box or container is relocked or resecured after the authorized purpose has been fulfilled. *Id.* § 66.058(b-1), (c); *see, e.g., id.* §§ 213.007 (authorizing the custodian to make ballots available for a recount), 273.042 (authorizing the custodian to make the ballots available to a grand jury for purposes of a criminal investigation). Section 1.012 of the Election Code establishes one such exception by generally requiring the custodian to make election records available to the public, unless such records are expressly excepted by the Public Information Act or the Election Code.⁴ *Id.* § 1.012(c); *see also* TEX. GOV’T CODE § 552.006 (providing that the Public Information Act “does not authorize the withholding of public information or limit the availability of public information to the public, except as expressly provided” within the Act).

Subchapter C of the Public Information Act establishes the exceptions to the general rule that public information shall be made available to the public. *See* TEX. GOV’T CODE §§ 552.101–.162 (“Information Excepted from Required Disclosure”). No section within that subchapter addresses anonymous voted ballots or expressly excepts them from disclosure. Furthermore, no

⁴Thirty-four years ago, in Open Records Decision 505, a previous Attorney General considered public access to voted ballots under the Public Information Act. Tex. Att’y Gen. ORD 505 (1988) at 1–2. The decision concluded that section 66.058’s prohibition on unauthorized entry into the locked ballot box during the preservation period fell within the Public Information Act’s disclosure exceptions for privileged or confidential information. Tex. Att’y Gen. ORD 505 (1988) at 2–3. However, in-depth review by this office of the issues raised in that decision results in the opposite conclusion. No language in either the Election Code nor the Public Information Act makes the entirety of a voted ballot privileged or confidential. Open Records Decision 505 is therefore overruled to the extent inconsistent with this opinion.

provision in the Election Code designates anonymous voted ballots as confidential or otherwise prohibits their disclosure to the public. By demanding that the public have access to election records, including anonymous voted ballots, the Legislature thereby authorized the election records custodian's entry to the locked ballot box during the 22-month preservation period for such purposes.

Any personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections must be redacted for purposes of disclosure to protect the constitutional right to a secret ballot in Texas.

While you ask specifically about *anonymous* voted ballots, it is important to note that Texas law has long established that all elections shall be by secret ballot. *Wood*, 126 S.W.2d at 9. This requirement of secrecy is mandatory—"that every voter is thus enabled to secure and preserve the most complete and inviolable secrecy *in regard to the persons for whom he votes*["*Id.* at 8; *Carroll v. State*, 61 S.W.2d 1005, 1007 (Tex. Crim. App. 1933) (emphasis added). In order to protect the secret ballot, "[p]ublic policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it["*Carroll*, 61 S.W.2d at 1008. The right of nondisclosure belongs to the individual voter. *See Oliphint v. Christy*, 299 S.W.2d 933, 939 (Tex. 1957). Your question appears to acknowledge this requirement by only inquiring about voted ballots that (1) have no information that could be used to identify the voter or (2) have been redacted to exclude any information that could be used to identify the voter. Krause Letter at 1.

Information is excepted from public disclosure under the Public Information Act "if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." TEX. GOV'T CODE § 552.101. No statutory provision generally designates election records or their contents to be confidential. However, the right to a secret ballot has been held to protect personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections. *See generally Wood*, 126 S.W.2d at 9; *Carroll*, 61 S.W.2d at 1008. Therefore, a court would likely find that personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections is excepted from public disclosure. As a result, such information must be preserved, and the election records custodian must redact such personally identifiable information to protect the constitutional right to a secret ballot in Texas. TEX. GOV'T CODE § 552.007 (providing that a governmental body has no discretion to release information deemed confidential by law). To be clear, the presence of some confidential information on a ballot does not provide a basis to withhold the ballot in its entirety.

The Election Code authorizes the Secretary of State and election records custodians to establish procedures to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots.

The Secretary of State is the chief elections officer of the state and is required to "assist and advise all election authorities with regard to the application, operation, and interpretation" of the Election Code and any other election laws. TEX. ELEC. CODE §§ 31.001(a), .004(a). In furtherance of the preservation of precinct election records in particular, the Legislature directed the Secretary of State to "instruct the affected authorities on the actions necessary to comply" with

section 66.058. *Id.* § 66.058(h). Thus, the Secretary of State has the authority to instruct elections administrators as to how to comply with both the ballot preservation requirements in section 66.058 and the public access requirements in section 1.012.

With the Secretary of State's oversight, the Legislature expressly authorized the election records custodian to "adopt reasonable rules limiting public access" under section 1.012 to further the purposes of "safeguarding the election records or economizing the custodian's time." *Id.* § 1.012(b). Pursuant to their respective authority, the Secretary of State and the election records custodians may establish procedures as authorized by law to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots under the Election Code.

S U M M A R Y

Anonymous voted ballots are election records under the Election Code, and the Legislature has established procedures aimed at both preserving those records and granting public access to them.

Section 66.058 of the Election Code requires the anonymous ballots to be held in a locked ballot box during a 22-month preservation period, with entry only as authorized by the Election Code. Section 1.012 establishes these ballots as public information and requires the election records custodian to make the ballots available to the public. By expressly requiring the custodian to provide public access to such records, the Legislature authorized entry into the locked ballot box for such purpose during the 22-month period. Thus, members of the public and legislators may inspect or obtain copies of anonymous voted ballots during the 22-month preservation period.

Personally identifiable information contained in election records that could tie a voter's identity to their specific voting selections is confidential and excepted from public disclosure. Any confidential information on an anonymous voted ballot must be redacted for purposes of disclosure in order to protect the constitutional right to a secret ballot.

The Election Code authorizes the Secretary of State and election records custodians to establish procedures to accomplish the dual priorities of ballot preservation and public access to anonymous voted ballots.

Very truly yours,



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