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ATTORNEY GENERAL OF TEXAS

May 1, 2024

The Honorable Dee Hobbs
Williamson County Attorney
405 M.L.K. Street, #7
Georgetown, Texas 78626

Opinion No. KP-0463

Re: Whether a member of the public may obtain copies of spoiled ballots on the 61st day following election day (RQ-0520-KP)

Dear Mr. Hobbs:

On behalf of the Williamson County Elections Department, you ask “whether physical copies of spoiled ballots in ballot box 4 can be made available to the public” sixty-one days after election day.¹ We begin by examining the handling of spoiled ballots at the polling place, the distribution of spoiled ballots at the close of the election, and the preservation of spoiled ballots following the election.

The Election Code dictates the handling of spoiled ballots at the polling place, the distribution of spoiled ballots at the close of the election, and the preservation of spoiled ballots following the election.

Election Code section 64.007 is titled “Spoiled Ballot.” TEX. ELEC. CODE § 64.007. It provides that “[i]f a voter mismarks, damages, or otherwise spoils the ballot in the process of voting, the voter is entitled to receive a new ballot by returning the spoiled ballot to an election officer.”² *Id.* § 64.007(a). A spoiled ballot returned by a voter to an election officer is accounted for on a register maintained by the officer at the polling place.³ *Id.* § 64.007(c) (requiring an election officer to “enter on the register the name of each voter who returns a spoiled ballot and

¹Letter from Honorable Dee Hobbs, Williamson Cnty. Att’y, to the Off. of the Att’y Gen., Op. Comm. at 1, 4 (Nov. 3, 2023), <https://www.texasattorneygeneral.gov/sites/default/files/request-files/request/2023/RQ0520KP> (“Request Letter”).

²A poster with instructions about “securing an additional ballot if the voter’s original ballot is spoiled” must be posted at each voting station and polling place. TEX. ELEC. CODE § 62.011(a), (c)(4); *see* TEX. SEC’Y OF STATE, VOTER INFORMATION POSTER, *available at* <https://www.sos.state.tx.us/elections/forms/pol-sub/7-36f.pdf>; *see also* TEX. ELEC. CODE § 62.0115(b)(3) (requiring notice of voters’ rights, including information about spoiled ballots).

³The Secretary of State is charged with creating the register form. *See* TEX. ELEC. CODE § 64.007(c); TEX. SEC’Y OF STATE, REGISTER OF SPOILED BALLOTS, *available at* <https://www.sos.state.tx.us/elections/forms/pol-sub/7-93f.pdf>.

the spoiled ballot's number"). After entering the required information about the spoiled ballot on the register, the election officer deposits the spoiled ballot in ballot box no. 4.⁴ *Id.* § 64.007(d); *see also id.* § 51.033(a), (c)–(e) (requiring four ballot boxes, each for a different purpose, be used at each polling location in an election).

The disposition of records and supplies at the close of the election is generally governed by Election Code chapter 66. *Id.* §§ 66.001–.062. Subsection 66.021(a) instructs the presiding judge, upon completing the election returns for the precinct, to “assemble the precinct election records and place them in the appropriate envelopes and ballot boxes for distribution.” *Id.* § 66.021(a). The term “precinct election records” is defined to mean “the precinct election returns, voted ballots, and *other records of an election that are assembled and distributed under*” chapter 66. *Id.* § 66.002 (emphasis added). Spoiled ballots are assembled and distributed under chapter 66; thus, they are precinct election records. Specifically, chapter 66 directs that the spoiled ballots along with the spoiled ballot register be placed in ballot box no. 4 and delivered by the presiding judge to the general custodian of election records. *Id.* §§ 66.021(b) (requiring the judge to lock ballot box no. 4 when it is ready for distribution), 66.026(2), (3) (providing that “[b]allot box no. 4 must contain” among other things, the register of spoiled ballots and any spoiled ballots), 66.051(b) (requiring the presiding judge to deliver “ballot box no. 4 and its key in person to the general custodian of election records”); *see also id.* § 127.067(c) (relating to disposition of precinct election records in election using electronic voting system instead of paper ballots).

Once delivered to the custodian, “[t]he records in ballot box no. 4 may be preserved in that box or by any other method chosen by the custodian.”⁵ *Id.* § 66.058(f). As precinct election records, spoiled ballots must be preserved by the custodian “for at least 22 months after election day.”⁶ *Id.* § 66.058(a); *see also* 13 TEX. ADMIN. CODE § 7.125(a)(10) (2020) (Tex. State Libr. & Archives Comm’n, Records Retention Schedules) (setting out “Local Schedule EL: Records of Elections and Voter Registration, 4th Edition” which requires that spoiled ballots be retained “[e]lection day + 22 months”).

You suggest that spoiled ballots may be subject to the preservation period in subsection 66.058(b). *See* Request Letter at 3–4. Subsection 66.058(b) directs that “[f]or a period of at least 60 days after the date of the election, the *voted ballots* shall be preserved securely in a locked room in the locked ballot box in which they are delivered to the general custodian of election records.” TEX. ELEC. CODE § 66.058(b) (emphasis added); *see also id.* § 1.012(f)–(h) (addressing the availability of voted ballots for public inspection). But spoiled ballots are not voted ballots as exemplified by the fact that spoiled ballots are delivered to the custodian in ballot box no. 4 while voted ballots are delivered to the custodian in ballot box no. 3. *Id.* §§ 51.033(d) (providing “[b]allot

⁴The Secretary of State prescribes the use of an envelope to keep spoiled ballots separate from other ballots that are returned in ballot box no. 4. *See* TEX. ELEC. CODE § 51.033(e) (specifying that “[b]allot box no. 4 is used for delivering defectively printed, spoiled, and unused ballots to their custodian after the election”); TEX. SEC’Y OF STATE, ENVELOPE FOR SPOILED BALLOTS, *available at* <https://www.sos.state.tx.us/elections/forms/pol-sub/7-77f.pdf>.

⁵If removed from ballot box no. 4, the records “may not be commingled with any other election records kept by the custodian.” TEX. ELEC. CODE § 66.058(f).

⁶With some exceptions, the records may be destroyed or otherwise disposed of after the preservation period. *Id.* § 1.013.

box no. 3 is used for delivering the voted ballots to their custodian”), 66.025(a)(1) (providing “[b]allot box no. 3 must contain . . . the voted ballots”). As a result, subsection 66.058(b) is not relevant to your question.

With that background and clarification, we consider whether copies of spoiled ballots preserved in ballot box no. 4 are available to the public during the 22-month preservation period.

The Election Code designates spoiled ballots preserved in ballot box no. 4 as public information subject to disclosure.

Section 1.012 of the Election Code generally requires the custodian to make election records available to the public unless the records are expressly excepted by the Public Information Act or the Election Code. *Id.* § 1.012(c) (“Except as otherwise provided by [the Election Code] or Chapter 552, Government Code [the Public Information Act], all election records are public information.”); Tex. Att’y Gen. Op. No. KP-0411 (2022) at 3. “Election records” include anything distributed or received by government under the Election Code or required by law to be kept by others for information of government under the Election Code, as well as any document or paper issued or received by government under the Election Code. TEX. ELEC. CODE § 1.012(d). Thus, spoiled ballots are not only “precinct election records” that must be preserved under subsection 66.058(a) but also “election records” available to the public under Election Code subsection 1.012(c). We must then examine whether spoiled ballots are expressly excepted from disclosure to the public by the Public Information Act or the Election Code.

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–.163 (“Information Excepted from Required Disclosure”). No section within that subchapter expressly addresses spoiled ballots or excepts them from disclosure.⁷ *See id.* Likewise, no provision in the Election Code designates spoiled ballots as confidential or otherwise prohibits their disclosure to the public. A court would likely conclude that, by requiring that the public have access to election records, the Legislature thereby authorizes the election records custodian’s entry to ballot box no. 4 to respond to a public information request for copies of spoiled ballots. This entry must be made in accordance with the time and manner requirements prescribed by statute, the Secretary of State, and the custodian. *See, e.g.*, TEX. ELEC. CODE §§ 1.012(a), (b) (requiring that an election record that is public information “be made available to the public during the regular business hours of the record’s custodian” and allowing the custodian to adopt reasonable rules regarding access to the records), 66.058(h) (authorizing the Secretary of State to instruct elections administrators on compliance with section 66.058 for elections involving federal office), 66.057(b) (requiring the general custodian of election records or the custodian’s designee be present at all times when the records in ballot box no. 4 are inspected).

⁷For instance, as you note, previous open records letter rulings issued by this office conclude that spoiled and unused ballots may not be withheld under Government Code section 552.101. *See* Request Letter at 3 (citing Tex. Att’y Gen. OR2001-2842); *see also* Tex. Att’y Gen. OR2009-10257 (concluding unused ballots were not confidential by law); Tex. Att’y Gen. OR2001-3228 (concluding spoiled and unused ballots were not confidential by law).

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.

That copies of spoiled ballots preserved in ballot box no. 4 are available to the public during the 22-month preservation period does not mean some information on an individual ballot may not be confidential.⁸ A recent opinion of this office explained that “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.” Tex. Att’y Gen. Op. No. KP-0411 (2022) at 4 (citing *Wood v. State ex rel. Lee*, 126 S.W.2d 4, 9 (Tex. 1939) and *Carroll v. State*, 61 S.W.2d 1005, 1008 (Tex. Crim. App. 1933)); *see also* TEX. CONST. art. VI, § 4. Therefore, a court would likely find that personally identifiable information contained in an election record, including a spoiled ballot, that could tie a voter’s identity to their specific voting selections is excepted from public disclosure. As a result, the election records custodian must redact any such personally identifiable information to protect the constitutional right to a secret ballot in Texas. *See* TEX. GOV’T CODE §§ 552.007 (providing that a governmental body has no discretion to release information deemed confidential by law), 552.301–.310 (setting out the procedure for a decision from the attorney general regarding whether information may be withheld).

⁸Briefing received by our office suggests that spoiled ballots, either alone or in combination with other information (e.g., the register of spoiled ballots), “can contain information identifying a voter’s selections” Brief from Jennifer Doinoff, Pres., Tex. Assoc. of Elections Administrators at 1 (rec’d Dec. 19, 2023) (on file with the Op. Comm.).

S U M M A R Y

The Legislature has established procedures aimed at both preserving spoiled ballots and granting public access to them.

Section 66.058 of the Election Code requires spoiled ballots be preserved in ballot box no. 4 or by any other method chosen by the election records custodian during a 22-month preservation period. Section 1.012 establishes spoiled ballots as public information and requires the 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 ballot box no. 4 for such purpose during the 22-month period. Thus, members of the public may obtain copies of spoiled ballots preserved in ballot box no. 4 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. Thus, any confidential information on a spoiled ballot must be redacted for purposes of disclosure in order to protect the constitutional right to a secret ballot.

Very truly yours,



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