



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 15, 2022

The Honorable Briscoe Cain  
Chair, House Committee on Elections  
Texas House of Representatives  
Post Office Box 2910  
Austin, Texas 78768-2910

**Opinion No. KP-0423**

Re: Authorized services a notary public may provide and fees a notary public may charge under state law (RQ-0459-KP)

Dear Representative Cain:

You ask whether a notary public may take certain actions while performing notarizations under current state law.<sup>1</sup> The actions you ask about pertain to the online notarization process and concern: (1) items a notary may add to the notarized document; (2) an optional fee a notary may charge; and (3) actions a notary may take with respect to the notary's record of an online notarization.<sup>2</sup> *See* Request Letter at 1–4.

**Addition of Items to a Notarized Document**

You first ask whether, “[i]n addition to the electronic seal . . . a notary [may] add additional information such as a barcode used to identify a document within the notary’s storage.” *Id.* at 2. You assert that neither chapter 406 of the Government Code nor associated regulations “appear to prohibit adding additional verifying information to the document, as long as the additional information does not interfere with current law.” *Id.* Online notarization requires a notary public to verify the identity of a person through two-way video and audio conference technology that meets the requirements of chapter 406, subchapter C, of the Texas Government Code and certain standards adopted by the Texas Secretary of State (“Secretary”). *See* TEX. GOV’T CODE

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<sup>1</sup>*See* Letter from Honorable Briscoe Cain, Chair, House Comm. on Elections, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (rec’d May 3, 2022), <https://texasattorneygeneral.gov/sites/default/files/request-files/request/2022/RQ0459KP.pdf> (“Request Letter”).

<sup>2</sup>Because the questions you ask generally arise in the context of online notarization, we limit this opinion to the authority of a notary public who has been specially commissioned as an online notary public. *See* Request Letter at 1–4; *see also* TEX. GOV’T CODE § 406.105(a) (authorizing a traditional notary public to apply to the Texas Secretary of State to be commissioned as an online notary public).

§ 406.110(b); *see also id.* § 406.104 (requiring the Secretary to promulgate rules developing and maintaining standards for online notarization). Once the notary public verifies the person's identity, the notary must "attach an electronic notarial certificate" to the document. 1 TEX. ADMIN. CODE § 87.41(e) (2022) (Off. of the Sec'y of State, Online Notarization Procedures). By statute, the electronic notarial certificate "contains the following: (A) the online notary public's electronic signature, electronic seal, title, and commission expiration date; (B) other required information concerning the date and place of the online notarization; and (C) the facts attested to or certified by the online notary public in the particular notarization." TEX. GOV'T CODE § 406.101(4). The certificate must additionally "include a notation that the notarization is an online notarization." *Id.* § 406.110(d).

Your letter does not specify the proposed location of a barcode within the document. An online notary public must "take reasonable steps to . . . ensure the integrity, security, and authenticity of online notarizations[.]" *Id.* § 406.108(b)(1). Toward that end, both the statute and the rules require that the manner of attaching the notary public's electronic signature and seal to the certificate be "capable of independent verification and render[] any subsequent change or modification to the electronic document evident." *Id.* § 406.109(d); *see also* 1 TEX. ADMIN. CODE § 87.41(j) (2022) (Off. of the Sec'y of State, Online Notarization Procedures). Neither the statute nor the rules otherwise provide for, or prohibit, the inclusion of additional information, such as a barcode, to the electronic notarial certificate or to another place within the document. Therefore, a court would likely conclude that a notary public may include additional information such as a barcode on the electronic notarial certificate or elsewhere on the document provided it does not interfere with the notary's obligations under subsections 406.108(b)(1) and 406.109(d) or the Secretary's rules.

### **Optional Fee**

Next, you identify certain components of the online notarization process and ask whether a notary public may charge a \$5 optional fee to cover them. *See* Request Letter at 2. Any authorized notary function performed in a traditional setting may also be performed as an online notarization by an online notary public. *See* TEX. GOV'T CODE § 406.107; *see also id.* § 406.016 (listing authorized functions of a notary public). But conducting a notarization online can involve the performance of additional steps in comparison to what is required in a traditional notarization. You ask about two such components, beginning with identity verification. *See* Request Letter at 2–3. When a person presents an identification credential to a notary public remotely and the notary does not personally know the person, the notary public must utilize third-party services to perform credential analysis and identity proofing to verify both the credential and the person.<sup>3</sup> *See* TEX.

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<sup>3</sup>Credential analysis "means a process or service . . . through which a third person affirms the validity of a government-issued identification credential through review of public and proprietary data sources." TEX. GOV'T CODE § 406.101(1). Similarly, identity proofing "means a process or service . . . through which a third person affirms the identity of an individual through review of personal information from public and proprietary data sources." *Id.* § 406.101(7).

GOV'T CODE § 406.110(b)(2). The other component you ask about is document storage.<sup>4</sup> While a traditional notary public must keep a record of each notarization in a book or electronically in a computer or other storage device,<sup>5</sup> an online notary public must keep an electronic record of the transaction that contains additional requirements, both in content and the level of security. *See id.* § 406.108(a)(1)–(7) (listing the contents of the online notarization record, which includes an audio visual recording of the person presenting an identification credential), 406.108(a), (b)(2)–(3) (requiring an online notary public to “keep a secure electronic record of electronic documents notarized,” along with a backup record that the notary must “protect . . . from unauthorized use”); *see also id.* § 406.109(b) (requiring the notary public to keep the electronic record of an online notarization “secure and under the online notary public’s exclusive control”).

The Legislature authorized a specific fee “for performing an online notarization.” *Id.* § 406.111. The fee may be “in an amount not to exceed \$25,” which is “in addition to any other fees authorized under Section 406.024.”<sup>6</sup> *Id.*; *see also id.* § 406.024(a) (authorizing fees for specific acts in the context of traditional notarizations). You assert that “the statutes are silent as to optional fees” for the tasks of identification verification and document storage and ask whether “optional fees fall under the \$25 maximum allowable fee[.]” Request Letter at 3. The performance of an online notarization includes the identity verification process and secure electronic storage of the online notarization record. *See TEX. GOV'T CODE* §§ 406.110(b)(2) (describing the identification verification necessary “[i]n performing an online notarization”), 406.108(a)–(c) (listing the requirements for the electronic record of an online notarization). Thus, to the extent an online notary public charges a \$5 fee for the identification verification and document storage associated with performing an online notarization and is not otherwise charging online notarization fees that would cause the \$25 maximum fee to be exceeded, a court would likely conclude that the notary public may charge \$5 for identification verification and document storage pursuant to section 406.111.

You also ask about the relationship between the \$25 maximum fee permitted for performing an online notarization under section 406.111 and the list of fees authorized under subsection 406.024(a). *See* Request Letter at 3. Subsection 406.024(a) contains a laundry list of fees authorized for specific acts or items. *See, e.g., TEX. GOV'T CODE* § 406.024(a)(6) (\$6 fee for an oath or affirmation), 406.024(a)(8) (50 cents per page for copies of records or papers in the notary’s public office). The list includes a catch-all fee of \$6 “for a notarial act not provided for.” *Id.* § 406.024(a)(11). You ask whether this catch-all provision could include identity verification and document storage. *See* Request Letter at 3.

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<sup>4</sup>Your letter refers to “tamper-proof document storage” but nothing in chapter 406 or the Secretary’s rules requires that a record of an online notarization be tamper-proof. Request Letter at 2–3. Only the digital certificate attached to a document notarized online must meet a tamper-specific criteria, which is that the certificate be tamper-evident, not tamper-proof. *See TEX. GOV'T CODE* § 406.109(d). Furthermore, no provision in chapter 406 or in the Secretary’s rules provides for the electronic storage by a notary public of the actual documents that have been notarized. Thus, we assume you to refer to a notary public’s duty to electronically store a record of an online notarization in accordance with the requirements set forth in statute.

<sup>5</sup>*See generally id.* § 406.014 (“Notary Records”).

<sup>6</sup>For example, the fee for administering an oath is \$6. *See id.* § 406.024(a)(6). A notary public administering an oath through an online notarization may thus charge \$6 for the oath and up to \$25 for administering it online.

Section 406.024 exists in subchapter A of chapter 406, which governs a traditional notary public. *See generally* TEX. GOV'T CODE §§ 406.001–.026. The Legislature did not define the term “notarial act” for purposes of subchapter A. But in subchapter C of chapter 406, which governs an online notary public, subsection 406.101(8) defines a “notarial act” as “the performance by an online notary public of a function authorized under Section 406.016.” *Id.* § 406.101(8); *see also id.* § 406.106(2) (authorizing an online notary public to “perform notarial acts as provided by Subchapter A”). This suggests that the term “notarial act” as used in subchapter A likewise refers to functions listed in section 406.016. *See In re Tex. Educ. Agency*, 619 S.W.3d 679, 687 (Tex. 2021) (orig. proceeding) (stating that courts “construe the Legislature’s chosen words and phrases within the context and framework of the statute as a whole, not in isolation”). Subsection 406.016(a) authorizes a traditional notary public to: “(1) take acknowledgements or proofs of written instruments; (2) protest instruments permitted by law to be protested; (3) administer oaths; (4) take depositions; and (5) certify copies of documents not recordable in the public records.” TEX. GOV'T CODE § 406.016(a). Thus, a “notarial act” for purposes of the catch-all fee provision in subsection 406.024(a)(11) refers broadly to a notary service listed in section 406.016 and not to individual steps taken by a notary public in the course and scope of providing a notary service.

Moreover, courts strictly construe statutes prescribing fees for public officers. *See McCalla v. City of Rockdale*, 246 S.W. 654, 655 (Tex. 1922). The Legislature has already accounted for the additional responsibilities associated with performing notarizations online by authorizing a fee of up to \$25, which is in addition to the fee for the underlying notarial act. *See* TEX. GOV'T CODE § 406.111; *see also id.* § 406.024(a)(1)–(11) (authorizing a fee of \$6 or less for any of the notarial acts listed in section 406.016). Thus, a court is unlikely to conclude that the catch-all fee of subsection 406.024(a)(11) was intended to encompass components of the online notarization process.

### **Actions Regarding Notary Public’s Record of Online Notarization**

Lastly, you assert that “technology has advanced to the point where a record of a notary transaction can be emailed securely,” explaining that this new technology is capable of producing, among other things, an “image of the ID with numbers redacted[.]” Request Letter at 3. You ask us to confirm whether a notary public may “send a record of the transaction over secure email as long as the image of the ID used for satisfactory evidence has redacted the numbers[.]” *Id.*

“An online notary public . . . is subject to [subchapter A of chapter 406] to the same extent as a notary public appointed and commissioned under that subchapter[.]” TEX. GOV'T CODE § 406.106(1). Subchapter A of chapter 406 provides that “[e]ntries in the notary’s [record] book are public information.” *Id.* § 406.014(b) (referring to a traditional notary’s record book). The Secretary’s rules echo the public nature of notarial records, but they make an exception regarding a specific portion of an online notarization record:

- (a) Subject to subsection (b) of this section, records regarding notarial acts performed are public information.
- (b) If any portion of the audio visual recording of an online notarization includes biometric information or includes an

image of the identification card used to identify the principal, that portion of the recording is confidential and shall not be released without consent of the individual(s) whose identity is being established unless ordered by a court of competent jurisdiction or upon request by the secretary of state.

1 TEX. ADMIN. CODE § 87.52 (2022) (Off. of the Sec’y of State, Public Information);<sup>7</sup> *see also* TEX. GOV’T CODE § 406.104(a), (b) (directing the Secretary to adopt rules to develop standards for online notarization and authorizing the Secretary to “confer with the Department of Information Resources or other appropriate state agency on matters relating to . . . technological aspects” of those standards). By law, the electronic record of an online notarization must contain “a recording of any video and audio conference” forming the basis for identity verification. TEX. GOV’T CODE § 406.108(a)(6). If the person is not personally known to the notary public, such a recording would include the “remote presentation by the person . . . of a government-issued identification credential, including a passport or driver’s license, that contains the signature and a photograph of the person[.]” *Id.* § 406.110(b)(2)(A). The rules make confidential any portion of the audio visual recording that includes biometric information or includes an image of the identification card or credential presented.<sup>8</sup> *See* 1 TEX. ADMIN. CODE § 87.52(b) (2022) (Off. of the Sec’y of State, Public Information). Thus, while chapter 406 and the Secretary’s rules do not expressly provide for emailing a record of an online notarization, a court would likely conclude that any release would require the removal of biometric information as well as the entire image of the identification card or credential, not just the numbers on the card or credential.<sup>9</sup> Otherwise, a notary public must obtain the consent of the person whose identity is being established before releasing a record of an online notarization containing those items, whether by secure email or otherwise. *See id.*

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<sup>7</sup>The rules also prohibit a traditional notary public from recording in the notary’s record book “an identification number that was assigned by a governmental agency or by the United States to the principal and that is set forth on the identification card or passport presented as identification[.]” 1 TEX. ADMIN. CODE § 87.50(a)(1) (2022) (Off. of the Sec’y of State, Prohibition Against Entering Personal Information in a Notary Record Book). If a traditional notary public inadvertently includes this information when preparing a certified copy of any entry in the record book, the notary “must redact that personal information prior to release of the information.” *Id.* § 87.52(a).

<sup>8</sup>The Legislature defines “biometric identifier” in various contexts as a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry. *See, e.g.*, TEX. BUS. & COM. CODE § 503.001(a), (b) (prohibiting the capture of biometric identifiers for commercial purposes without consent); TEX. GOV’T CODE §§ 560.001, .002 (prohibiting a governmental body from disclosing a person’s biometric identifiers except in limited circumstances).

<sup>9</sup>Whether any particular piece of technology is capable of redacting an audio visual recording sufficiently enough for a release of the recording to comply with the rules on confidentiality requires the finding of facts, which is beyond the purview of the opinion process. *See* Tex. Att’y Gen. Op. No. KP-0397 (2022) at 3.

**S U M M A R Y**

Chapter 406 of the Government Code provides for notaries public, including online notaries. A court would likely conclude that the law does not prohibit a notary public performing an online notarization from including additional information such as a barcode within the electronic notarial certificate or elsewhere on the document, provided doing so does not interfere with the notary's obligations under subsections 406.108(b)(1) and 406.109(d) of the Government Code, or the Texas Secretary of State's rules.

To the extent an online notary public charges a \$5 fee for identification verification and document storage associated with performing an online notarization and is not otherwise charging online notarization fees that would cause the \$25 maximum fee for online notarization to be exceeded, a court would likely conclude that the notary public may charge \$5 for identification verification and document storage pursuant to section 406.111. At the same time, a court is unlikely to conclude that a catch-all fee in subsection 406.024(a)(11) for "notarial acts not provided for" was intended to encompass components of the online notarization process such as identity verification and document storage.

While chapter 406 and the Secretary's rules do not expressly provide for emailing a record of an online notarization, a court would likely conclude that any release of an audio visual recording containing the presentation of an identification card or credential would require the removal of biometric information as well as the entire image of the identification card or credential, not just the numbers on the card or credential. Otherwise, a notary public must obtain the consent of the person whose identity is being established before releasing a record of an online notarization containing those items, whether by secure email or otherwise.

Very truly yours,



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