



# DISTRICT ATTORNEY'S OFFICE

33<sup>rd</sup> & 424<sup>th</sup> Judicial Districts

COUNTIES OF

BLANCO • BURNET • LLANO • SAN SABA

FILE # RQ-0126-KP  
I.D. # 48072

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OPINION COMMITTEE

September 6, 2016

**RQ-0126-KP**

Office of the Attorney General  
Attention Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548  
Via Email: [Opinion.Committee@texasattorneygeneral.gov](mailto:Opinion.Committee@texasattorneygeneral.gov)

*Request for Attorney General Opinion*

Dear Chairmen and Members of the Committee:

Recently a voter in my district asked me to seek an opinion from the Texas Attorney General regarding certain voting requirements and recording requirements for the election. After speaking with the citizen, I agree that answers to these questions would be important to future elections in Texas, and especially important to our election in November 2016. Furthermore, numerous news agencies recently reported the attempted computer hacking into the voting systems of two states. This type of incident clearly emphasizes the need for the utmost security of our voting systems as well as the necessity for checks and balances to ensure elections are conducted fairly and accurately. Therefore, I am respectfully requesting an opinion concerning the following questions and further request this process be expedited so we may have an answer prior to the November election if possible.

On September 1, 2016 I received notification of my request for an Opinion from the Attorney General in RQ-0126-KP. Upon review I have determined I would like to amend the second question as follows with the changes indicated by underlined italicized print:

II. Does the Texas Election Code require the Elections Judge at each polling location to print, sign and return to the County Election Officers a tally list and precinct returns recording the number of votes for each candidate for early voting results as well Election Day results?

The modified request for opinion is attached in its entirety to this email transmission.

Sincerely,

A handwritten signature in black ink that reads "Wiley B. McAfee".

Wiley McAfee  
District Attorney for 33<sup>rd</sup>/424<sup>th</sup> Judicial Districts

- I. **Are electronic voting systems used by counties in the State of Texas required to store (and by implication be able to print those images) an image of the ballot that contains the items listed in Chapter 52 of the Election Code, including a number assigned to each individual ballot, the nature and date of the election, the designation of "OFFICIAL BALLOT", and a voting square to the left of the candidate's name?**

Section 128.001 of the Texas Election Code provides in part as follows:

Sec. 128.001. COMPUTERIZED VOTING SYSTEM STANDARDS. (a) The secretary of state shall prescribe procedures to allow for the use of a computerized voting system.

The procedures must provide for the use of a computerized voting system with:

- (1) multiple voting terminals for the input of vote selections on the ballot presented by a main computer; and
- (2) a main computer to coordinate ballot presentation, vote selection, **ballot image storage**, and result tabulation." (*Emphasis added*).

Section 52.003 requires a candidate's name be placed on that ballot Section. 52.062 provides that ballots be numbered consecutively.

Section 52.063 requires the ballot designate the nature of the election and the date of the election.

Section 52.064 requires the ballot to have the words "OFFICIAL BALLOT" printed across the top of the ballot.

Section 52.070 requires a square be placed on the ballot to the left of the candidate's name on the ballot.

A definition of "image of a ballot" or "ballot image" does not appear in Section 1.005 (Definitions) section of the Texas Election Code. Section 1.003, Texas Election Code, provides the Code Construction Act (Ch. 311 Texas Government Code) applies to the Election Code. Therefore, pursuant to Section 311.011(a), Texas Government Code, "Words and phrases shall be read in context and construed according to the rules of grammar and common usage."

Merriam-Webster's online dictionary, <http://www.merriam-webster.com/dictionary/image>, defines "image" as "a reproduction or imitation of the form of a person or thing;" or alternatively, as "an exact likeness."

The Secretary of State's website defines ballot image on his website under the Glossary of Election Terminology as "The ballot as *it appears* on a direct recording electronic (DRE) voting system." (*Emphasis added.*) There is no citation as to the authority for this definition and the writer has found no definition in either the election code or administrative code of this State.

The use of the terms "as it appears" would indicate the Secretary of State has defined a ballot image as what the voter sees or reads when in the ballot booth casting a vote. If a ballot image were to refer to some other electronic form of the ballot, the definition would logically refer to "as stored" or "as recorded" on the electronic voting system.

Therefore, if the ballot is required to contain the various items detailed above, it would logically follow that a "ballot image" as required by Texas Election Code 128.001 would require those same items be contained in a "ballot image" or "an exact likeness" of the ballot. Such an image is critical to the ability to accurately provide a recount and ensure the integrity of any given election.

Texas Election Code Sec. 213.007(a) provides as follows:

"On presentation by a recount committee chair of a written order signed by the recount supervisor, the custodian of voted ballots, voting machines or test materials or programs used in counting electronic voting system ballots shall make the ballots, machines, or materials or programs, including the records from which the operation of the voting system may be audited, available to the committee."

From the clear language of the statute regarding the Conduct of Recount, Chapter 213, Texas Election Code, it appears the ballot images are necessary for the recount committee.

Therefore, it follows, that in order to be available to the committee each ballot image would have to be printed, or presented in some visible form to the committee rather than digitally stored as ballot totals.

**II. Does the Texas Election Code require the Elections Judge at each polling location to print, sign and return to the County Election Officers a tally list and precinct returns recording the number of votes for each candidate for early voting results as well Election Day results?**

Section 65.004, Texas Election Code provides:

“Three original tally lists shall be maintained at the polling place to record the number of votes received for the candidates and for and against the measures voted on.” Section 65.005(c) further provides in part “...After verifying that the three lists are in agreement, each counting officer shall sign the list that the officer has kept.” A reading of these statutes implies a list of the number of votes received by each candidate be printed and signed upon verification for each polling place, and then returned to county election officials. The statutes do not distinguish between early voting and election day results and therefore, appear to require a tally list at each stage of the election.

**III. What is the remedy at law if an elections administrator excludes a poll watcher’s access to any of the authorized activities provided in the Texas Election Code?**

Sec. 33.056 of the Texas Election Code provides as follows:

“OBSERVING ACTIVITY GENERALLY. (a) Except as provided by Section 33.057, a watcher is entitled to observe any activity conducted at the location at which the watcher is serving. A watcher is entitled to sit or stand conveniently near the election officers conducting the observed activity.

(b) A watcher is entitled to sit or stand near enough to the member of a counting team who is announcing the votes to verify that the ballots are read correctly or to a member who is tallying the votes to verify that they are tallied correctly.

(c) A watcher is entitled to inspect the returns and other records prepared by the election officers at the location at which the watcher is serving.

(d) A watcher may not be prohibited from making written notes while on duty. Before permitting a watcher who made written notes at a precinct polling place to leave while the polls are open, the presiding officer may require the watcher to leave the notes with another person on duty at the polling place, selected by the watcher, for retention until the watcher returns to duty.”

Additionally, the Election Code provides:

“OBSERVING SECURING OF VOTING SYSTEM EQUIPMENT BEFORE ELECTION. (a) A watcher appointed to serve at a polling place in an election using voting system equipment that is required to be delivered to the polling place in a secured

condition is entitled to observe the inspection and securing of the equipment in the jurisdiction of the authority responsible for distributing election supplies to the polling place at which the watcher is appointed to serve.

(b) On request of a watcher, the authority responsible for distributing the election supplies shall inform the watcher of the place, date, and hour of the inspection. A watcher shall be admitted on presentation of a certificate of appointment. The person admitting the watcher shall return the certificate to the watcher.” Section 33.059, Texas Election Code.

There are various safeguards in place to allow poll watchers to observe activities during elections in order to protect the integrity of the process. However, there is concern that if an Elections Administrator refused to allow these safeguards to be in place and denied a poll watcher access to observe authorized activities, the result could harm the integrity of the process and the election would have already taken place. Therefore, there might be no adequate remedy for a violation of this statute other than the individual criminal sanction provided in Sec. 33.061 of the Texas Election Code. The remedy against the individual would punish that person but not provide protection for the election itself. Is there any remedy to protect the election as well as punish the individual obscuring the poll watcher’s ability to perform their responsibilities?