First Assistant
Corby Holcomb
Criminal Division Chief
Laura Gorman
Civil Division Chief
Ariane Flores
Director Juvenile Division
Michael Cox
Director Family Justice
James Saint
(Board Certified Child Welfare Law)

DEE HOBBS

COUNTY ATTORNEY

405 M.L.K. Street #7
Georgetown, Texas 78626

General Counsel - Jason Nassour

Office Administrator
Stephanie Lloyd
Chief of Staff
Peggy Vasquez
Chief Investigator
Rudy Gonzalez
Evidence Director
Michael Etheridge
Victim Services Director
Wren Seabolt

Phone (512) 943-1111 • www.wilco.org/countyattorney • Fax (512) 943-1120

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RQ-0520-KP

MEMORANDUM

To: Office of the Attorney General, Opinion Committee

From: Dee Hobbs, County Attorney
Williamson County Attorney's Office

Date: November 3, 2023

Subject: Request for Texas Attorney General Opinion

I. Introduction

On **October 26**, **2023,** the Williamson County Attorney's Office received a request pursuant to the Request for an Attorney General Opinion of Section 402 of the Texas Government Code, from **Judith Ritchie** (hereinafter, "the requestor") seeking assistance in seeking an Attorney General Opinion on behalf of the Williamson County Elections Department, regarding whether the physical spoiled ballots must be shared with poll watchers who submit a request for the spoiled ballots.

Pursuant to Section 402.042(c), Texas Government Code, this brief is submitted to seek a ruling regarding the applicability of the below provision(s).

II. Applicability of Section 66.058 of the Elections Code—Preservation of Precinct Election Records

Section 66.058 of the Election Code provides in pertinent part:

(a) Except as otherwise provided by this code, the precinct election records shall be preserved by the authority to whom they are distributed for at least 22 months after election day.

(b) For 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. On the 61st day after election day, the general custodian of election records may:

(1). require a person who has possession of a key that operates the lock on a ballot box containing voted ballots to return the key to the custodian; and

(2). unlock the ballot box and transfer the voted ballots to another secure container for the remainder of the preservation period.

(b-1) Except as permitted by this code, a ballot box or other secure container containing voted ballots may not be opened during the preservation period.

Section 1.012 of the Election Code addresses public information within election records.

(a) Subject to Subsection (b), an election record that is public information shall be made available to the public during the regular business hours of the record's custodian.

(b) For the purpose of safeguarding the election records or economizing the custodian's time, the custodian may adopt reasonable rules limiting public access.

(c) Except as otherwise provided by this code or Chapter 552, Government Code, all election records are public information.

(d) In this code, “election record” includes:

(1) anything distributed or received by government under this code;

(2) anything required by law to be kept by others for information of government under this code; or

(3) a certificate, application, notice, report, or other document or paper issued or received by government under this code.

(e) Except as provided by Subsections (f) and (g), an election record shall be available not later than the 15th day after election day in an electronic format for a fee of not more than $50.

(f) Beginning on the first day after the date the final canvass of an election is completed, the general custodian of election records shall make available for public inspection election records that are:

(1). images of voted ballots, if a county maintains images of voted ballots; or

(2). cast vote records.

(g) Beginning on the 61st day after election day, the general custodian of election records shall make available for public inspection election records that are original voted ballots.

(h) The custodian shall adopt procedures to ensure the redaction of any personally identifiable information of the voter contained on a ballot before making the voted ballot available for public inspection.

The Williamson County Elections Department (hereinafter "Williamson County"), received a request for the physical spoiled ballots from an election. The current practice of Williamson County as it pertains to spoiled ballots is to provide the requestor with the form that lists all the spoiled ballots. The requestor is now wanting to see the physical spoiled ballots. Williamson County agrees that the spoiled ballots are in fact an "election record" as defined by Section 1.012 of the Election Code, as it is a record that was distributed or received by a government entity. This statute further provides that beginning on the 61st day after election day, the general custodian of election records shall make available for public inspection election records that are original voted ballots. (Tex. Elec. 1.012(g)).

Subsection (b) of section 66.058 requires that *voted ballots* and *ballot stubs* be preserved in a locked room in the locked ballot box or sealed envelope in which they are delivered to the general custodian of election records and that, "[e]xcept as permitted by this code, a ballot box containing voted ballots or an envelope containing ballot stubs may not be opened during the preservation period." *See also* Elec. Code §§ 213.007 (access to voted ballots for recounts), 221.008 (access to voted ballots for election contest), 1.013 (election records may be destroyed after preservation period unless election contest or criminal investigation or proceeding in connection with election is pending). The preservation period in the instant case is sixty-one days after the May 5, 2023 election. *See* Elec. Code § 66.058(a).

It would appear from the reading of both Section 66.058 and Section 1.012(g) that the elections administrator can make spoiled ballots available for inspection after the 61st day from election day. In Attorney General Opinion KP-0411, your office concluded, "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." Attorney General Opinion KP-0411 at 6; *see also* Elec. Code §§ 1.012(c), (d), 66.058(b-1). Thus, members of the public may inspect or obtain copies of the information during the 22-month preservation period, and the county may not withhold any of the information at issue under section 66.058 of the Election Code. Tex. Att'y Gen. Op. OR2023-18166 (2023).

Additionally, your office has distinguished spoiled ballots from other precinct election records. The spoiled and unused ballots are not required to be kept in a locked box as are voted ballots but are only required to be preserved for 61 days after the election and then may be destroyed. *See* Elec. Code § 1.013 (providing that election records may be destroyed after the prescribed period time). Information in ballot box no. 4, which contains the spoiled and unused ballots, may be preserved in that box or by any other method chosen by the custodian. *See* Elec. Code § 66.058(f). The general custodian of election records or the custodian's designee shall be present at all times when the records delivered in ballot box no. 4 are inspected. *See* Elec. Code § 66.057(b). Tex. Att'y Gen. Op. OR2001-2842 (2001). Section 66.058(b) of the Election Code specifically provides that voted ballots and ballot stubs must be maintained in a lock box but does not provide the same protection for spoiled and unused ballots, and therefore, spoiled and unused ballots are not confidential by law. Tex. Att'y Gen. Op. OR2001-2842 (2001)

III. Conclusion

For the foregoing reasons, Williamson County, on behalf of the Williamson County Elections Department, respectfully request the Texas Attorney General Opinions Division, issue an opinion on whether physical copies of spoiled ballots in ballot box 4 can be made available to the public after 61 days.

If you have any questions concerning this request, please feel free to call Ariane Flores, Civil Division Chief, Williamson County Attorney's Office. Thank you.

Sincerely,

Dee Hobbs

Dee Hobbs
County Attorney
Williamson County Attorney's Office
405 MLK Street, Box 7
Georgetown, Texas 78626
Tel: (512) 943-1111
Fax: (512) 943-1431