



**SENT VIA E-MAIL**

November 7, 2022

Chris Herren  
Chief, Voting Section  
Civil Rights Division  
4CON – Room 8.1815  
950 Pennsylvania Avenue, NW  
Washington, DC 20530  
[Chris.herren@usdoj.gov](mailto:Chris.herren@usdoj.gov)

Re: Texas Ballot Chain of Custody

Dear Mr. Herren,

The League of Women Voters of Texas and the Southern Coalition for Social Justice write to alert the Department of Justice to developments in Texas concerning the improper retention and preservation of election records, including voted ballots, in possible violation of federal law. We urge the Department to notify Texas election officials of the law on this issue to protect the integrity of the election.

On August 17, 2022, Texas Attorney General Ken Paxton issued an [advisory opinion](#) that purports to authorize under state law public access to voted ballots without regard to the 22-month window of ballot custody laid out in 52 U.S.C.S. § 20701. In issuing this opinion, Attorney General Paxton upended his office's longstanding interpretation of Texas law and made no consideration for the myriad of duties election administrators have with respect to ballot chain of custody within the 22-month preservation window provided by federal law. This sudden reversal has created confusion amongst both voters and election administrators and created a new and unexpected vulnerability in Texas's election system. Without clarity from the Department of Justice, these actions may result in serious, irreparable breaches of the ballot chain of custody, expose voters and election workers to threats of violence and intimidation, and perhaps even result in an election where the results are unknown and unknowable due to missing, tampered, or destroyed ballots. **Accordingly, we urge the Department of Justice to notify Texas counties and election administrators of their ongoing duties under federal law, to ensure that the integrity of Texas elections is maintained.**

The requirements of Title III of the Civil Rights Act of 1960, codified at 52 U.S.C.S. § 20701, are clear and unambiguous: every voted ballot in a federal election shall be retained and preserved for 22 months following such an election. These preserved ballots must be retained in their original format, and any person "who willfully steals, destroys, conceals, mutilates, or

alters” any such record is in violation of federal law.<sup>1</sup> These provisions of federal law serve an obvious and important purpose: ensuring that the results of any federal election are verified and verifiable, and that the records necessary to confirm election results remain intact and unaltered.

For decades, the Texas Attorney General and Secretary of State interpreted Texas law to mirror this understanding. A 1988 advisory opinion from the Texas Attorney General’s office held that ballots were required to remain confidential within the 22-month preservation period as a matter of both state and federal law, and that the Texas Public Information Act allowed access only after that 22-month preservation period.<sup>2</sup> The opinion reasoned that voted ballots were public records outside of the 22-month preservation period, but were required to remain confidential within the preservation period.<sup>3</sup> This understanding provided a workable framework for allowing public access to election records while protecting the reliability and certainty of federal elections in Texas. Attorney General Paxton even endorsed this understanding of as recently as August 12 of this year, relying on precisely the same provisions of Texas law to conclude that election records were “confidential for at least 22 months after election day.”<sup>4</sup>

Yet without warning, a mere five days later, the Attorney General reversed this settled understanding of Texas law by issuing an opinion that purported to make voted ballots public records, and thus subject to production and examination within the 22-month retention period contemplated by state and federal law.<sup>5</sup> The opinion makes little effort to reconcile or explain the rationale for the shift away from the 1988 interpretation of Texas law, simply writing in a footnote that “review by this office of the issues raised in that decision results in the opposite conclusion.”<sup>6</sup>

The Attorney General opinion purports to revolutionize the ballot custody scheme in Texas. Despite its focus on statutory interpretation, the opinion could have huge consequences on election administrators by making it extremely difficult to comply with both federal ballot custody requirements and the Texas Public Information Act. Yet the opinion makes no effort to reconcile these competing demands or account for the impacts on elections workers. For example, the opinion offers no limiting principle for the time in which voted ballots must be made available as public records, theoretically allowing for access as soon as the day after the ballots are cast.<sup>7</sup> **Such access would not only be entirely unworkable during the canvass and certification process, but potentially disastrous, as it exposes voted ballots to a serious risk**

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<sup>1</sup> 52 U.S.C.S. § 20702.

<sup>2</sup> Tex. Att’y Gen. Open Records Decision No. 505 (Sept. 2, 1988), <https://www.texasattorneygeneral.gov/sites/default/files/ord-files/ord/2020/ord19880505.pdf> (citing, e.g., Tex. Elec. Code § 66.058).

<sup>3</sup> *Id.* at 2.

<sup>4</sup> Tex. Att’y Gen. Open Records Decision No. 2022-24048 (Aug. 12, 2022), <https://www.documentcloud.org/documents/22267317-aug-12-2022-ag-tarrant> (citing, e.g., Tex. Elec. Code § 66.058).

<sup>5</sup> Tex. Att’y Gen. Op. No. KP-0411 (Aug. 17, 2022), <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/kp-Ballot%20Opinion.pdf>.

<sup>6</sup> *Id.* at 3 n.4.

<sup>7</sup> See Jessica Huseman, *Ken Paxton Bucks Legal Precedent and Secretary of State’s Advice in Letting Anyone Examine Ballots Right After Elections*, VOTEBEAT, Aug. 24, 2022, <https://texas.votebeat.org/2022/8/24/23320771/ken-paxton-ballots-public-records-election-security> (citing concerns of elections directors across Texas about the timeline on which ballots may be accessed under the opinion).

**of “theft, destruction, concealment, mutilation, or alteration” – in direct contravention of federal law.**<sup>8</sup> In the worst-case scenario, granting the kind of access authorized by the Attorney General’s opinion could result in the destruction or alteration of ballots before results have been lawfully certified, thus rendering those ballots uncountable and possibly rendering election results unknowable. And this is only one possible risk – the opinion leaves a whole host of concerns unaddressed and details unenumerated, delegating the task of applying the opinion to local election administrators and the Secretary of State at the same time it undermines a central component of the ballot chain of custody in Texas.<sup>9</sup>

This sudden reversal has resulted in a predictable yet equally sudden destabilization in this component of election administration in Texas. A flood of public records requests, initiated by parties who want to cast doubt on lawful election results across Texas, have already cited the opinion as legal authority for a vast range of requests.<sup>10</sup> These requests focus on large, diverse metro areas of Texas, where fringe election integrity groups have sought to investigate, overturn, or otherwise invalidate election results that they disagree with.<sup>11</sup> The release of the Attorney General’s opinion has served not only to fuel an atmosphere of doubt regarding Texas elections, but offer a potential avenue to overturn or invalidate those results.

Against this backdrop of uncertainty, **we urge the Department of Justice to reaffirm the unambiguous requirements of federal law.** The Department of Justice has issued clear guidance that 52 U.S.C.S. § 20701 applies to election audit activity.<sup>12</sup> But this guidance contemplates a post-certification election review, whereas the risks posed by a maximal interpretation of the Attorney General’s opinion are most dangerous pre-certification, before results can be ascertained and finalized. As the Department’s guidance aptly notes:

[W]here election records are no longer under the control of elections officials, this can lead to a significant risk of the records being lost, stolen, altered, compromised, or destroyed. This risk is exacerbated if the election records are given to private actors who have neither experience nor expertise in handling such records and who are unfamiliar with the obligations imposed by federal law.<sup>13</sup>

The undersigned respectfully submit that, without clarification from the Department of Justice, the Attorney General’s opinion creates precisely the risk contemplated in the Department of Justice’s July 2021 guidance. We urge the Department to publicly clarify that while the precise scope of the Texas Public Information Act is not an issue of federal law, the lawful ballot chain of custody is, and any interpretations of the Attorney General’s August 17 opinion that would result in “theft, destruction, concealment, mutilation, or alteration” of voted ballots are contrary to federal law and thus null and void.

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<sup>8</sup> 52 U.S.C.S. § 20702.

<sup>9</sup> Tex. Att’y Gen. Op. No. KP-0411 at 5.

<sup>10</sup> See Huseman, *supra* note 7 (citing dozens of requests received by Tarrant and Harris Counties shortly after the release of the opinion).

<sup>11</sup> *Id.*

<sup>12</sup> Department of Justice, *Federal Law Constraints on Post-Election “Audits”* (July 28, 2021), at 2–4, <https://www.justice.gov/opa/press-release/file/1417796/download>.

<sup>13</sup> *Id.* at 4.

We will remain in touch with reports of any violation of the proper ballot chain of custody that we hear of, whether under color of the Attorney General's opinion or otherwise. We are happy to discuss or offer further clarification at the Department's request.

Respectfully,

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