

The State of Texas



Forensic Audit Division
P.O. Box 13942
Austin, Texas 78711-3942
www.sos.state.tx.us

Phone: 512-475-2725
Fax: 512-475-2811
Dial 7-1-1 For Relay Services

John B. Scott
Secretary of State

October 18, 2022

Via Electronic Mail

Clifford Tatum
Harris County Elections Administrator
1001 Preston
Houston, TX 77002

Re: Notice of Mobile Ballot Boxes from the 2020 General Election lacking proper chain-of-custody and request for corrective action.

Dear Mr. Tatum,

We are writing to inform you that our ongoing audit of Harris County has revealed serious breaches of proper elections records management in the handling of Mobile Ballot Boxes (MBBs) during the November 2020 General Election. The urgency of this letter is to ensure that none of these process issues occur in the upcoming November 2022 General Election.

As you are aware, the Forensic Audit Division (FAD) of the Texas Secretary of State's Office has been conducting an audit of Harris County. Throughout the audit process, we have endeavored to complete the audit in the most efficient manner possible and to do so with the full cooperation of the counties. While we have had the benefit of cooperatively working with the other three counties subject to the audit, we cannot say the same of our experience working with your predecessor. The previous Harris County Elections Administrator failed to respond to our initial requests for basic information in our December 10, 2021 letter, forcing our team to take extraordinary steps to obtain responsive records. The lack of response forced our team to make at least seven trips to Harris County to review paper records in the Election Technology Center warehouse. We were not provided an inventory of the records nor were we given the opportunity to speak with Harris County Elections staff.

We are thankful for the efforts you have made to assist our audit team since you began your new role. When we presented preliminary findings to you on October 4, 2022, you made staff available for the first time and provided us with some of the electronic records that we had requested since June 2022. Just last week we received long-requested records that resolved some of our concerns. But what's troubling is that the records you recently provided still leave many questions unanswered. Given that early voting for the November 2022 election begins in a matter of days, there is an immediate need for us to inform you of our preliminary findings.

We have identified the following issues in the November 2020 General Election:

- There are at least 14 polling locations where MBBs¹ included in the Tally program do not have proper chain-of-custody. Multiple MBBs were created for these locations but there is no indication as to why one MBB was used instead of another. Harris County must maintain records that indicate why electronically stored ballots were either used or discarded. *See* TEX. ELEC. CODE §§ 1.012²-1.013,³ 66.002,⁴ 129.051.⁵ For the November 2022 General Election, Harris County must document when and if any vDrives⁶ are duplicated or otherwise created by Central Count, explain the reasons why, and document the transfer of custody for all vDrives. *See* TEX. ELEC. CODE § 129.051.
- Pollbook and provisional voting data provided by Harris County do not match the number of cast vote records (CVRs) on certain MBBs. Although we continue to investigate this issue, basic election reconciliation between pollbooks and ballots should be done and documented. *See* TEX. ELEC. CODE § 127.131.
- Although we are still investigating, Harris County does not appear to have maintained systems to read the MBBs or otherwise recover CVRs stored within. Without these systems, we are not able to review the data on the MBBs, some of which were used at the extralegal drive-through voting locations. Harris County is required to maintain these records in a readily accessible format during the 22-month preservation period pursuant to state and federal law. TEX. ELEC. CODE §§ 66.002, 66.058(a); *see also* 52 U.S.C. § 20701 (for certain Federal Elections such as the 2020 General Election).
- At a minimum, meaningful records retention should allow for access to all election records. Harris County has not met this minimum for the records related to the November 2020 General Election. Harris County should maintain, and be able to produce, records for the November 2022 General Election in numbered boxes with an inventory of contents for each box.⁷ *See* TEX. ELEC. CODE §1.012 (“an election record that is public information *shall* be made *available* to the public...”) (emphasis added); 2022 Tex. Op. Att’y Gen. KP-0411; *Webster’s Third New Int’l Dictionary* 150 (2002) (defining “available” as “accessible” or “may be obtained”).

¹ An MBB stores cast vote records (CVRs) and is the removable media storage device that is ultimately read and tabulated.

² “Election record” includes anything distributed or received by government under the Election Code; anything required by law to be kept by others for information of government under this code; or a certificate, application, notice, report, or other document or paper issued or received by government under this code.

³ Observing election records include “voted ballots, election returns, other election records, or other records that are preserved under the Election Code.”

⁴ Defining election records to include “voted ballots.”

⁵ “The general custodian of records *shall* create and maintain an inventory of all electronic storage media...*shall* develop a procedure for tracking the custody of each electronic information storage medium from its storage location, through election coding and the election process, *to its final post-election disposition and return to storage...*require[s] two or more individuals to perform a check and verification check *whenever a transfer of custody occurs.*” (emphasis added).

⁶ Harris County’s current voting system uses vDrives instead of MBBs.

⁷ *See* Chain of Custody Best Practices, *Texas Secretary of State Annual Election Law Seminar* (August 2022).

Please verify to us in writing within five days that Harris County will take appropriate actions to ensure that any of the above issues will not occur during the November 2022 election.

Background

On December 10, 2021, our office sent a letter to the four counties subject to audit for the 2020 General Election that requested, “A list of Early Voting or Election Day polling locations that had a discrepancy of one percent or more between the number of voters that checked in to the number of votes cast at that location.” In essence, this was a request for documentation of standard polling location reconciliation that should be conducted in every election. Although the other counties provided substantive responses, Harris County replied on December 21, 2021, that, “Our office has gathered information and is in the process of comparing for any percentage discrepancies.” Despite continued requests from our office, Harris County has never provided a list of discrepancies on a location-by-location basis.

From our discussions with the former Election Administrator, Isabel Longoria, and her deputy, Beth Stevens, it was our understanding that when Harris County upgraded their voting systems from the Hart InterCivic voting system that utilized eSlates as Direct Recording Electronic (DRE) devices after the 2020 General Election to the current Verity system, Harris County did not retain any equipment or computers that provide the relevant reports or, alternatively, can read MBBs from that election.

It is also our understanding that while the Hart voting system in use for the 2020 General Election is equipped with software that has the ability to generate multiple reports and audit logs, Harris County produced only a limited subset of these records. In response to our request for these documents in June 2022, Harris County stated they provided all reports they were able to produce. Given Harris County’s failure to respond to our December 2021 request and the absence of a fulsome 2020 electronic record, FAD has endeavored to compile on its own the previously requested list of polling locations for which there was a discrepancy of 1% or more. We have compared daily summary-of-voter totals, daily count tapes from the JBCs and eSlates, the Tally audit log, and other records in an attempt to piece together location-specific data. We have also reviewed the Central Count Packets, Early Voting Reconciliation Envelopes, and Election Day Reconciliation Packets. As you are aware, Harris County maintains their paper elections records in its warehouse. These records comprise the papers for hundreds of polling locations in over 500 boxes and plastic tubs of election records and Harris County has been unable to provide any inventory of the records. Nevertheless, in the course of our review, we found multiple discrepancies that cannot be explained from the records that were made available to us.

After speaking with you and your team, Harris County has now provided reports and records that were not produced previously. As recently as this past Friday, we have been informed that a backup of the election should exist. Harris County Elections staff has indicated that eSlates and JBCs are backed up which may lead to the recovery of additional information.

Harris County's Handling of eSlates for Certain Locations, Primarily Drive-Through Locations

The voting system Harris County used during the 2020 General Election comprised eSlates⁸ (the machine on which the voter inputs his vote) and a Judge's Booth Controller (controller or JBC). The CVR was captured on the JBC in the MBB and also stored internally on the eSlate. Drive-through voting was implemented for the 2020 General Election by Chris Hollins, formerly the Harris County Clerk.

It is our understanding that Harris County experienced difficulties recovering CVRs from the MBBs used in Harris County's extralegal experiment with drive-through voting. Harris County consulted Hart regarding its intention to use the equipment for drive-through voting, and Hart was under the impression the eSlates would remain connected to the JBC because there were well-known issues with bent or broken pins that had prompted Hart to design a protector.⁹ At the drive-through locations, however, the eSlates were routinely unplugged from the JBC, taken to a voter, and then plugged back into the JBC. Unsurprisingly, pins on the connectors to the JBCs were damaged. Consequently, the eSlates were not reliably transferring the CVRs to the MBB in the JBCs as would be the typical process, resulting in stranded votes. Additionally, it is our understanding that in some circumstances eSlates paired with a particular JBC had been inadvertently "crossed" or paired with a different JBC in the unplugging/replugging process. Damaged pins and crossed eSlates resulted in inconsistencies in the number of votes captured on an eSlate versus the number of access codes issued from a JBC. These issues rendered the tapes printed from the JBCs largely useless in the reconciliation process. In addition, although the eSlates from drive-through voting were transferred to other custodians to rescue the stranded ballots, there are no chain-of-custody documents showing the transfers. *See* TEX. ELEC. CODE § 129.051; Election Advisory 2019-23. The lack of chain-of-custody of the eSlates is especially concerning because Harris County was aware that the count of CVRs on the JBCs were inaccurate so the eSlates were by necessity going to be the official record of cast ballots.

FAD Discovered 14 Locations Where Multiple MBBs Were Created Without Explanation

For at least 14 locations,¹⁰ we have located records of voters voting at these polling locations and ballots being captured by the eSlates, JBCs, and—in turn—the MBBs. The MBBs from the polling locations, however, were not the MBBs ultimately tabulated. In some cases, there are chain-of-custody documents for the MBBs that were returned by election judges to Central Count, but the MBB is not located in the Central Count packet and there is no record to explain why the original MBBs from the polling location are not in the packet and were not tabulated. In addition, FAD has been able to locate missing MBBs in an alternate box or tub, though a chain-of-custody or documentation did not exist to explain why the original MBBs were not tabulated or how Harris County ensured the votes cast at those particular locations were tabulated.

⁸ In some circumstances, the voting device utilized was a disabled access unit (DAU). For ease of reference, the term eSlate will be used to refer to both interchangeably throughout.

⁹ *See also* Appendix A: Hart Voting System Support Procedures Training Manual at 368 ("Bent or Recessed Connector Pins"); *id.* at 376 (describing procedure to install Booth Port Protectors and noting: "The pins on the outside of the eSlate and DAU eSlate booths are subject to damage. If damaged, the solution typically requires that the entire booth pigtail be replaced.").

¹⁰ List attached as Appendix B.

Having reviewed the recently provided material in hopes of establishing the connection between the MBBs tabulated with the votes cast at these locations, we are unable to do so for several locations. Unfortunately, even the audit logs do not reflect the creation of the MBBs ultimately tabulated or enable us to trace the votes tabulated back to the polling location without significant breaks in the chain-of-custody.

Among other deficiencies, chain-of-custody documentation¹¹ for the CVRs from these locations is lacking in the following respects: the disposition of the original MBBs from the JBCs; the transfer of the eSlates from one location to the next; the creation of MBBs associated with certain early voting locations; and why MBBs documented to be associated with particular drive-through voting locations were not the MBBs ultimately tabulated.

Pollbook and Provisional Data Provided by Harris County Do Not Match the Number of CVRs on the MBBs

Additionally, in reviewing the pollbook and provisional vote records provided to us, the number of CVRs for each of the MBBs identified as associated with a location described above show discrepancies between the expected CVRs and the CVRs that were tabulated. Last week, Harris County provided pollbook records with voter sign-ins from all Early Voting and Election Day locations. The number of voters checked in on the pollbook plus the number of provisional votes at a particular location should match the number of CVRs on an MBB associated with a particular location. This, however, is not the case. For example, the pollbook record from DTV-141U reflects 19,216 voters checked in on the pollbook. The provisional data provided reflects 99 provisional votes were cast at that location. The total expected number of CVRs on the MBB associated with this location is 19,315. Yet the actual number of CVRs contained on the MBB associated with this location is 19,716 yielding an excess of 401 CVRs. We are continuing to investigate this issue but we wanted to bring this to your attention to ensure reconciliations are done on a daily basis, or at a minimum at the end of early voting, to ensure this does not occur in the November 2022 Election.

Summary

FAD has identified at least 14 locations where chain-of-custody documentation is lacking at best and missing at worst. We also understand that Harris County has no current ability to read MBBs so we are unable to review the CVRs stored on the individual MBBs to verify the contents.

We appreciate the cooperation and assistance provided by the current Election Administrator and Harris County Elections staff. The integrity of our election processes is of utmost importance to your team and is evident in their response and efforts to explain to us what occurred in 2020. We also understand that processes and procedures have changed in Harris County since the November 2020 General Election, and that properly implementing chain-of-custody processes and documentation of the handling of ballots is now a top priority.

In light of the above, and in order to ensure that proper procedures for the handling of ballots and electronic media are followed, the Secretary of State's Office will be providing you the following resources:

- We will be sending a contingent of inspectors to the county to observe Central Count during the November 2022 election to ensure that Harris County establishes appropriate procedures and

¹¹ See TEX. ELEC. CODE § 129.051; Election Advisory 2019-23; and Appendix C: Hart Best Practices Guide (2009) at 100 (“Record receipt and movement of all equipment and MBBs on a chain-of-custody document.”).

follows them. These inspectors will perform randomized checks on election records, including tapes and chain-of-custody, and will observe the handling and counting of ballots and electronic media.

- The Texas Office of Attorney General has agreed to dispatch a task force to Harris County that will be available at all times during the election period in order to immediately respond to any legal issues identified by Secretary of State, inspectors, poll watchers, or voters.
- Election Security Trainers from the Secretary of State's Elections Division will be present to assist Harris County for the duration of the election period from early voting, to Election Day, and through tabulation.

Thank you again for your cooperation. Please contact me with any questions or concerns.

Best,

A handwritten signature in blue ink that reads "Chad Ennis". The signature is cursive and includes a long horizontal flourish at the end.

Chad Ennis
Director of the Forensic Audit Division
Office of the Secretary of State

Attachments(3)

CC:

Greg Abbott, Governor

Dan Patrick, Lieutenant Governor

Dade Phelan, Speaker of the House

Brent Webster, First Assistant Attorney General

Bryan Hughes, Chair, Senate Committee on State Affairs

Brian Birdwell, Vice-Chair, Senate Committee on State Affairs

Briscoe Cain, Chair, Elections Committee

Jessica Gonzalez, Vice-Chair, Elections Committee