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Integrity of Harris County Voter Roll Continues To Be At Risk

Texas SOS issues first election law opinion in five years due to mistakes by Harris County Voter Registrar
Comes on the heels of Voter Registrar Ann Harris Bennett disenfranchising 250+ voters in Baytown

HOUSTON – Senator Paul Bettencourt today presented an Opinion by the Texas Secretary of State, the first one released in five years, and sent a letter calling on the Harris County Registrar to follow the law as outlined by the highest election official in the state. The Opinion is regarding a voter challenge by Senate District 7 resident Alan Vera and the procedural mistakes made by Harris County Voter Registrar Ann Harris Bennett and Harris County Attorney Vince Ryan's office. Mr. Vera's challenge showed multiple examples of voter registrations at post office boxes, or commercial property addresses, which opens up the voter roll to fraud with people registered and voting in areas in which they do not live.

"The integrity of the voter roll is paramount to the entire electoral process," said Senator Bettencourt. **"My constituent, Mr. Vera, asked me to request this opinion and I agreed because the law is clear and his voter challenge should not have been thrown out."**

The challenge covered over 4,000 voter registrations as not meeting the residency requirements as stated in Section 1.015 of the Texas Election Code. Following the filing of the challenge, Harris County Voter Registrar, Ann Harris Bennett, erroneously put over 1,000 voters on the suspense list, creating serious confusion before the August Harris County Bond Election. The County Attorney's Office advised the challenge was not valid as it lacked "personal knowledge" that the registrations were inaccurate and ended the challenge.

"**The voter registration residency challenge that I filed should have activated a very simple, administrative process within the registrar's system as clearly laid out in the Texas Election Code,"** said Alan Vera. **"Instead, the process spelled out in the law was mishandled by the voter registrar and was further bungled by the Harris County Attorney. That is why I went to my State Senator to ask for help."**

The opinion from the Texas Secretary of State stated that "personal knowledge" could include "*…knowing from experience and observation that those (voter registration) addresses are commercial properties or other properties that are not generally residences…"* Given the opinion from the Secretary of State, Mr. Vera's challenge does meet the requirement of "personal knowledge" as required by the election code.

"Having people registered in bulk where they do not live opens up the opportunity for a candidate or party to pack a targeted district," added Harris County Clerk Stan Stanart. **"The voter roll should represent where people actually live."**

Most recently, as reported by Houston area media, 250+ residents in the City of Baytown could be given the wrong ballots in the November election as Ms. Bennett failed to update boundary lines to include recently annexed areas. Additionally, unanswered questions continue to remain about her court fight, spending taxpayer money, regarding her refusal to remove non-citizens from the voter roll. (https://bit.ly/2BC0wQI). **"Public confidence in the voter roll can only be restored by Voter Registrar Bennett properly following the law,"** concluded Senator Bettencourt.

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Rolando B. Pablos
Secretary of State

October 10, 2018

The Honorable Paul Bettencourt
Texas Senate
Capitol Office
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Election Law Opinion RP-1

Dear Senator Bettencourt:

This formal election law advisory opinion is in response to your letter dated August 30, 2018, requesting this Office's opinion on matters relating to voter-initiated voter registration challenges based on residency in Texas.

Specifically, you requested the opinion of this Office concerning a voter registration challenge filed by Alan D. Vera, a resident of Harris County, to the Harris County Voter Registrar. As described in your letter, Mr. Vera has challenged over 4,000 voter registrations based on an allegation that the voters' residences given are invalid and do not meet the requirements of a residence as defined by the Texas Election Code (the "Code"). According to your letter, the Harris County Attorney's Office advised the Harris County Voter Registrar to deny the challenge based on their opinion that Mr. Vera does not have personal knowledge that the registration of each voter is inaccurate. As further described in your letter, although the Harris County Voter Registrar had begun to issue notices to those voters challenged, the county would not place those voters who do not respond to the notice onto the suspension list, based on the advice of the Harris County Attorney's Office.

You ask that the following questions be addressed:

1. Whether the challenge submitted was a valid challenge under the Texas Election Code.

2. Whether a voter registrar has any leeway in implementing the challenge; and

3. Whether the advice given by the Harris County Attorney's Office was incorrect on both counts.

Please note that this Office is not in a position to resolve questions of fact. Accordingly, I will interpret your request to seek an opinion on the following legal questions:

1. What does the term "personal knowledge" mean under Sections 16.091 and 16.092 of the Code?

2. Is it discretionary or mandatory for a voter registrar to act on a sworn statement which is facially compliant with Sections 16.091 and 16.092 of the Code?

I will provide answers to these legal questions in the context of this formal election law opinion, which is rendered under my authority in Section 31.001(a) of the Texas Election Code to obtain and maintain uniformity in the interpretation of election laws:

I. BACKGROUND

Sections 16.091, 16.092, 16.0921, and 16.093 of the Texas Election Code provide, in relevant part:

§16.091. Right To Challenge Registration

> Except as otherwise provided by this subchapter, a registered voter may challenge the registration of another voter of the same county at a hearing before the registrar.

§16.092. Sworn Statement Required

> A voter desiring to challenge a registration must file with the registrar a sworn statement of the grounds for the challenge that:
>
> (1) identifies the voter whose registration is being challenged; and
>
> (2) states a specific qualification for registration that the challenged voter has not met based on the personal knowledge of the voter desiring to challenge the registration.

§ 16.0921. Confirmation Notice on Challenge Based on Residence

(a) Except as provided by Subsection (c), on the filing of a sworn statement under Section 16.092 alleging a ground based on residence, the registrar shall promptly deliver to the voter whose registration is challenged a confirmation notice in accordance with Section 15.051.

(b) If the voter fails to submit a response to the registrar in accordance with Section 15.053, the registrar shall enter the voter's name on the suspense list.

(c) The registrar may not deliver a confirmation notice resulting from a sworn statement filed after the 75th day before the date of the general election for state and county officers until after the date of that election. This subsection does not apply to a person who submits a registration application after the 75th day and prior to the 30th day before the general election for state and county officers.

§ 16.093. Hearing on Challenge

(a) On the filing of a sworn statement under Section 16.092 alleging a ground other than residence, the registrar shall schedule a hearing on the challenge. The hearing procedure does not apply to an allegation of a ground based on residence…

TEX. ELEC. CODE §§ 16.091; 16.092; 16.0921; 16.093.

"[R]esidence" is defined in Section 1.015 of the Code as follows:

> §1.015. Residence
>
> (a) In this code, "residence" means domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence.
>
> (b) Residence shall be determined in accordance with the common-law rules, as enunciated by the courts of this state, except as otherwise provided by this code.
>
> (c) A person does not lose the person's residence by leaving the person's home to go to another place for temporary purposes only.
>
> (d) A person does not acquire a residence in a place to which the person has come for temporary purposes only and without the intention of making that place the person's home.
>
> (e) A person who is an inmate in a penal institution or who is an involuntary inmate in a hospital or eleemosynary institution does not, while an inmate, acquire residence at the place where the institution is located.

TEX. ELEC. CODE § 1.015.

Specifically, a voter wishing to challenge the registration of another voter must deliver a sworn statement of the grounds for the challenge to the voter registrar of the county in which the voter is registered "based on the personal knowledge of the voter desiring to challenge the registration." TEX. ELEC. CODE §§ 16.091 and 16.092; *see also* Elec. Law Op. Sec'y State DAD-73 (1983) (interpreting historical Texas Election Code procedure(s) to follow when a voter's registration is challenged). This "sworn statement" does not need to be limited to one voter. Instead, multiple voters may be challenged in a single "sworn statement" if the challenging voter's sworn statement (1) properly identifies each challenged voter; and (2) states a challenge, based on personal knowledge, that each challenged voter has not met a specific qualification for remaining registered. *See* Elec. Law Op. Sec'y State DAD-73 (1983).

"Personal knowledge" is not defined in Section 16.092 of the Code, nor is it defined elsewhere in the Code. It has been defined by Texas courts and other authorities in various contexts to include information which is based on one's observation and/or experience, and can include "logical conclusions based on underlying facts" and knowledge derived from various sources. *See, e.g.*, *In re DuPont de Nemours & Co.*, 136 S.W. 3d 218, 226 (Tex. 2004) ("[A]n affiant's acknowledgement of the sources from which he gathered his knowledge does not violate the personal knowledge requirement") (internal citation omitted); *Willet v. Cole*, 249 S.W.3d 585, 592 (Tex. App.—Waco 2008) (In election contest to determine eligibility of voters, witnesses who had "been to both [address where voters were alleged to actually reside and vet clinic where voters were listed as residing in voter registration records]" could "testif[y] that the [voters whose eligibility was being challenged] did not live, reside, sleep, or stay at the vet clinic."); *1001 McKinney Ltd. v. Credit Suisse First Bos. Mortg. Capital*, 192 S.W.3d 20, 27 (Tex. App.—Houston [14th Dist.] 2005) (finding personal knowledge of affiant where affidavit "contain[ed] logical conclusions based on underlying facts."); Black's Law Dictionary (10th ed. 2014) (defining "personal knowledge" as "[k]knowledge gained through firsthand observation or experience, as distinguished from a belief based on what someone else has said").

For challenges filed under Sections 16.091 and 16.092 of the Code alleging a ground based on residence, the voter is not entitled to a hearing. *See* TEX. ELEC. CODE § 16.093. Instead, Section 16.0921 of the Code provides that the registrar shall, "promptly", "on the filing of a sworn statement" which is facially compliant with Section 16.092(1) and (2) of the Code and "alleg[es] a ground based on residence", deliver to the challenged voter's "last known address" a confirmation notice in accordance with Sections 15.051 and 15.052 of the Code. TEX. ELEC. CODE §§ 15.051; 15.052; 16.092; 16.0921. The "last known address" includes any current residence and mailing address the voter has on file. TEX. ELEC. CODE § 15.051(c).

This confirmation notice includes, among other things, that "the voter is subject to submission of a statement of residence before the voter may be accepted for voting in an election held after that deadline", and also includes an official confirmation notice response form for the voter to mail, which is postage prepaid and preaddressed for delivery to the registrar. TEX. ELEC. CODE § 15.052. The voter registrar may not send out these confirmation notices in response to sworn statements filed after the 75th day before the date of the general election for state and county officers, except for challenged voters who submit registration applications after the 75th day and prior to the 30th day before the general election for state and county officers. TEX. ELEC. CODE § 16.0921(c).

Voters whose registrations were challenged shall submit a written response to the notice that confirms the voter's current residence and provides all of the information "a person must include in an application to register to vote under Section 13.002." This written response includes, but is not limited to (if the voter does not have possession of it), the postage prepaid, preaddressed official confirmation notice response form included with the notice. *See* TEX. ELEC. CODE §§ 15.053; 16.0921(b). Alternatively, the voter may confirm the voter's current residence by providing a statement of residence the next time the voter votes in person, or, if applicable, by mail. TEX. ELEC. CODE §§ 15.053; 16.0921(b). The voter will also be told in the confirmation notice that the voter's registration is subject to cancellation if the voter fails to confirm the voter's current residence either by the written response or through a statement of residence at the polls (or with a mail-in ballot if applicable) before November 30 following the second general election for state and county officers that occurs after the date the confirmation notice is mailed.

See TEX. ELEC. CODE §15.052(a)(2). In other words, the voter is put on the "suspense list" until the earlier of two, bi-annual, general elections or the voter submitting the written statement or the statement of residence at the polls (or with a mail-in ballot if applicable). While the voter is on the suspense list, even if the voter does not provide the written response contemplated by Section 16.0291(b) of the Code, the voter is not precluded from voting a full, regular ballot in the precinct in which the voter is seeking to vote if the voter submits the statement of residence at the polls (or with the voter's mail-in ballot, if applicable), and the voter's residence on the statement of residence is either the voter's residence address listed on the voter rolls or within the county in which the voter is seeking to vote. *See* TEX. ELEC. CODE §§ 15.112; 63.0011(b). If the voter has moved out of the county, for example, the voter may still be able to vote a limited ballot. *See* TEX. ELEC. CODE §§ 112.002; 112.004. In either case, if the voter has moved, the statement of residence or the limited ballot application, if applicable, will update the voter's residence address for purposes of voter registration to their current address. TEX. ELEC. CODE §§ 63.0011(b); 112.002(e).

The voter registrar cannot question the voter's response to the confirmation notice or statement of residence. Accordingly, if the voter responds in the written statement or the statement of residence that the voter does in fact reside at the address listed in the voter's registration, the voter is not suspended.

II. ANALYSIS

1. *"Personal knowledge" under Section 16.092 of the Code could include knowledge gained from experience and observation*

It is the opinion of this Office that "personal knowledge" under Section 16.092 of the Code could include a voter (1) knowing from experience and observation the registration addresses of various voters; and (2) knowing from experience and observation that those addresses are commercial properties or other properties that are not generally "residences" as defined by Section 1.015 of the Code. If a voter, from experience and observation, knows that a particular address which a voter lists as a residence address is the address of a penal institution, that is sufficient "personal knowledge" from which to challenge the residency of individuals registered there, as Section 1.015(e) of the Code explicitly prohibits the use of a penal institution as a voter's registration address.

This Office notes that questions of residency are to be determined "in accordance with the common-law rules, as enunciated by the courts of this state, except as otherwise provided by this code." TEX. ELEC. CODE § 1.015(b). This Office also recognizes that as to a voter's residence, "the presumption is in favor of the voter's own assessment of the facts and his or her intent." *See* Elec. Law Op. Sec'y State GSC-1 (2004). Accordingly, this Opinion does not determine whether a voter could or could not reside at a particular location (with the exception of penal institutions, which are explicitly prohibited as serving as residences for voter registration purposes under Section 1.015(b) of the Code), and it is not this Office's position that a voter could never, for example, reside at a church.

It is precisely because of the fact-specific, fluid definition of "residency" in the Code that the Code permits a voter to file such a statement based on personal knowledge gained through "observation" and "experience" that, for example, certain addresses are not generally residential.

2. ***It is mandatory, not discretionary, for a voter registrar to act "promptly" on a sworn statement challenging residency which is facially compliant with Sections 16.091 and 16.092 of the Code***

Once a facially compliant "sworn statement" is filed, Section 16.0921(a) of the Code imposes a mandatory, not discretionary, duty on the registrar, as it uses the word "shall." *See* TEX. ELEC. CODE § 16.0921(a) ("[O]n the filing of a sworn statement under Section 16.092 alleging a ground based on residence, the registrar *shall* promptly deliver to the voter whose registration is challenged a confirmation notice in accordance with Section 15.051.") (emphasis added). Accordingly, a plain reading of Section 16.0921 of the Code does not provide the voter registrar discretion regarding whether to deliver a confirmation notice to voters whose registrations are challenged in a sworn statement that is facially compliant with Section 16.092 of the Code.

Moreover, while there is a prohibition from delivering a confirmation notice to a voter in connection with a sworn statement "filed after the 75th day before the date of the general election for state and county officers until after the date of that election" pursuant to Section 16.0921(c) of the Code, this limit is based on the filing date of the sworn statement and nothing else. Accordingly, so long as the sworn statement is "filed" by the voter prior to the 75th day, the notices must be sent out "promptly", even if after the 75th day before the election.

III. CONCLUSION

"[P]ersonal knowledge" under Section 16.092 of the Code can include a voter (1) knowing from experience and observation the registration addresses of various voters; and (2) knowing from experience and observation that those addresses are commercial properties or other properties that are not generally "residences" as defined by Section 1.015. Further, on the filing of a sworn statement alleging a ground based on residence that meets the requirements of Section 16.092 of the Code, filed prior to the 75th day before the general election for state and county officers, the voter registrar shall promptly deliver to the challenged voter a confirmation notice in accordance with Sections 16.0921 and 15.051 of the Code, even if such delivery occurs less than 75 days before the general election.

Sincerely,

Rolando B. Pablos
Texas Secretary of State

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October 26, 2018

Ms. Ann H. Bennett
Harris County Voter Registrar
1001 Preston,
Houston, Texas 77002

RE: *Texas Secretary of State Election Law Opinion RP-1*

Dear Ms. Bennett,

The Texas Secretary of State issued its first Election Law Opinion since 2013 to address procedural mistakes made by your office, the Harris County Voter Registration Department and the County Attorney's Office. As shown by the attached opinion from the Texas Secretary of State, these actions continue to put the integrity of the Harris County Voter Roll at risk. The procedures used, as it relates to voter residency challenges, are not correct and the legal advice given by the County Attorney's Office is contrary to the opinion of the State of Texas' highest election official, Secretary of State Rolando B. Pablos.

Background

Al Vera, a resident of Harris County, submitted a facially compliant challenge to the Harris County Voter Registrar in which Mr. Vera challenged over 4,000 voter registrations based on the residences given being invalid and not meeting the requirements of a residence as stated in Sec. 1.015 of the Texas Election Code. The procedure for a residency challenge is set in statute and is, according to the Texas Secretary of State, not subject to deviation.

However, according to various media accounts and statements made in the Harris County Commissioners Court, the County Attorney's Office stated that the challenge was not valid because as *"explained to Commissioners Court at its Tuesday meeting that to challenge a voter's registration under state law, the challenger must have personal knowledge that the registration is inaccurate. (Assistant County Attorney Douglas) Ray concluded that Alan Vera, the chairman of the Harris County Republican Party's Ballot Security Committee who brought the challenges in July, could not possibly know each of the 4,037 voters on his list. Therefore, the challenges cannot be considered,"*[i] The Harris County Attorney's Office advised the Harris County Registrar to deny the challenge based on <u>their opinion</u> that the challenger did not have personal knowledge of each voter.

Additionally, the Voter Registrar Department had begun to issue confirmation notices to those challenged and had placed some of those challenged on the suspense list. Accordingly, the County Attorney's Office is quoted as saying *"since we had determined or advised the registrar the challenge was not a valid challenge to begin with, we have also advised them to disregard whatever the result is of the return information they get from the challenge."*[ii] This is a clear violation of the procedure in the Texas Election Code and referenced in the Opinion.

After speaking with Mr. Vera and based on my knowledge gained as the former Harris County Voter Registrar, and in my capacity as a Member of the Texas Senate, I submitted a request for an official Opinion from the Texas Secretary of State concerning this incident.

On October 10, 2018, the Texas Secretary of State issued Election Law Opinion RP-1 which the following questions were answered:

1) What does the term "personal knowledge" mean under Sections 16.091 and 16.092 of the Code?
2) Is it discretionary or mandatory for a voter register to act on a sworn statement which is facially complaint with Sections 16.091 and 16.92 of the Code?

Secretary of State Opinion RP-1

As it relates to "personal knowledge", it is the opinion of the Texas Secretary of State that "personal knowledge" could include a voter (1) knowing from experience and observation that the registration addresses of various voters; and (2) knowing from experience and observation that those addresses are commercial properties or other properties that are not generally "residences" as defined by Section 1.015 of the Code. As stated in the Opinion *"[i]t is precisely because of the fact-specific definition of "residency" in the Code that the Code permits a voter to file such a statement based on personal knowledge gained through "observation" and "experience" that , for example, certain addresses are not generally residential.*[iii] Thus the conclusion of the Opinion **CLEARLY** states " '[P]ersonal knowledge' under Section 16.092 of the Code can include a voter (1) knowing from experience and observation the registration addresses of various voters; and (2) knowing from experience and observation that those addresses are commercial properties or other properties that are not generally "residences" as defined by Section 1.015 "[iv]

Importantly, as it relates to the issue of mandatory verses discretionary actions by a voter registrar once a sworn complaint is filed, according to the Opinion, the Code imposes a **MANDATORY** not discretionary, duty on the registrar. Again, as stated in the Opinion *"a plain reading of Section 16.092 of the Code does not provide the voter registrar discretion regarding whether to deliver a confirmation notice to voters who registrations are challenged in a sworn statement that is facially complaint with Section 16.092 of the Code."*[v]

Conclusion

It is imperative to maintain the public confidence in the Voter Roll in Harris County. In addition, Harris County Commissioners Court and the County officials handling election matters must be aware of what is contained in this Opinion. Mr. Vera's challenge should not have been denied. Again, once a facially compliant complaint is filed, the voter registrar has **NO** ability to deviate from the procedure stated in the code. It is imperative to maintain the public's confidence in the Voter Rolls of Harris County. The actions of the Harris County Voter Registration Office are not in accordance with the Election Code or the Opinion of the Texas Secretary of State. Public confidence in the Voter Roll must be restored.

Though any Opinion of the Texas Secretary of State is non-binding, they are drafted with the intent of stating what they opine a judge would rule if a case similar to the facts proposed in the letter was filed for judicial review. This Opinion, RP-1, will guide the other 253 counties in Texas to stay in compliance with the Texas Election Code. My question is will the Harris County Voter Registrar comply with the opinion issued by the Texas Secretary of State in this County? I await your answer.

Sincerely,

Senator Paul Bettencourt
Texas State Senator, District 7

CC: Harris County Judge Ed Emmett
Harris County Commissioner Rodney Ellis
Harris County Commissioner Jack Morman
Harris County Commissioner Steve Radack
Harris County Commissioner R. Jack Cagle
Harris County Clerk Stan Stanart
Harris County Attorney Vince Ryan
Harris County Tax Collector Ann H. Bennett

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[i] Despart, Zach. "Harris County attorney says 4,000 voter registration challenges were invalid." Houston Chronicle 28 August 2018. https://www.chron.com/news/houston-texas/houston/article/Harris-County-attorney-says-4-000-voter-13189294.php 29 August 2018.
[ii] Harris County Commissioners Court. (2018) Harris County Commissioners Court Hearing August 28, 2018 [streaming video] Retrieved from http://harriscountytx.swagit.com/play/08282018-892.
[iii] Tex. Sec. of State ELO-RP-1 (2018)
[iv] Id.
[v] Id.