December 21, 2017

The Honorable Bob Hall
Texas Senator, District 2
P.O. Box 12068
Austin, Texas 78711

Re: Hill County election investigation

Dear Senator Hall:

Earlier, you wrote this office making several inquiries into the March 2016 Hill County Republican Primary Election, where there were roughly 1,700 more ballots counted than voters who voted. The Office of the Attorney General (OAG) Criminal Investigations Division (CID) has completed its investigation into the matter and provides the following analysis to assist you and other members of the Legislature as you consider methods to ensure ballot integrity.

In short, we found that a series of negligent errors on the part of election officials caused the skewed ballot count. We uncovered no evidence that the acts were fraudulent despite violations of the Election Code occurring. Nonetheless, this case highlights that inadequate safeguards exist to prevent such errors in future elections. We encourage the Legislature to consider methods to prevent certification or acceptance of election results if ballots cast exceed voters who voted.

A synopsis of the allegations and investigative findings are essential to understanding the disparity between ballots and voters. We then answer the specific questions you posed.

I. Investigative Findings

On July 21, 2016, the OAG received an investigative referral from the Texas Secretary of State (SOS) regarding possible election fraud in Hill County. Specifically, a report filed with the SOS alleged that there were 1,743 more reported ballots counted during the March 1, 2016 Republican primary election than voters who voted (that there were 9,038 reported Republican ballots cast during the Republican primary election but only 7,301 reported voters).
A. Overcounting of 1,691 Absentee and Early Ballots

An examination of the initial election-day ballot count showed that the total Republican ballots counted was 9,038. Hill County Elections staff informed OAG investigators that Hill County’s election equipment vendor, Election Systems and Software (ES&S), performed an audit in July 2016 and determined the primary cause of the discrepancy between counted ballots and counted voters.

According to ES&S staff, the ballot reading machine had not been cleared following each batch of ballots read by the machine. The ballots were run through the machine in three batches. Absentee (mail-in) ballots were run through the machine first, followed by early voting in-person ballots, and finally the election-day in-person ballots. In Hill County, the ballot count is recorded after each batch is counted in the machine, and the machine is to be reset to zero. The machine keeps a log of every function it performs during the ballot count, and the log from March 1, 2016 showed that the machine was not reset following each batch of ballots. This resulted in the 510 absentee ballots being triple counted: (1) by themselves, (2) with the early voting ballots, and (3) again during the election-day ballots. Also, the 691 early voting ballots were double counted: (1) by themselves, and (2) again with the election-day ballots. The result was that 1,691 total ballots were overcounted. The explanation from ES&S is illustrated in CHART 1 below.

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<th>CHART 1: ES&amp;S Audit Explanation of Ballot Overcounting</th>
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<td>ES&amp;S Audit Explanation (*)&amp; Denotes Over Count</td>
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B. Forty-Six Net Additional Miscounted Ballots

The ES&S audit identified 1,691 overcounted ballots, which alone does not fully explain the discrepancy between ballots counted and voters who voted. The total number of ballots counted through the machine should have been 7,347 if it had not been for the triple counted absentee ballots and the double counted early voting ballots. However, the voter list only contained 7,301 voters, which is still 46 net more ballots than voters.
1. Ninety-Eight Democratic Voters Added to Republican List

A former Hill County elections staff member told OAG investigators that there were only two ways for a voter to be added to the voter list: (1) an early voter was added to the list automatically when their voter information label was printed, or (2) an election-day voter was added to the list automatically if their bar code was scanned from the election-day combination form (the form signed by the voter at the polls) after election day.

OAG investigators obtained an impound order and conducted an examination of the ballots from the March 2016 Republican and Democratic primary elections in a court of inquiry in the 66th Judicial District of Hill County. The number of Republican ballots counted during the examination hearing totaled 7,346, one ballot less than the 7,347 ballots that were counted on election day. The machine read 7,341 ballots, and five ballots were unreadable by the machine due to creases or rips in the ballot. The five unreadable ballots were either from the early voting or election day.¹ There were 510 absentee ballots counted on election day, but there were only 509 corresponding carrier envelopes for absentee ballots, and there were only 508 absentee ballots counted during the examination hearing. Investigators were unable to determine why either an additional absentee ballot was counted on election day or why carrier envelope with a ballot that was counted on election day is now missing. Using 7,346 as the true and correct number of Republican ballots cast (based upon 509 absentee ballots), investigators from the OAG sought to determine why 45 voters were left off the voter list and/or whether the 45 additional ballots were fraudulently counted by Hill County elections staff.

OAG auditors examined the names of voters who signed in to vote early, by mail, and on election day and utilized forensic auditing software to compare the combination forms (voter sign in sheets) with the voter list provided by Hill County. OAG auditors determined 98 voters who were on the voter list did not sign any combination form. OAG investigators later determined these were voters who voted in the Democratic primary election but were erroneously added to the Republican primary voter list.

2. Fifteen Absentee Voters Not Added to List and One Cancelled Absentee Ballot

OAG investigators then compared absentee ballot envelopes to the voter list. They found 15 absentee ballot envelopes that had not been added to the voter list by Hill County elections staff. OAG investigators also found one voter who cancelled the voter’s absentee ballot and voted in person but had not been added to the voter list. According to Hill County elections staff, absentee ballots have to be entered into the voter list manually because absentee ballots do not require an early voting label to

¹ Because early voting and election-day ballots were comiled during storage, investigators were unable to determine from which batch the five unreadable ballots originated.
be printed and they are not scanned on election day. Hill County elections staff did not provide a reason as to why they did not finish manually adding the 15 absentee voters to the voter list.

3. Eighty-Four Early Voters Not Added to List

According to statements given by Hill County Elections staff during the court of inquiry, Hill County elections staff printed the election-day combination form at about 10:00 am on February 26, 2016 in order to have enough time to print the lists and include them in the packets provided to the election-day precinct judges on March 1, 2016. The election-day combination form contained the printed notation “VOTED EARLY” in the signature box of each voter who voted early, so that they would be added to the voter list, and so they would not be allowed to vote a second time on election day. Voters who voted early after the list was printed were not marked with “VOTED EARLY,” and were thus not added to the voter list with the barcode scanner when the Hill County elections staff scanned the combination forms in the days following election day. None of the Hill County staff members who were interviewed knew why the early voters were not added to the list automatically when their voter information labels were printed during early voting. According to Hill County Elections staff, Hill County used software from a company called Votec during early voting and software from ES&S on Election Day. The Votec data was then added to the ES&S software to compile the voter list. OAG investigators found 84 voters from the Votec list that were not on the final voter list.

4. Thirty-One Provisional and Twelve Limited Voters Not Added to List

OAG investigators determined that voters who voted provisional or limited ballots (early or on election day) were not added to the voter list. Provisional and limited voters are often not in the county’s list of registered voters and may not have labels printed during early voting. For the same reason, they may not appear on the bar coded election-day combination form; therefore, they may not be scanned into the voter roll when they vote. OAG investigators checked the SOS Texas Elections Administration Management System (TEAM) database and confirmed that those voters, whose ballots were accepted, were added to the TEAM database manually by Hill County elections staff after the election (but not the Hill County voter list). In total, OAG investigators found 31 provisional and 12 limited ballots that were not added to the voter list.

C. Conclusion: Negligence Accounted for Discrepancy between Ballots and Voters

After accounting for the aforementioned groups of voters, OAG investigators identified 7,346 voters who signed into the polls and voted in the March 2016 Republican Primary Election, which exactly matched the number of ballots counted during the court of inquiry. See Chart 2 for a summary count of the voters.
The primary purpose of the investigation was to determine if anyone committed the offense of illegal voting by knowingly voting more than once in an election. *See Tex. Election Code § 64.012.* The OAG investigation, as detailed above, found no evidence to support the allegation that any ballots were fraudulently cast during the Republican primary election. Elections office personnel were negligent in both failing to zero the ballot counting machine and failing to check the voter list to reconcile the differences between the voter list and number of cast ballots. As illustrated in Chart 2, all of the voters left off of the voter list would have been included on the list if the following steps had been taken:

- All of the absentee ballots had been manually added to the voter list
- The voters who cast limited and provisional ballots had been manually added to the voter list
- All of the in-person voters had been added to the voter list using the barcode reader following election day instead of combining the Votec (early voting) list with the election-day list
- Voters who voted in the Democratic primary had not been erroneously added to the Republican primary voter list
- The person who cancelled their mail-in ballot and voted in person had been manually added to the voter list

**II. Legislative Inquiry**

Subsequent to the initial complaint and allegations referred from the Secretary of State, we received your letter regarding five issues in Hill County. The inquiries and our findings are as follows:
**Question 1:** Why was the discrepancy between the number of voters and the number of votes not identified prior to canvassing?

**Finding:** A former Hill County elections staffer stated that she noticed on election day that the number of total ballots looked higher than normal, and she notified the Elections Administrator. Hill County elections staff stated that election night was so busy that the Elections Administrator failed to remember to verify the numbers. A Republican Party official interviewed stated that he noticed that the numbers looked higher than normal, but he attributed the high numbers to higher than normal voter turnout due to the presidential primary election. Furthermore, there was not a comparison between the vote totals and voter list by Hill County elections staff or party officials prior to canvasing.²

**Questions 2–4:** What steps have the Secretary of State’s office taken to determine if this has occurred in other elections and gone undetected?

What procedures should the Secretary of State’s office put in place in the future to identify and correct such errors in future elections prior to canvasing results?

What election regulations or waivers to regulations from the Secretary of State’s Office did, or could have, contributed to this issue?

**Findings:** These questions are best left to the Texas Secretary of State’s office. As background, it is worth noting that in Texas, state agencies have no inherent substantive powers. See, e.g., Sexton v. Mount Olivet Cemetery Ass’n, 720 S.W.2d 129, 137 (Tex. App.—Austin 1986, writ. ref’d n.r.e.) (“It is axiomatic that such agencies are creatures of statute and have no inherent authority. They may, therefore, exercise only those specific powers conferred upon them by law in clear and express language, and no additional authority will be implied by judicial construction.”). Agencies therefore can only enforce laws or promulgate regulations when the Legislature has specifically granted them authority to make rules on particular topics and provided an intelligible principle or reasonable standard as a guidepost for rulemaking. See Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 740 (Tex. 1995) (“The Texas Legislature may delegate its powers to agencies established to carry out legislative purposes, as long as it establishes ‘reasonable standards to guide the entity

² While primary elections are conducted under the authority of parties, county parties may contract with county election officers for the county elections officer to perform election services for primaries. TEX. ELEC. CODE § 31.092. Such a contract is in place in Hill County. Various provisions of the Texas Election Code, Texas Administrative Code, advisories and directives issued by the SOS, and plans the counties (including Hill County is this case) are required to develop in accordance with those materials are meant to ensure that votes from those systems are recorded accurately. See, e.g., Texas Secretary of State, Election Advisory No. 2012-03, at https://www.sos.state.tx.us/elections/laws/advisory2012-03.shtml.
to which the powers are delegated.” (quoting Railroad Comm’n v. Lone Star Gas Co., 844 S.W.2d 679, 689 (Tex. 1992)).

Regardless, there are some protections already in place, such as a statutory requirement for a written plan for comparing the number of votes to voters. TEX. ELEC. CODE § 127.007. The SOS is highlighting this statutory requirement for a reconciliation plan in its trainings with counties.

**Question 5:** Does all of the voting equipment involved with the votes in question comply with all state laws and regulations?

**Finding:** Our investigation uncovered no issues with the ability of the voting equipment to comply with state law and regulations. Rather, the negligent errors on the part of election staff caused the discrepancy between ballots and voters. However, it should be noted that the Hill County Elections Administration office did not follow Election Code sections 123.005, 123.006, and 123.007, which stipulate that an election authority may use only one type of voting system (paper ballot or voting machine) at any particular polling location. The Hill County Elections Administration office used both paper ballots and machines at the various polling locations, and they offered voters the choice of how to vote. There is no criminal punishment or statutory enforcement mechanism for violating these sections of the Election Code.

Very truly yours,

Jeffrey C. Mateer
First Assistant Attorney General

cc: Lieutenant Governor Dan Patrick
Speaker of the House Joe Straus
Sen. Bryan Hughes, Chair, Senate Select Committee on Election Integrity
Secretary of State Rolando Pablos