



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring
Attorney General

202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

September 29, 2016

Mr. William A. Bell, Jr.
Secretary, Isle of Wight County Electoral Board
Post Office Box 77
Isle of Wight, Virginia 23397

Mr. Robin R. Lind
Secretary, Goochland County Electoral Board
Post Office Box 1013
Goochland, Virginia 23063

Dear Mr. Bell and Mr. Lind:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You have presented three questions concerning regulatory amendments adopted by the State Board of Elections (the "Board"). These amendments modify 1 VAC 20-60-30 through 1 VAC 20-60-50, and your questions are limited to consideration of the following language: "Voters are permitted to use cameras or audio or visual recording devices inside the polling place."

Specifically, you have asked the following:

1. Whether the cited regulatory language conflicts with state law;
2. Whether voters shall "be permitted to use cameras or audio or visual recording devices inside the polling place which permits them to be in communication with 'an other' outside the polling place without signing a request, and without having 'an other' sign a statement, and have an Officer of Election record the name of the voter and the name and address of the person assisting him" (emphasis in original); and

3. Whether voters shall “be permitted to take photographs or pictures of themselves, or of fellow voters, or make photographic copies of their ballot, within the polling place.”

Background

You relate that the Board adopted regulatory amendments to 1 VAC 20-60-30 through 1 VAC 20-60-50 at its June 28, 2016, meeting. These amendments include the language cited above (“Voters are permitted to use cameras or audio or visual recording devices inside the polling place.”). You further represent that this language was not previously incorporated in the Virginia Administrative Code.

Applicable Law and Discussion

1. Whether the cited regulatory language conflicts with state law.

The General Assembly has prohibited certain activities within polling places. Sections 24.2-604 and 24.2-607 of the *Code of Virginia* address this issue. Specifically,

[i]t shall be unlawful for any authorized representative, voter, or any other person in the room to (i) hinder or delay a qualified voter; (ii) give, tender, or exhibit any ballot, ticket, or other campaign material to any person; (iii) solicit or in any manner attempt to influence any person in casting his vote; (iv) hinder or delay any officer of election; (v) be in a position to see the marked ballot of any other voter; or (vi) otherwise impede the orderly conduct of the election.^[1]

Subsection 24.2-604(E) also authorizes officers of election to “require any person who is found by a majority of the officers present to be in violation of this section to remain outside of the prohibited area” surrounding the entrances to the polling place.

Subsection 24.2-604(C) authorizes the presence of authorized representatives of political parties or candidates within polling places, and these authorized representatives shall be permitted “to use a handheld wireless communications device.” However, authorized representatives “shall not be allowed to use such a device to capture a digital image inside the polling place or central absentee voter precinct,” and “[t]he officers of election may prohibit the use of cellular telephones or other handheld wireless communications devices if such use will result in a violation of subsection A or D [of § 24.2-604] or § 24.2-607.”

Representatives of the news media may also enter polling places on election day, and are permitted “to visit and film or photograph inside the polling place for a reasonable and limited period of time while the polls are open.”² However, the *Code of Virginia* specifies that the news media “shall not film or photograph any person who specifically asks the media representative at that time that he not be filmed or photographed”; “shall not film or photograph the voter or the ballot in such a way that it divulges how any individual voter is voting”; and “shall not film or photograph the voter list or any other voter record or material at the precinct in such a way that it divulges the name or other information concerning any individual voter.”³

¹ VA. CODE ANN. § 24.2-604(D) (Supp. 2016).

² VA. CODE ANN. § 24.2-604(J).

³ VA. CODE ANN. § 24.2-604(J)(ii) through (iv).

As this statutory language demonstrates, the *Code of Virginia* expressly authorizes the media to film or photograph the ballot, so long as a ballot is not filmed or photographed in a way that divulges a voter's vote. The *Code of Virginia* also prohibits authorized representatives' use of "handheld wireless communication devices" to capture digital images within a polling place. The *Code of Virginia* is silent, however, as to the use of such devices by individual voters at polling places. As the General Assembly has prescribed limits for the news media's ability to film or photograph within polling places, and has proscribed authorized representatives' use of handheld wireless devices "to capture a digital image" in polling places, but has not prohibited voters' use of "cameras or audio or visual recording devices" within a polling place, the cited regulatory language does not conflict with state law.⁴

2. Whether voters "shall 'be permitted to use cameras or audio or visual recording devices inside the polling' place which permits them to be in communication with 'an other' outside the polling place without signing a request, and without having 'an other' sign a statement, and have an Officer of Election record the name of the voter and the name and address of the person assisting him."

Article II, § 3 of the Constitution of Virginia provides that "[s]ecrecy in casting votes shall be maintained, except as provision may be made for assistance to handicapped voters, but the ballot box or voting machine shall be kept in public view and shall not be opened, nor the ballots canvassed nor the votes counted, in secret."

Sections 24.2-649 and 24.2-1006 of the *Code of Virginia* address the manner in which certain voters may receive assistance while voting. As provided by § 24.2-649(B), "[a]ny qualified voter who requires assistance to vote by reason of physical disability or inability to read or write may, if he so requests, be assisted in voting."⁵ A voter permitted by law to receive assistance may do so only where (1) the voter signs a written request stating that he requires assistance, and (2) the assisting individual signs a statement.⁶ Section 24.2-1006 of the *Code of Virginia* provides that "[e]xcept as provided by § 24.2-649, no person shall directly or indirectly advise or assist any voter as to how he shall cast his ballot after the voter has entered the prohibited area at the polls," and provides penalties for violations of this section. Accordingly, only the specific methods of voter assistance set out in § 24.2-649 are permitted under Virginia law.

⁴ To the extent that the *Code of Virginia* prohibits the use of photography by certain classes of individuals, but does not prohibit voters from such behavior, principles of statutory construction do not permit the conclusion that photography by voters is proscribed. When the legislature omits language from one statute that it has included in another, courts may not construe the former statute to include that language, as doing so would ignore "an obvious manifestation of a contrary intention" of the legislature. See *Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 654 (2004).

⁵ Section 24.2-649 also provides for two other methods of voter assistance: under § 24.2-649(A), a voter who is age 65 or older or physically disabled may vote outside of, but within 150 feet of the entrance to, the polling place; under § 24.2-694(C), a voter who requires assistance in a language other than English may receive assistance from an officer of election, a volunteer, or a candidate interpreter.

⁶ Virginia Code § 24.2-649(B) provides that an officer of election or other individual providing this assistance shall not enter the booth with the voter unless (i) the voter signs a request stating that he requires assistance by reason of physical disability or inability to read or write and (ii) the officer of election or other person signs a statement that he is not the voter's employer or an agent of that employer, or an officer or agent of the voter's union, and that he will act in accordance with the requirements of this section.

The situation described in your second question, involving the use of a camera or audio or visual recording device to communicate with “an other” outside of the polling place for assistance in voting, is not a method of voter assistance permitted under § 24.2-649. Accordingly, the provision of assistance to a voter by means of communication by a camera or audio or visual recording device would constitute a violation of § 24.2-1006.⁷

3. Whether voters shall “be permitted to take photographs or pictures of themselves, or of fellow voters, or make photographic copies of their ballot, within the polling place.”

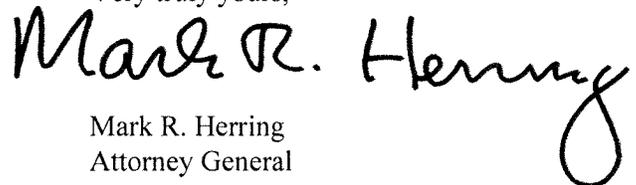
The *Code of Virginia* does not prohibit an individual from divulging how he or she is voting. While § 24.2-1011 of the *Code of Virginia* provides that a voter may not carry a ballot away from a polling place or vote any ballot other than that provided by the officers of election, these prohibitions do not otherwise constitute a prohibition on photography of one’s own ballot. Where the media is permitted to photograph voters and ballots in polling places, within certain limits, to conclude that filming and photography are entirely prohibited in polling places would force an incongruous interpretation of the *Code of Virginia*.⁸ However, all relevant statutory and regulatory provisions governing conduct in the polling place remain in effect, and apply to the extent that officers of election conclude an individual’s behavior impedes the orderly conduct of the election, as prohibited by § 24.2-604(A) of the *Code of Virginia*, or impinges upon another voter’s constitutional right to a secret ballot in violation of § 24.2-607, the officers of election may take appropriate action pursuant to § 24.2-604(E).

Conclusion

For the reasons set forth above it is my opinion that the regulatory language cited in your request, and included in 1 VAC 20-60-30 through 1 VAC 20-60-50 as amended by the Board on June 28, 2016, does not conflict with state law. It is also my opinion that a voter is not permitted to use cameras or audio or visual recording devices inside the polling place to communicate with individuals outside the polling place in violation of § 24.2-1006 of the *Code of Virginia*. Additionally, it is my opinion that pursuant to the regulatory amendments adopted by the Board on June 28, 2016, voters shall be permitted to take photographs or pictures within the polling place, where doing so does not constitute a violation of Title 24.2 of the *Code of Virginia*.

With kindest regards, I am

Very truly yours,



Mark R. Herring
Attorney General

⁷ It should be noted that 1 VAC 20-60-30 through 1 VAC 20-60-50, as amended, do not provide for such communications. As the Board is empowered to “make rules and regulations and issue instructions and provide information consistent with the election laws,” Virginia Code § 24.2-103(A), the amended regulatory language permits for the use of audio or visual recording devices only where such use comports with *all* relevant laws. Accordingly, my response to your second question does not modify or otherwise impact my response to your first question.

⁸ “The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd.” *Jones v. Conwell*, 227 Va. 176, 181 (1984).