



October 16, 2000

Mr. Jim Muse  
Executive Director  
General Services Commission  
P.O. Box 13047  
Austin, Texas 78711-3047

Open Records Decision No. 668

Re: Whether a governmental body may charge for access to information that the entity has made available on its Internet web site under section 552.272 of the Government Code, which provides parameters under which a governmental body may charge for access to and copies of electronically maintained public information, and the effect of section 552.272 on a county commissioners court's authority to charge a fee for the use of its computerized electronic information system under section 191.008 of the Local Government Code. (ORQ-49)

Dear Mr. Muse:

Your predecessor, Mr. Carl Mullen, asked whether a governmental body may charge, under section 552.272 of the Public Information Act (the "Act"), for access to information that the entity has made available on its Internet web site. Mr. Mullen also asked what effect section 552.272 has on a county commissioners court's authority to charge a fee for the use of its computerized electronic information system under section 191.008 of the Local Government Code.

We first consider whether a governmental body may charge for access to information available on its Internet web site. Section 552.272 of the Government Code provides:

(a) In response to a request to inspect information that exists in an electronic medium and that is not available directly on-line to the requestor, a charge may not be imposed for access to the information, unless complying with the request will require programming or manipulation of data. If programming or manipulation of data is required, the governmental body shall notify the requestor before assembling the information and provide the requestor with

an estimate of charges that will be imposed to make the information available. A charge under this section must be assessed in accordance with this subchapter.

(b) If public information exists in an electronic form on a computer owned or leased by a governmental body and if the public has direct access to that computer through a computer network or other means, the electronic form of the information may be electronically copied from that computer without charge if accessing the information does not require processing, programming, or manipulation on the government-owned or government-leased computer before the information is copied.

(c) If public information exists in an electronic form on a computer owned or leased by a governmental body and if the public has direct access to that computer through a computer network or other means and the information requires processing, programming, or manipulation before it can be electronically copied, a governmental body may impose charges in accordance with this subchapter.

(d) If information is created or kept in an electronic form, a governmental body is encouraged to explore options to separate out confidential information and to make public information available to the public through electronic access through a computer network or by other means.

(e) The provisions of this section that prohibit a governmental entity from imposing a charge for access to information that exists in an electronic medium do not apply to the collection of a fee set by the supreme court after consultation with the Judicial Committee on Information Technology as authorized by Section 77.031 for the use of a computerized electronic judicial information system.

Gov't Code § 552.272.

Section 552.272(b) says: "If public information exists in an electronic form on a computer owned or leased by a governmental body and if the public has direct access to that computer through a computer network or other means, the electronic form of the information may be electronically copied from that computer without charge . . . ." The term "computer network" is not defined.

When words are not statutorily defined, a court must interpret them by the rules of grammar and common usage. *Garay v. State*, 940 S.W.2d 211, 219 (Tex. App.—Houston[1st Dist.] 1997, writ ref'd); Gov't Code § 312.002(a). The common usage of "computer

network” includes the Internet, among other things.<sup>1</sup> Therefore, the electronic form of public information may be copied from a governmental body’s Internet web site without charge, unless accessing the information requires processing, programming, or manipulation. The information may also be electronically copied without charge if the public has direct access through another type of computer network or by any other means.

Section 552.272 of the Act is silent, however, as to whether a governmental body may charge for providing *access* to public information on the Internet. Section 552.272(d) encourages governmental bodies to make public information available through electronic access through a computer network, such as the Internet, but it does not say anything about charging for access to the information.

Generally, the Act distinguishes between providing “access to” and “copies of” public information. *See* Gov’t Code §§ 552.221, 552.228. Providing access usually means “providing the public information for inspection or duplication in the offices of the governmental body.” Gov’t Code § 552.221(b)(1). However, providing access to a governmental body’s Internet web site allows a user to make electronic copies at will and at any time from a remote location, *e.g.*, a home computer. In the context of the Internet, the term “access to” necessarily includes the ability to make “copies of” the information. Conversely, electronic copies cannot be made unless access to the information through a computer network, such as the Internet, is first provided. Therefore, if a governmental body cannot charge for electronic copies of public information made available on its Internet web site, then it follows that a governmental body cannot charge for providing access to that information in the first place.

At first blush, however, it is not entirely clear from reading section 552.272(b) whether a governmental body *must* allow electronic copies to be made without charge. Subsection (b) does not say this explicitly. It says that “the information *may* be electronically copied . . . without charge.” Ordinarily, the word “may,” as used in legislative enactments, denotes permissiveness, and will not be construed as having a mandatory effect, though it will be given such meaning if such appears to have been the intention of the

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<sup>1</sup>A network, in computing, is two or more computers connected for the purpose of routing, managing, and storing rapidly changing data. A local area network (LAN), which is restricted by distances of up to one mile, and a metropolitan area network (MAN), which is restricted to distances of up to 60 miles, connect personal computers and workstations (each called a node) over dedicated, private communications links. A wide area network (WAN) connects large numbers of nodes over long-distance communications links, such as common carrier telephone lines, over distances ranging from that between major metropolitan centers to that between continents. An internet is a connection between networks. The Internet is a WAN that connects thousands of disparate networks . . . providing global communication between nodes on government, educational, and industrial networks. Networks allow for resource sharing (*e.g.*, multiple computers sharing one printer), data sharing, and communication or data exchange (*e.g.*, electronic mail). “Network,” THE COLUMBIA ENCYCLOPEDIA (6th ed. 2000) (visited October 2, 2000) <<http://www.bartleby.com/65/>>.

legislature. *Commonwealth Bonding & Casualty Ins. Co. v. Bowles*, 192 S.W. 611, 612 (Tex. Civ. App.--Amarillo 1917), *rev'd on other grounds, Bowles v. Mitchell*, 245 S.W. 74 (Tex. Comm'n App. 1922).

The word “may,” as it is used in subsection (b), is permissive. But, in this case, permission is given to the public, not the governmental body. What subsection (b) actually means is that the public may, or may not, as it chooses, make an electronic copy of the information without charge. It does not say that the governmental body may, or may not, allow free copies to be made. Clearly the public, and not the governmental body, will be making the copy. Thus, the permissiveness granted by the ordinary meaning of the word “may” does not apply to the governmental body. In other words, since the statute permits a member of the public to copy public information on the Internet without charge, a governmental body *must* allow electronic copies to be made from its Internet web site without charge to effectuate the statute’s mandate.<sup>2</sup>

Subsection (e) of section 552.272 confirms this reading of subsection (b). Subsection (e) indicates that more than one provision of section 552.272 prohibits a governmental body from imposing a charge: “The *provisions* of this section that prohibit a governmental entity from imposing a charge for access to information that exists in electronic medium . . . .” Gov’t Code § 552.272(e). Because subsection (a) expressly prohibits a governmental entity from imposing a charge for access to information that exists in electronic medium, it is obviously one of the provisions to which subsection (e) refers. *See* Gov’t Code § 552.272(a). The other provision can be only subsection (b), which by negative inference prohibits a governmental body from charging the public for such copies. *See* Gov’t Code § 552.272(b). Thus, subsection (e) refers to two subsections of section 552.272 that prohibit charges: subsection (a), in which the prohibition is explicit, and subsection (b), in which the prohibition is implicit.

Subsection (a) also supports this reading of subsection (b) as generally prohibiting a governmental body from imposing a charge. If no charge is allowed when electronic information is *not* available directly on-line, as provided in section 552.272(a), then it makes sense that no charge is allowed when the information is available directly on-line and presumably easier to access, under section 552.272(b). To conclude otherwise would produce an absurd result. Interpretations of statutes which would produce absurd results are to be avoided. *Sharp v. House of Lloyd, Inc.*, 815 S.W.2d 245, 249 (Tex. 1991) (citing *McKinney v. Blankenship*, 154 Tex. 632, 282 S.W.2d 691, 698 (1955)). Therefore, as a general rule, a governmental entity may not charge for electronic copies of public information that is available by direct access on its Internet web site, or through another type of computer network, or by any other means.

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<sup>2</sup>This is distinguished from the situation where a requesting party asks that copies of public information be provided on a diskette or other computer-compatible media. *See* Gov’t Code § 552.228.

The main exception to this rule is that a governmental body may charge for electronic information that “require[s] processing, programming, or manipulation on the government-owned or government-leased computer before the information is copied.” Gov’t Code § 552.272(b). “Processing” is defined in the Act as “the execution of a sequence of coded instructions by a computer producing a result.” Gov’t Code § 552.003(3). “Programming” is defined as “the process of producing a sequence of coded instructions that can be executed by a computer.” Gov’t Code § 552.003(4). “Manipulation” is defined as “the process of modifying, reordering, or decoding of information with human intervention.” Gov’t Code § 552.003(2).

The Texas Association of Counties and the County District Clerks Association, in their joint brief, argue that documents produced or received by governmental entities in non-electronic form (*e.g.*, paper documents) must be manipulated, processed, and programmed before they can be placed on the Internet. Therefore, they conclude, governmental entities may charge requestors for Internet access to cover the cost of this initial processing, programming, and manipulation.

But this conclusion is not logically compelled. Although documents were at one time manipulated, processed, or programmed to be placed on an Internet web site, it does not follow that they must again be manipulated, processed, or programmed in response to a particular request under the Act. A governmental body can charge only for those things which are done for the sole purpose of fulfilling the request. *See* Gov’t Code § 552.262(a) (charges for providing copies of public information may not exceed the actual cost of producing the information). Section 552.272(b) of the Act does not permit a governmental body to make retroactive charges for the processing, programming, or manipulation of data performed for the purpose of making public information directly accessible to the public through a computer network, such as the Internet, or through other means. In the circumstance described by the Texas Association of Counties and the County District Clerks Association, the processing, programming, and manipulation was not performed by the governmental body for the sole purpose of responding to any particular request for information under the Act.

Consider a situation where a person makes a request to this office for certain open records decisions dealing with a particular issue. Suppose also that the information is available by direct access to the Attorney General’s Internet web site, but that the information posted on the web site is not searchable with a search engine. Thus, the public has direct access to the information on-line; but it would be difficult for the requestor to access the particular decisions that the requestor seeks. Without a search engine, the requestor would have to read through every single decision to find those that applied to the issue. Depending on the type of request made, the Attorney General’s Office could either provide the responsive information on a diskette or other computer-compatible media, or it could do some processing, programming or manipulation to provide easier access to the

information on-line by, for example, adding a search engine. In the latter case, the Attorney General's Office would provide the requestor a written estimate of the associated costs in accordance with section 552.231 of the Government Code. *See* Gov't Code § 552.231. In response to the estimate, the requestor may ask that a search engine be added to the web site and may agree to pay the estimated costs. In such a scenario, this office could charge the requestor for the processing, programming or manipulation costs. However, as to future requestors who seek to use the search engine that has previously been added to the web site, this office would be prohibited from imposing any charge.

Likewise, a governmental body cannot subsidize the cost of an ongoing project to provide direct access to public information via the Internet by charging a requestor under the Act for processing, programming, or manipulation performed for a purpose other than the sole purpose of responding to that particular request. For example, a governmental body may undertake a project to make public information available on its Internet web site, which, as previously mentioned, is encouraged by section 552.272(d) of the Act. The project may include a process of converting the information on paper documents into electronic form. In the middle of the project, suppose that the governmental body receives a request for information that has already been converted into electronic form but has not yet been made available on the Internet. In that situation, section 552.272(a) would apply because the information that is responsive to the request would "not [be] available directly on-line to the requestor." Gov't Code § 552.272(a). The governmental body could not charge the requestor for its costs in converting the information into electronic form because the programming and manipulation was not done solely in response to the request. In other words, complying with the request would not require "programming or manipulation of data" because the information had already been manipulated as a part of the ongoing project, and not solely for the purpose of complying with the request for the information. Section 552.272(a) of the Act does not permit a governmental body to charge a requestor for programming or manipulation of data, unless it is done solely to comply with a particular request under the Act. *See* Gov't Code § 552.262(a) (charges for providing copies of public information may not exceed the actual cost of producing the information).

The next question is what effect section 552.272 of the Government Code has on a county commissioners court's authority to charge a fee for the use of a "computerized electronic information system" under section 191.008 of the Local Government Code. Section 191.008(a) states:

(a) The commissioners court of a county by order may provide for the establishment and operation of a computerized electronic information system through which it may provide on a contractual basis direct access to information that relates to all or some county and precinct records and records of the district courts and court of appeals having jurisdiction in the county, that is public information, and that is stored or processed in the

system. The commissioners court may make records available through the system only if the custodian of the records agrees in writing to allow public access under this section to the records.

The statute further provides that the commissioners court may “set a reasonable fee, charged under a contract, for use of the system.” Loc. Gov’t Code § 191.008(b). The question is whether, or to what extent, this statute conflicts with section 552.272 of the Government Code.

On its face, section 191.008 of the Local Government Code appears to conflict with section 552.272 because it allows a governmental entity to charge for use of a “computerized electronic information system,” which would seem to include the Internet. Charging for electronic copies of information made available by direct access on the Internet, as we have already concluded, is generally prohibited by section 552.272(b).

To resolve the conflict between these two statutes, we look for guidance to the Code Construction Act, which provides:

- (a) If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.
- (b) If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.

Gov’t Code § 311.026. Because section 191.008 of the Local Government Code applies only to county commissioners courts, and section 552.272 of the Government Code applies to all governmental bodies, section 191.008 is a special or local provision.

The Internet is clearly a type of “computerized electronic information system,” as that phrase is ordinarily understood.<sup>3</sup> Therefore, section 191.008 of the Local Government Code allows county commissioners courts to charge for access to public information on the Internet. This conflicts with section 552.272 of the Government Code, which generally

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<sup>3</sup>The phrase “computerized electronic information system” is not defined in the statute itself. When words are not statutorily defined, a court must interpret them by the rules of grammar and common usage. *Garay v. State*, 940 S.W.2d 211, 219 (Tex. App.–Houston[1st Dist.] 1997, writ ref’d); Gov’t Code § 312.002(a). “Computerize” means “to carry out, control, or produce by means of a computer.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 237 (10th ed. 1993). “Electronic” is defined as “implemented on or by means of a computer.” *Id.* at 372. “System” is defined, in part, as “a group of devices or artificial objects or an organization forming a network especially for distributing something or serving a common purpose [such as] a data processing system.” *Id.* at 1197.

prohibits a governmental body from imposing a charge. The question is whether, in spite of this conflict, these two statutes can be construed so that effect is given to both. *See* Gov't Code § 311.026(a). But even if this conflict is irreconcilable, the special provision will still prevail as an exception to the general provision, unless there is a manifest intent that the later enacted general provision should prevail. *See* Gov't Code § 311.026(b).

Because the terms "computer network" and "computerized electronic information system" both include the Internet, we do not believe these two statutes can be construed so that both are given effect. However, we find no manifest intent that section 552.272 of the Government Code, the later enacted general provision, should prevail over section 191.008 of the Local Government Code, the special provision.<sup>4</sup> Where another statute sets a fee for providing copies of specific information to the public, that statute prevails over the more general cost provisions of the Act. Attorney General Opinion MW-163 (1980). Therefore, we conclude that section 191.008 prevails as an exception to section 552.272(b). Section 191.008 allows a specific type of governmental body, a county commissioners court, to charge for use of a computerized electronic information system containing certain types of public records, which include "all or some county and precinct records and records of the district courts and courts of appeals having jurisdiction in the county, that is public information." Loc. Gov't Code § 191.008(a). County commissioners courts may establish such systems and "set a reasonable fee, charged under contract, for the use of the system." Loc. Gov't Code § 191.008(b).

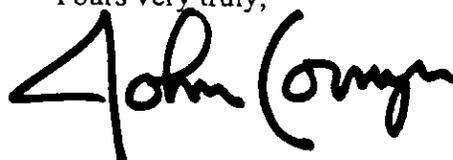
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<sup>4</sup> Section 191.008 of the Local Government Code was enacted in 1991. *See* Act of May 6, 1991, 72nd Leg., R.S., ch. 86, § 1, 1991 Tex. Gen. Laws 656. Section 552.272 of the Government Code was enacted four years later in 1995. *See* Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 17, 1995 Tex. Gen. Laws 5127, 5138.

S U M M A R Y

A governmental body may not charge for electronic copies of public information that is available by direct access on its Internet web site. *See* Gov't Code § 552.272(b). However, a governmental body may charge for copies of public information in response to a particular request under the Act if providing access to such copies requires processing, programming, or manipulation on the government-owned or government-leased computer before the information is copied. *Id.* Section 191.008 of the Local Government Code is an exception to this general rule. Even though providing copies of electronic information may not require processing, programming, or manipulation, a county commissioners court may still charge on a contractual basis for direct access to a computerized electronic information system that contains all or some county and precinct records and records of the district courts and court of appeals having jurisdiction in the county. *See* Loc. Gov't Code § 191.008.

Yours very truly,

A handwritten signature in black ink that reads "John Cornyn". The signature is written in a cursive, slightly slanted style.

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