



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 10, 1992

Honorable John D. Hughes
Hood County Attorney
County Courthouse, Room 6
Granbury, Texas 76048

Letter Opinion No. 92-7

Re: Use of the "records management and preservation fee" established by section 118.011(b) of the Local Government Code (RQ-335)

Dear Mr. Hughes:

You have requested our opinion regarding the proper use of the "records management and preservation fee" established by Senate Bill 770, Acts 1991, 72d Leg., ch. 587, § 1, at 2105. That enactment, codified as subsection 118.011(b) of the Local Government Code provides:

(b) The county clerk may set and collect the following fee from any person:

....

(2) Records Management and Preservation Fee (Sec. 118.0216).....not more than \$5

Section 118.0216, enacted as part of the same bill, declares:

The fee for "Records Management and Preservation" under Section 118.011 is for the records management and preservation services performed by the county clerk after the filing and recording of *a document* in the records of the office of the clerk. The fee must be paid at the time of the filing of *the document*. The fee may be used only to provide funds for specific records preservation and automation projects.

Id. § 2 at 2105 (emphasis added).

You ask a series of questions about the use of this fee. Your first question is whether the fee is under the control of the county clerk.

The county treasurer is the "chief custodian of county funds." Local Gov't Code § 113.001. That official is responsible for receiving "all money belonging to the county" from any source. Local Gov't Code § 113.003. The commissioners court, however, has general control over county finances. See Attorney General Opinion WW-430 (1958) (commissioners court is the guardian of county funds). Thus, we answer your first question in the negative: the records management and preservation fee is not under the control of the county clerk.

You also ask whether the statute requires that the records management and preservation fee be maintained in a separate account with the county treasurer, and whether such account is subject to audit. Although neither section 118.0216 nor 118.011 of the Local Government Code requires that a separate account be maintained, the former requires that funds generated by this fee be used exclusively "for specific records preservation and automation projects." The clear implication of such a condition is that a separate account be maintained for funds collected by this fee; otherwise, a comingling of funds would preclude compliance with the statutory requirement. As to whether this fund is subject to audit, "[t]he county auditor has general oversight of the books and records of a county . . . officer authorized or required by law to receive or collect money." Local Gov't Code § 112.006(a). Any money held by a county official is within the auditor's sphere of authority. See Attorney General Opinion MW-188 (1980); 35 D. Brooks, COUNTY AND SPECIAL DISTRICT LAW § 19.9 (Texas Practice 1989).

You next ask whether the county clerk should deposit the collected fee in the county depository. Section 113.021(a) of the Local Government Code requires that fees collected by a county officer "shall be deposited with the county treasurer." The *county treasurer* is then directed to "deposit the money in the county depository in a special fund to the credit of the officer who collected the money." Local Gov't Code § 113.021(b). Section 113.022 specifies the time within which deposit of funds must be made with the treasurer.

Your next question is whether the charging of a records management fee is completely discretionary with the county clerk. Section 118.011(b) of the Local Government Code states that the clerk "*may* set and collect the following fee." (Emphasis added.) Thus, whether the fee is to be collected is within the county clerk's discretion. The clerk may also fix the *amount* of the fee, so long as it does not exceed \$5.00. You also inquire whether the fee may be collected for "probate

and civil cases" and "in probate proceedings where instruments are filed after the 90 day filing deadline." In accordance with section 118.0216, the records management fee may be collected upon the "filing and recording" of any *document*. The statute requires neither the type of proceeding nor the timeliness of filing to be considered in collecting the fee.

You also ask whether the funds collected by virtue of the records management fee may be expended within the sole discretion of the county clerk. As previously noted, the commissioners court controls county finances and is the body which is charged with preparing the county budget and allocating funds to the various officers and departments. *Weber v. Sachse*, 591 S.W.2d 563 (Tex. Civ. App.--Dallas 1979, writ dismissed w.o.j.). However, with respect to the funds collected from the records management fee, the commissioners court may expend such amounts only in compliance with section 118.0216, that is, "for specific records preservation and automation projects." As to whether this money may be used "to upgrade old record keeping systems," we find nothing in the statute which would preclude such use.

Since your last question is premised on the presumption that the county clerk enjoys complete discretion to expend the collected fees, we need not address it.

S U M M A R Y

The "records management and preservation" fee established by Senate Bill 770, Acts 1991, 72d Leg., ch. 587, at 2104, may be collected by the county clerk at his discretion. Any fees collected should be deposited with the county treasurer in a separate account, which is subject to audit. The commissioners court is responsible for allocating county funds, but it may expend funds collected under the "records management and preservation" fee only "for specific records management and automation projects."

Yours very truly,



Rick Gilpin
Assistant Attorney General
Opinion Committee