



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 23, 1993

Honorable Mike Driscoll
Harris County Attorney
1001 Preston, Suite 634
Houston, Texas 77002-1891

Letter Opinion No. 93-102

Re: Clarification of Letter Opinion No. 92-7
(1992) (ID# 22015)

Dear Mr. Driscoll:

You have asked us to clarify Letter Opinion 92-7 (1992) with regard to the following questions:

1. Whether the County Clerk is authorized to collect a Records Management and Preservation Fee, pursuant to TEX. LOC. GOV'T CODE ANN. § 118.011(b)(2) (Vernon 1988), on *all* documents filed in her office? If not, then on which documents is the County Clerk authorized to collect said fee?
2. Whether the County Clerk may impose a Records Management and Preservation Fee, pursuant to TEX. LOC. GOV'T CODE ANN. § 118.011(b)(2) (Vernon 1988), on certain documents filed in her office while choosing to exempt other documents from such fee?
3. Whether the County Clerk may impose a Records Management and Preservation Fee, pursuant to TEX. LOC. GOV'T CODE ANN. § 118.011(b)(2) (Vernon 1988), at differing rates, up to the \$5 statutory limit, for different types of documents filed in her office?

Section 118.011 of the Local Government Code, the section about which you specifically ask, articulates a fee schedule for services a county clerk renders. Subsection (a) of section 118.011 lists fees that a county clerk is required to collect; subsection (b) lists fees that a clerk is authorized, but not required, to collect, including a "Records Management and Preservation Fee" of "not more than \$5." Section 118.0216 provides that the records management and preservation fee shall be used "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 may be used only to provide funds for specific records preservation and automation projects."

We examined these two provisions in Letter Opinion No. 92-7 (1992) in response to a series of questions about the use of the records management and preservation fee that

section 118.011(b)(2) of the Local Government Code authorizes a county clerk to collect. We stated in pertinent part as follows:

[You ask] 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.

For another letter opinion construing sections 118.011(b)(2) and 118.0216 of the Local Government Code, see Letter Opinion No. 92-81 (1992).

Since this office issued Letter Opinion No. 92-7, the legislature has amended chapter 118 of the Local Government Code to make further provisions for records management and preservation fees. See Acts 1993, 73d Leg., ch. 675, §§ 1-6, at 2509-11 (S.B. 1058). The legislature revised section 118.052, which articulates a fee schedule for services a county clerk renders in civil court actions and probate court actions, as well as miscellaneous fees that a county clerk is required to charge. In particular, the legislature added to the list of miscellaneous fees a records management and preservation fee of \$5.00. See *id.* § 1, at 2510 (adding subsection (3)(F) to Local Gov't Code § 118.052). The legislature also added to subchapter C, chapter 118 of the Local Government Code sections 118.0546 and 118.0645, which state as follows:

Sec. 118.0546. RECORDS MANAGEMENT AND PRESERVATION FEE--CIVIL CASES. (a) The fee for "Records Management and Preservation" under Section 118.052 is for the records management and preservation services performed by the county as required by Chapter 203.

(b) The fee shall be assessed as cost and must be paid at the time of filing any civil case or ancillary pleading thereto.

(c) The fee shall be placed in a special fund to be called the records management and preservation fund.

(d) The fee shall be used only for records management and preservation purposes in the county. No expenditure may be made from this fund without prior approval of the commissioners court.

Sec. 118.0645. RECORDS MANAGEMENT AND PRESERVATION FEE--PROBATE CASES. (a) The fee for "Records Management and Preservation" under Section 118.052 is for the records management and preservation services performed by the county as required by Chapter 203.

(b) The fee shall be assessed as cost and must be paid at the time of filing any probate case or adverse probate action.

(c) The fee shall be placed in a special fund entitled records management and preservation fund.

(d) The fee shall be used only for records management and preservation purposes in the county as required by Chapter 203. No expenditure may be made from this fund without prior approval of the commissioners court.

See id. §§ 2, 3, at 2510. In addition, the legislature amended article 102.005 of the Code of Criminal Procedure by adding subsection (d), which requires a defendant convicted of an offense in a county court to "pay a fee of \$10 for records management and preservation services performed by the county." *See id.* § 6, at 2511.

The House of Representatives added these amendments into Senate Bill 1058 on the floor of the house during the bill's second reading. *See* Debate on C.S.S.B. 1058 on the Floor of the House, 73d Leg. (May 24, 1993) (tape available from House Committee Services Office). As introduced by Representative Eckels, the amendment proposed revisions not only to the provisions in chapter 118 relating to civil court actions and probate court actions, but also to section 118.0216 of the Local Government Code explicitly enumerating types of records that are subject to the imposition of the records management and preservation fee that section 118.011(b)(2) authorizes a county clerk to collect. The proposed amendment also listed types of records that are not subject to the imposition of the fee.¹ *See* H.J. of Tex., 73d Leg., at 3322-26 (1993). The legislature did

¹As proposed, Representative Eckels' amendment to C.S.S.B. 1058 would have modified section 118.0216 of the Local Government Code to provide in pertinent part as follows:

The fee for "Records Management and Preservation" under Section 118.011 is for the records management and preservation services performed by the county as required by Chapter 203 [clerk] after the filing of a document that is required or permitted to be filed in the following records:

- (1) real property records;
- (2) personal property records;
- (3) personal records;
- (4) cattle brand registration records;
- (5) assumed names;

not incorporate into the enrolled bill the proposed amendments to section 118.0216 of the Local Government Code.

You first ask whether a county clerk may collect a records management and preservation fee on all documents filed in the clerk's office. Letter Opinion No. 92-7 stated that the clerk may collect the records management and preservation fee "upon the 'filing and recording' of any *document*." (Emphasis in original.) In light of the legislature's recent actions on this matter, we are able to clarify our previous answer. Pursuant to sections 118.052(3)(F), 118.0546, and 118.0645 of the Local Government Code, a county clerk is required, not merely authorized, to collect a records management and preservation fee in the amount of \$5.00 upon the "filing of any civil case or ancillary pleading thereto"² and upon the "filing of any probate case or adverse probate action." Thus, a document relating to a civil case or a probate case is subject to the mandatory \$5.00 records management and preservation fee only if the document initiates the case; if the document is an "ancillary pleading" to a civil case; or if the document initiates an adverse probate action, *see* Letter Opinion No. 93-78 (1993) at 2. A county clerk may not impose a

(footnote continued)

(6) bonds; and

(7) financing statements and related instruments established by the Business & Commerce Code that are filed in the real property records.

(b) This fee does not apply to:

(1) marriage records;

(2) financing statements and related instruments established by the Business & Commerce Code that are not filed in the real property records;

(3) budgets and notices of posting; or

(4) any document for which a filing fee is prohibited by statute.

H.J. of Tex., 73d Leg., at 3322-23 (1993).

The amendments that Representative Eckels proposed to add to C.S.S.B. 1058 came from another bill that he had introduced in the Seventy-Third Legislature which did not make it to the floor of the house. That bill, H.B. 2215, related only "to records management and preservation fees used by counties"; it did not pertain to various other fees that local governments and state agencies impose and collect, as did C.S.S.B. 1058. Because "[n]umerous requests for Attorney General opinions have been made in relation to [sections 118.011(b)(2) and 118.0216 of the Local Government Code, which the Seventy-Second Legislature added], resulting finally in a recommendation by the Attorney General that the legislature clarify the law on the [records management and preservation fee]," the bill was designed "[t]o clarify the provisions of the Local Government Code relating to records management and preservation fees." House Comm. on County Affairs, Bill Analysis, H.B. 2215, 73d Leg. (1993).

²During the third reading of C.S.S.B. 1058 on the floor of the house, Representative Cook proposed to amend the bill by deleting "or ancillary pleading thereto" "because there's really not a definition of what that is." Debate on C.S.S.B. 1058 on the Floor of the House, 73d Leg. (May 25, 1993) (tape available from House Committee Services Office). Obviously, Representative Cook's proposed amendment failed.

records management and preservation fee in any amount upon the filing of any other document relating to a civil case or probate case.

Additionally, pursuant to article 102.005(d) of the Code of Criminal Procedure, a county clerk must charge a defendant convicted of an offense "a fee of \$10 for records management and preservation services performed by the county." In our opinion, the clerk may not charge a records management and preservation fee upon the filing of any individual document in connection with a criminal case; the \$10.00 fee that the defendant pays upon conviction is meant to cover the handling of all documents filed in relation to the case. If the defendant is not convicted, the county clerk will not collect a records management and preservation fee. Finally, as to any document that is filed and recorded in the records of a county clerk but that is not related to a civil case, a probate case, or a criminal case, the clerk is authorized, but not required, to impose a records management and preservation fee of "not more than \$5." *See* Local Gov't Code § 118.011(b)(2). In our opinion, the fact that the legislature rejected Representative Eckels' proposal to amend section 118.0216 of the Local Government Code explicitly to list types of records that are not subject to the imposition of the discretionary records management and preservation fee, *see supra* note 1 and accompanying text, indicates that the legislature intended every document which is unrelated to a civil case, probate case, or criminal case to be subject to the fee (unless another statute expressly forbids the imposition of such a fee on a particular type of document, *see* Elec. Code §§ 1.002(b), 12.003 (prohibiting registrar from charging fee for performing function related to voter registration)).

You ask whether a county clerk may impose the records management and preservation fee on certain documents filed in the clerk's office while choosing to exempt other documents from the fee. We understand you to ask only about those documents subject to the discretionary records management and preservation fee pursuant to section 118.011(b)(2) of the Local Government Code. In our opinion, the legislature intended that a county clerk who chooses to impose the records management and preservation fee would impose the fee "across the board"; thus, if the clerk chooses to impose the fee, he or she must collect the fee on all documents unrelated to a civil case, probate case, or criminal case (unless, again, another statute expressly forbids the imposition of such a fee on a particular type of document). Consequently, we conclude that, in regard to documents subject to the discretionary record management and preservation fee pursuant to section 118.011(b)(2) of the Local Government Code, a county clerk generally may not impose a records management and preservation fee on certain documents filed in the clerk's office while choosing to exempt other documents from the fee.

Finally, you ask whether the county clerk may impose a records management and preservation fee that is not more than \$5.00, but that varies, depending on the type of document filed. Again, we understand you to ask only about those documents subject to the discretionary records management and preservation fee that a county clerk collects pursuant to section 118.011(b)(2). We believe the legislature intended that a county clerk who chooses to impose the records management and preservation fee would impose the same fee on all documents unrelated to a civil case, probate case, or criminal case.

Consequently, we conclude that a county clerk may not impose a records management and preservation fee that varies depending on the type of document filed.

S U M M A R Y

Pursuant to sections 118.052(3)(F), 118.0546, and 118.0645 of the Local Government Code, a county clerk is required to collect a records management and preservation fee in the amount of \$5.00 upon the filing of any document relating to a civil case or a probate case if the document initiates the case, is an "ancillary pleading" to a civil case, or initiates an adverse probate action. A county clerk may not impose a records management and preservation fee upon the filing of any other document relating to a civil case or probate case. Additionally, pursuant to article 102.005(d) of the Code of Criminal Procedure, a county clerk must charge a defendant convicted of an offense a records management and preservation fee of \$10.00. The clerk may not charge a records management and preservation fee on any of the individual documents filed in connection with a criminal case. As to any document that is filed and recorded in the records of a county clerk but that is not related to a civil case, a probate case, or a criminal case, section 118.011(b)(2) of the Local Government Code authorizes, but does not require, a county clerk to impose a records management and preservation fee of "not more than \$5" (unless another statute expressly forbids the imposition of such a fee on a particular type of document).

In regard to documents subject to the discretionary record management and preservation fee pursuant to section 118.011(b)(2) of the Local Government Code, a county clerk generally may not impose a records management and preservation fee on certain documents filed in the clerk's office while choosing to exempt other documents from the fee. Furthermore, a county clerk may not impose a records management and preservation fee that varies depending on the type of document filed.

Yours very truly,



Kimberly K. Ottrogge
Assistant Attorney General
Opinion Committee