

AUSTIN COUNTY
 Bellville, Texas 77418



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OPINION COMMITTEE

RQ. 0055-6A

Hon. Greg Abbott
 Office of the Attorney General
 Opinion Committee
 P.O. Box 12548
 Austin, TX 78711-2548

FILE # ML-43105-C
 I.D. # 43105

COPY!

RE: Opinion request concerning section 118.0216 of the Local Government Code

Dear General Abbott:

Over the last two budget years, a controversy has arisen between the County Clerk and the County Commissioners Court regarding the proper use of Records Management and Preservation (RMP) funds. The County Clerk, Ms. Carrie Gregor, is of the opinion that the use of RMP funds for salaries is legally impermissible, while the Commissioners Court is of the opinion that the delivery of records management services necessarily implies some portion of the funds could be used for salaries. The inability to reach agreement on this issue threatens the intended purpose of the Records Management and Preservation funding authorized by statute.

I respectfully request your opinion on the legality of using Records Management and Preservation Fees to pay salaries in the County Clerk's Office. My specific questions are as follows:

1. Do the terms "records management services" and "automation purposes" as used in section 118.0216 of the Local Government Code exclude the payment of salaries in the County Clerk's Office, as a matter of law?

2. If these terms do not exclude the payment of salaries, then must the funds provided for salaries be allocated by some proportion to the actual performance of Records Management “services” and “purposes”?
3. If so, what duties of the County Clerk and staff are functionally distinct as “records management and preservation services” and “automation purposes”?

Section 118.011 (b)(2) of the Texas Local Government Code authorizes the County Clerk to collect a “Records Management and Preservation Fee” at the time of filing certain documents.

Section 118.0216 of the Texas Local Government Code states the following:

- (a) 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.
- (c) The fee may be used **only** to provide funds for specific records management and preservation, including for automation purposes.
(emphasis added)

These three questions surface every year, in Austin County as well as other counties, without definitive resolution as we prepare our budget. Provided below is what we see as two (I. and II.) alternative viewpoints.

Section I of this letter presents the contentions and arguments of the Commissioners Court, while Section II presents the contentions and arguments of the County Clerk.

I. (Commissioners Court position)

May Salaries Be Paid from Dedicated Funds?

The County Clerk collects a “Records Management and Preservation” fee in conformity with §118.011 of the Texas Local Government Code. The County Clerk in Austin County has a staff of six deputy clerks, each of whom performs duties that involve, to some degree, maintenance and preservation of a wide range of governmental records. In a prior budget, as

much as \$20,000.00 in Records Management and Preservation funds has been allocated to supplement salaries of one or more such employees. The salary cost of a single clerk, inclusive of benefits, exceeds \$20,000.00 per year.

However, in the last budget year, the County Clerk identified only \$7,000.00 in staff related time that she felt qualified for Record Maintenance and Preservation supplementation. During the budget process, the County Clerk stated that she does not believe the authorizing statute (§118.0216 of the Texas Local Government Code) provides authority for the use of these dedicated funds in any measure for salaries, contending that all funding for salaries in her office is an obligation imposed solely upon the general revenue fund of the County.

The Commissioners Court, responsible for funding of county offices, is of the opinion that salaries of those clerks whose tasks can generally be identified as reasonably related to "records management and preservation" can and should be paid in whole or in part by funds generated from the records management fee. In making this determination, the Commissioners Court fully recognizes that many functions of the clerk's office have no connection to records management or preservation, such as those duties outlined in the clerk's portion of this submission. The Commissioners Court seeks clarification regarding the legality of an expenditure of some proper portion of the RMP funds for salary purposes for those clerical functions reasonably related to records management and preservation.

Generally speaking, the disbursement of funds from the "Records Management" fee requires a "partnership" between the Clerk and the Commissioners Court. See Letter Opinion 92-81 (1992), which holds that the Commissioners Court has sole discretion to determine how the county will spend revenues generated by this fee once the clerk has identified those duties and functions that conform to the statutory limitation contained in Section 118.0216 of the Local

Government Code: “specific records management and preservation, including automation purposes.” In many Texas counties, this issue has been amicably resolved by the Clerk and the Commissioners Court reaching agreement upon a proration of RMP funds for use in defraying cost of salaries of those clerks engaged in records management and preservation functions. This opinion request results from the inability of the Commissioners Court and the County Clerk to reach an agreement in Austin County, Texas, in light of the Clerks belief that any expenditure of the RMP funds for salary purposes is legally impermissible.

The County Clerk originally based her contention that salaries were not an appropriate expenditure of fund proceeds upon the language of §118.0216 prior to its amendment by the 77th Legislature in 2001. The earlier version of the statute referred to “specific records preservation and automation projects.” See Appendix A, 1999 version of §118.0216 Tex.Loc.Govt.Code. An earlier Attorney General Opinion, DM-492, is also based upon this earlier version of the subject statute. As a consequence, the Commissioners Court is of the opinion that the language relied upon by the Clerk, below, from this opinion is unfounded, in light of legislative amendment subsequent to the date of the A.G. Opinion.

In 2001, the 77th Legislature substantially amended §118.0216 of the Local Government Code. In that amendment, the Legislature dropped the language referring to “projects” and instead proved in subsection (d):

“The fee may be used only to provide funds for specific records management and preservation, including for automation purposes.”

It seems only axiomatic that in order to provide any “services”, as identified in §118.0216(a), some level of human labor is required in order to actually provide and deliver “records management and preservation” functions. The elimination of specific “projects” from the legislation seems to contemplate a broader range of expenditures than the earlier statute.

Further, the legislative history provided by the Clerk documents a discussion of instances involving the transfer of RMP funds to other uses outside of the Clerk's budget. Austin County Commissioners seek an attorney general's opinion on the legality of utilization of the RMP funds for purposes of salary supplementation within the Clerk's budget. The Attorney General is urged to obtain a complete transcript of the legislative dialogue on H.B. 370 in order to fully understand the context of the cited language.

Appropriate expenditures from the records management and preservation funds should include salaries for staff engaged in record management functions. In *Hooten v. Enriquez*, 863 S.W.2d 522 (Tex.App.—El Paso, 1993), the Commissioners Court attempted to establish direct control over the records management functions of the County Clerk's office. The Court of Appeal in El Paso held that the Commissioners Court's attempt to direct which staff members were to be used in records management was beyond the authority of the Commissioners Court.

However, in *Hooten*, some measure of the dedicated records management and preservation funds were in fact utilized for staff salaries. Neither the Court of Appeals, nor subsequent Attorney General's opinions have suggested that the use of such funds for salary supplementation is legally impermissible.

To date, Attorney General's opinions have not directly addressed the question of whether or not the public funds deposited to the Records Management and Preservation account is subject to utilization for salaries or salary supplements for those employees of the County Clerks office actually engaged in records management and preservation services or activities. As a consequence, there is little or no guidance for either Clerks or Commissioners Courts regarding the allocation of salaries in the County Clerk's office.

The Legislature has also created a separate Records Management and Preservation fee under §118.052 of the Local Government Code for documents coming into the possession of the clerk by way of County court proceedings. That fee is not at issue in this request for opinion.

In order to appreciate the significant number of documents affected by the mandate of care imposed by §118.0216, one must understand the range of documents covered by the fees authorized by §118.011 of the Local Government Code. Specifically, §118.012 pertains to the filing, registering, and indexing of personal property records; §118.013 pertains to the filing, recording and indexing of real property records (with some exceptions); §118.018 pertains to marriage licenses; §118.019 pertains to declarations of informal marriages; and §118.020 pertains to brand registrations.

The Records Management and Preservation fee authorized by §118.0216 refers to the gamut of fees authorized by §118.011, as clarified by the referenced sections cited above. Thus, virtually all aspects of record management and preservation, excluding those documents generated by court proceedings, are properly duties and functions of the County Clerks office. It is difficult to imagine any processing or handling of a document defined by §118.011, once filed with the Clerk, that does not require some level of “management and preservation”. Therefore, virtually all duties of the Clerk have some connection with records management and preservation, and therefore a corresponding expenditure of labor by the Clerk and her staff.

In light of the expansive reading required by §118.011 in conjunction with §118.0216, the use of specific “records management and preservation” funding, including automation purposes, should include all or part of the salaries of those clerk’s office personnel involved in the actual delivery of “records management and preservation” services.

§203.003 of the Local Government Code requires the Commissioners Court to establish a county clerk records management and preservation fund for fees subject to §118.0216 and approve in advance any expenditures from the fund. As noted above, the process of identifying those functions and services that warrant expenditure from this fund requires a partnership between the Clerk and the Commissioners Court.

However, since the functions of records management and preservation apply to all property filings, marriage licenses, brand registrations, unless otherwise limited or restricted by the statutory provisions falling between §118.011 and §118.0216, virtually every document entrusted to safekeeping by the County Clerk requires some degree of “management and preservation”, and in turn incurs some measure of the time and effort of the Clerk’s staff. As such, the use of the Records Management and Preservation fund should be sufficiently expansive to cover the actual costs incurred in the delivery of records management and preservation services, including the cost of labor.

The statutory language should not be so narrowly construed as to exclude the cost of labor incurred in records management and preservation. These funds should be properly utilized to pay in whole or in part the salaries of those employees who are actually engaged in the delivery of records management and preservation “services” having to do with these documents.

The difficulty presented in Austin County is the position taken by the County Clerk that the fees should be declared “off limits” for any salary supplementation. Until the Attorney General provides an opinion regarding the suitability of some use of the fee generated by §118.011 for supplementation of salaries of those individuals actually engaged in records management and preservation services, the County Clerk and the Commissioners Court may simply be unable to agree, therefore frustrating the statutory purpose of the fee itself.

II. (County Clerk's position)

May Salaries Be Paid from Dedicated Funds?

The first question goes to legislative intent of whether salaries can be paid from the fee. The statute does not mention salaries as a use for the fee. The statute specifically states that the fee can only be used for specific records management and preservation, including for automation purposes.

You have previously held that there is nothing in the statute to preclude the use of the fees "to upgrade old record keeping systems" Letter Opinion 92-7 and that using the fee to pay for "rent or additional storage space" of clerk's records is a matter for commissioners court to determine. Letter Opinion 92-81.

Prior to September 1, 2001, section 118.0216 of the Local Government Code provided that, "The fee may be used only to provide funds for specific records preservation and automation projects." (emphasis added).

Due to a controversy in many counties over the proper use of the fee, H.B. 370 was introduced in 2001 by Rep. Juan Hinojosa. One part of the bill replaced the word "projects" with the word "purposes".

On March 21, 2001 a hearing was held in the House Committee on County Affairs on H.B. 370. Portions of the transcript of that hearing are attached as Appendix B and will be referred to below. (The entire transcript and legislative history is attached as Appendix D). The identity and title of the speakers and witnesses is as follows:

Rep. Juan Hinojosa	Sponsor of H.B. 370
Rep. Tom Ramsay	Chairman of House Committee on County Affairs
Rep. Glenn Lewis	Member of House Committee on County Affairs
Rep. Ignacio Salinas	Member of House Committee on County Affairs
J.D. Salinas	County Clerk Hidalgo County
Joy Streater	County Clerk Comal County
Jeane Brunson	County Clerk Parker County
Jim Allison	General Counsel, County Judges & Commissioners Assoc.

A substantial part of the hearing on H.B. 370 focused on what is the proper and improper use of records management fees. Selected portions of the hearing are as follows:

Rep. Salinas: I received a fax from a county clerk and her contention is...that the county has gone in and some places taken the \$5.00 [fee] and used them for other purposes.

Hinojosa: ...the bill makes it clear that the fee...will be used only for the preservation of these records and nothing else.

Appendix B, pages 1-2

Rep. Lewis: I believe the testimony was...when the county clerk would go before commissioners court with their budget, the commissioners would lower some of their budget in one areas and say, oh, because you have that preservation money that you can use we're gonna reduce the amount of your budget. It wasn't that they'd actually taken that money and used it for something else, but they had, uh, shorted the county clerk; or the county clerk felt like they had been shorted on their budget because they had access to these monies.

Chair Ramsay: Members, if they're using funds for something else, it's against the law.

Appendix B, pages 2-3

Chair Ramsay: Does your commissioners court deduct from your budget any of that money?

Streater: Yes they do.

Chair Ramsay: What do they, how do they explain that to you when they do that?

Streater: They just tell me that I have the money there and that they're going to use it

Chair Ramsay: And it says, pretty clear, what the money can be used for and **it's not for salaries.**

Appendix B, pages 4-5

J.D. Salinas: But if you see this bill, this money isn't, cannot be used for computers.

Appendix B, page 6

Chair Ramsay: They [commissioners court] can say well you've got that money, J.D. so you use it, we're not gonna fund your clerk salary but you use it, you got a fund there, you pay her out of that fund.

J.D. Salinas: I have no problem filing a lawsuit in getting that money back.

Appendix B, page 7

Chair Ramsay: So you have not had the problem that we've heard from other clerks this morning...of the fee...being used for something other than what the statute calls for?

Chair Ramsay: Are you aware of the usual situation in counties? Or the unusual situation, your situation?

Brunson: My situation, and over the years in hearing some horror stories within different counties, is probably unusual. [T]here have been several lawsuits that have been filed across the state. I'm not certain that maybe educating the commissioners might not be a good idea.

Appendix B, page 8

Allison: [1]f there's a county commissioners court out there transferring that fee out of the special account and using it for other purposes, then I would like to know the name of the county and I will personally contact that commissioners court and furnish them with copies of the Attorney General's opinion and tell them that is not allowed.

Appendix B, page 9

Rep. Salinas: My concern is more from the county clerks...where a commissioners court gives it, somewhat loose interpretation to the statute and says because now you are going to automate the records, you also need to pay for the personnel who is going to run the equipment for automation.

Appendix B, page 10

H.B. passed out of committee, was passed by the legislature and became effective September 1, 2001.

The Austin County Commissioners Court refers to \$20,000.00 being allocated from a prior budget to supplement salaries. (Commissioners Court position, p. 3). However, this money was agreed to, for a one year trial period, only after the County Clerk was told that "the Court would cut her budget and she would have to get rid of an employee." see, Austin County Commissioners Court Order 01-220. Appendix C. In the last budget year, \$7,000.00 was agreed to by the County Clerk as a settlement of litigation. This use of the records management fee to balance the budget seems to be a great concern to Reps. Lewis, Salinas and other members of the House Committee on County Affairs.

There are monies that other departments collect that have been approved or statutorily authorized for the payment of salaries.

The interest generated under section 23.122 (c) of the Tax Code shall be used by the county tax assessor-collector "to defray the cost of administration". Tex.Att'y Gen. Op. No. JC-0135 held that this may include the supplementation of salaries.

Art. 102.007 (f) of the Code of Criminal Procedure specifically lists "salaries" as a valid expenditure from the hot check fund.

But even if we ignore the distinctions in statutory language, it seems hard to believe that the legislature views motor vehicle inventories and hot check prosecution with the same degree of significance as preserving historical records.

To emphasize the importance that the legislature puts on preserving records, section 1 of H.B. 370, chapter 794 provides:

"(a) The legislature finds that the deterioration of public documents in the offices of the county clerks constitutes a threat to the integrity and reliability of the existing system for preserving public documents."

The plain reading of the statute along with its legislative intent makes it clear that the fee was not intended to be used to pay salaries. The fee is intended to provide a fund that will allow counties to adequately manage, preserve, protect and automate documents that are the history of each county in Texas. This includes refurbishing historical documents; purchasing supplies to prevent deterioration; purchasing equipment to copy records into a more permanent media, such as microfilming and scanning; and the proper storage of documents. The fee provides a revenue source to pay for the necessary paper, equipment and related materials, so that counties do not have to choose between funding other vital needs and preserving records. It is critical to note the statutory scheme that requires the fee to be paid at the time documents are filed. Therefore, the size of the fund will be proportional with the number of documents that are filed and also

proportional with the equipment that is required to preserve the documents. In essence, the records generate the money to provide for their preservation, but it's the county's responsibility to provide a revenue source to pay for salaries.

The second question presumes that you find that salaries can be paid from records management and preservation fees. If you answered the first question, "yes", then surely there must be some reasonable relation between the "records management and preservation" duties of an employee of the county clerk's office and the amount of salary that is paid from the fund. For an extreme example, if there is no connection between the duties and salary, then it would be permissible to pay the salary of a clerk who issues hunting and fishing licenses from record management and preservation fees. This assumes that the fee is established merely as a method to raise money to defray county expenses.

Since the language of the statute limits the use of the funds to records management and preservation, the extreme example listed above must be improper. However, what is proper? If an employee spends 25% of her time on records management and preservation, is it permissible to pay 100% of her salary from the records management and preservation fund? If the purpose in collecting the fees is to provide money to preserve records then it seems absurd to spend the money on duties other than records management and preservation. That would give counties the unlimited discretion to balance budgets at the expense of document preservation.

If salaries are to be paid from the records management and preservation fund, then there must be a reasonable relation to the performance of records management and preservation services. This would require each county to provide some system to track and connect duties to show who is actually engaged in records management and preservation. The Clerk disagrees

with the assertion that each of her deputies “performs duties that involve, to some degree, maintenance and preservation”. (p. 2 of Comm. Court position) or that “virtually all duties of the Clerk have some connection with records management”. (p. 6 of Comm. Court position). The Clerk agrees with the Commissioners that a separate records management and preservation fee exists under section 118.052 of the Local Government Code for probate records, civil records and criminal records. However the significant amount of labor that is required to perform these duties should not be paid for from the fee established in section 118.001.

The third question focuses on what, if any, County Clerk duties are functionally distinct as records management “services” and “purposes” from other duties of the County Clerk. If a distinction exists, then certain duties could not be legally funded by records management fees.

The statute itself states that the fee may only be used for “services” performed “after the filing and recording of a document”. This includes refurbishing historical documents; purchasing supplies to prevent deterioration; purchasing equipment to copy records into a more permanent media, such as microfilming and scanning; and the proper storage of documents. This is preservation! Anything else is off limits when it comes to accessing records management and preservation fees. This includes duties such as attending Commissioners Court and transcribing minutes; assisting the public with searches and making copies; attending hearings, court and jury trials as Court Clerk; conducting early voting and elections; receiving money from the public, issue receipts and checks, maintaining charge accounts and issuing receipts; daily accounting and banking transactions; telephone inquiries; issuing hunting, fishing and other licenses; taking oaths; posting notices; preparing unclaimed property reports; maintaining overweight vehicle permits; maintaining records on estrays; preparing monthly reports; and office administration.

By law, many duties of the County Clerk that may seem to involve records are actually distinct from and not reasonably related to “records management and preservation”. This is because the work is not done after filing and recording.

Section 118.018 of the Local Government Code pertains to Marriage Licenses. Before a marriage license is filed, the County Clerk must prepare the application; administer the oath; prepare waivers and orders; and issue certificates. This is a function of the County Clerk’s Office that is performed before filing and recording. Therefore, the records management and preservation fee can not legally be used to pay the salary for the person performing the service.

Section 118.019 of the Local Government Code pertains to the Declarations of Informal Marriages. The pre-filing and recording duties of the County Clerk are similar to the duties for marriage licenses and the salaries for these services can not be paid from the records management and preservation fee.

Section 118.020 of the Local Government Code pertains to Brand Registration. Before a brand is filed, the Clerk must search the records for duplicate brands. The time that is spent searching the records and issuing a certificate is performed before the document is filed. Therefore, the records management and preservation fee can not legally be used to pay the salary for the person performing the service.

Section 118.011 allows the County Clerk to “collect a fee for services”, separate from the records management fee, however not all of these records are required to be permanently preserved, so the daily routine work, i.e. the labor, is a service but not a “preservation service.”

The County Clerk is also responsible for indexing records. Indexing is the permanent categorization of all records in either alphabetical or numerical order to assist the public when searching for records. The labor involved with indexing should not be paid from records

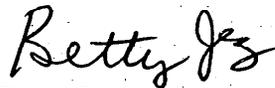
management fees as the fee for the service is paid for with the filing fee, see sections 118.012 (personal property records), 118.013 (real property records), 118.020 (brand registration). The filing fee is separate from the records management fee and is deposited into the General Revenue Fund. Salaries for the County Clerk's Office are then paid from the General Revenue Fund.

Attorney General Opinion DM-492, (1998) sums up the proper use of records management as follows:

"We reiterate that section 118.0216 requires the records management and preservation fund to be spent for specific records preservation and automation projects, subject to the commissioners court's advance approval of such expenditures, and the fund may not be diverted from its statutorily assigned purposes to pay other expenses of the clerk's office."

Your opinion on these three issues will be greatly appreciated.

Very truly yours,



Betty Jez
Auditor, Austin County