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OPINION RECORDS DIVISION

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OPINION COMMITTEE

FILE # ML-43398-03

I.D. # 43398

December 23, 2003

Via CMRRR # 7003 2260 0007 1630 6366

Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0154-GA

Re: Request for Attorney General Opinion

Dear Attorney General Abbott:

On behalf of the Honorable Dianne Wilson, County Clerk of Fort Bend County, I am seeking an opinion from your office. I request your opinion on the following questions:

1. Whether the County Clerk may redact social security numbers only from the imaged court document available on the County Clerk's website of public documents filed in her office, rendering the information inaccessible to the public who view the documents on the internet?
2. Whether the County Clerk has the authority to designate a document filed in her office as the original document, contrary to the opinion of the County Court at Law Judges opinion as to what constitutes the original?
3. Whether the County Clerk is able to issue a certified copy of an imaged document if certain information (i.e. social security numbers) has been redacted from the imaged document by the County Court?

Statement of Facts

The County Clerk of Fort Bend County, the Honorable Dianne Wilson, is extremely pro-active with regard to computer technology in her office. Her office was one of the first county clerk offices in the state to image all documents filed in her office. If a member of the public seeks information/documents maintained by the county clerk, the information is available at a computer terminal in her office, with the exception of juvenile records and other records deemed confidential by law.

By the very nature of the documents being scanned and imaged when they are filed in her office, the County Clerk is able to provide these documents to the public over the internet.¹ The Board of County Court at Law Judges has ordered the County Clerk to redact social security numbers only from the imaged documents available on the internet, but not from the paper copy presented by the filer. The goal of the judges is to prevent this information from being available to the public who access the documents on the internet, from where it can be easily obtained and the potential for misuse/abuse is great. However, they judges do not want the social security numbers redacted from the paper copy maintained by the County Clerk for use by the judges and walk-in public customers who request to view the hard copy in the file.

Statutory Provisions

The county clerk serves as clerk for county criminal and civil courts, including probate courts. The clerk is also the recorder for the county. Primary statutory authority provisions for these duties of the county clerk are derived from the Texas Penal Code, the Code of Criminal Procedure and the Rules of Civil Procedure. However, the majority of statutory provisions regarding the county clerk's recording duties are found in the Local Government Code. The following statutory provisions apply to the questions at issue in this request:

Local Government Code § 191.001. County Recorder; Seal; General Duties

(c) The county clerk shall record, exactly, without delay, and in the manner provided by this subtitle, the contents of each instrument that is filed for recording and that the clerk is authorized to record.

Local Government Code § 192.006. County Court Records

(a) The county clerk is the custodian of the records of the county court in civil and criminal cases and in matters of probate. The county clerk shall record each act and proceeding of the county court, record under direction of the judge each judgment of the court, and record the issuance of and return on each execution issued by the court.

(b) The county clerk shall keep the records of the county court properly indexed and arranged.

Local Government Code § 205.002. Authorization

Any local government record data may be stored electronically in addition to or instead of source documents in paper or other media, subject to the requirements of this chapter or other media, subject to the requirement of this chapter and rules adopted under it.

¹ See http://www.co.fort-bend.tx.us/Admin_of_Justice/County_Clerk/index_info_research.htm

S.B. No. 1559:

AN ACT relating to the confidentiality of and access to certain personal information contained in instruments recorded with a county clerk.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 11, Property Code, is amended by adding Section 11.008 to read as follows:

Sec. 11.008. CONFIDENTIAL INFORMATION IN REAL PROPERTY RECORDS. (a) In this section, "instrument" means a deed, mortgage, or deed of trust.

(b) An instrument executed on or after January 1, 2004, transferring an interest in real property to or from an individual may not be recorded unless a notice appears on the first page of the instrument in 12-point boldfaced type or 12-point uppercase letters and reads substantially as follows:

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OF THE FOLLOWING INFORMATION FROM THIS INSTRUMENT BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

Texas Penal Code § 37.10(a)(3) Tampering with Governmental Record

- (a) A person commits an offense if he:
(3) intentionally destroys, conceals, removes or otherwise impairs the verity, legibility or availability of a governmental record.

Texas Rules of Judicial Administration Rule 12.2(d)

Judicial record means a record made or maintained by or for a court or judicial agency in its regular course of business *but not pertaining to its adjudicative function*, regardless of whether that function relates to a specific case. *A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record.* A record is a document, paper, letter, map, book, tape, photograph, film, recording, or other material, regardless of electronic or physical form, characteristics, or means of transmission. (emphasis added)

Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I)

The social security number of a member of the public is confidential under Section 552.101 of the Government Code in conjunction with the 1990 amendments of the Social Security Act if it was obtained or is maintained by a governmental body under any provision of law enacted on or after October 1, 1990.

Attorney General Opinion DM-166 (1992)

A county clerk holds court case records on behalf of the judges of the courts served by the clerk. Therefore, court case records maintained by county clerks are records of the judiciary.

Comments

The County Clerk's main question presented is whether the County Court at Law Judges have the authority to order her to redact certain information from the imaged document filed, but not the paper copy maintained in the clerk's file? The County Clerk argues that as the "custodian of the records of the county court in civil and criminal cases and in matters of probate," she has the authority to designate a version of a document as the "original."

As a procedural method in the County Clerk's Office, at the time a request for a copy is made by a member of the public, a copy of the imaged document is printed and a deputy clerk certifies that copy of the imaged document as a certified copy. This process saves the deputy clerks a great deal of time, as it does away with the need to locate a physical file, remove the requested document from the file, make the copy and put the file back together in the proper order. Additionally, in the event a specific file is not in the clerk's office, but is with a specific court, the requestor does not have to wait until the file is returned to the clerk's office to obtain copies. If the County Clerk is required to redact certain information from the imaged document, she is unable to certify that document as a certified copy of the original document on file.. The county clerk fears that the alteration of a document filed in her office changes the origin of the document, rendering her unable to certify the document as an exact copy of the original document filed. Therefore, the rationale for classifying all imaged documents as the original document serves as a method of convenience to the County Clerk's Office and to the members of the public who request copies of documents filed in her office.

The State Record Office, State Library and Archives (512-452-9242) was contacted by this office for their opinion on the issues in question. Although the State Library and Archives Office would not give a specific opinion regarding the Fort Bend County Clerk, they gave generalizations regarding documents filed in various county offices. Pursuant to the State Library and Archives Office, there can only be one (1) official record, which may be in paper form, electronic or microfilm. The State Library and Archives Office refers to this original as the "record of copy" and the "primary document." Furthermore, the State Library and Archives Office is of the opinion that the custodian of records may designate any document in their possession as the official record. This administrative procedure of designating a document as an original is left to the discretion of the administrator of a specific office. In the event an electronic or imaged document is altered, the original, paper document automatically becomes the primary document. The State Library and Archives Office also cautions against altering a document if it is not in the normal course of business for a specific county office.

Additionally, pursuant to Senate Bill 1559, effective September 1, 2003, the State Senate approved a bill that allows the filer to remove or strike a social security number or drivers license number from a document transferring an interest in real property to or from an individual. Although this senate bill applies only to real property filings, it can be argued that in the event the State Senate intended the same information to be removed or stricken from other filings in the county clerk's office, Senate Bill 1559 or another comparable bill would have been enacted to address such other documents filed in that office.

Pursuant to Texas Rules of Judicial Administration Rule 12.2(d), a judicial record for a specific judge and/or court is not the file not pertaining to its adjudicative function. "A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record." Therefore, it can be reasonably ascertained that a "judicial record" is the record maintained by the county and/or district clerk. As the custodian of records for documents filed in her office, the county clerk has the statutory authority to designate a document as an original.

The social security number of a member of the public is confidential under Section 552.101 of the Government Code in conjunction with the 1990 amendments of the Social Security Act if it was obtained or is maintained by a governmental body under any provision of law enacted on or after October 1, 1990. Neither the County Clerk nor this office is aware of a law enacted on or after October 1, 1990, that authorizes the County Clerk to obtain or maintain social security numbers. Therefore, we have no basis for concluding that the social security numbers contained in any document filed in the County Clerk's office are obtained or maintained under such a law and are therefore confidential under federal law.

Finally, the question of safeguarding social security numbers from possible misuse and abuse is at issue in this request. The County Court at Law Judges do not want the information stricken or redacted from the hard copy filed in the County Clerk's Office. Therefore, any member of the public who requests to see any file will have access to everything in the file, including social security numbers. The County Court at Law judges simply want social security numbers to not be available on the internet. The County Clerk is in favor of protecting social security numbers to the extent allowed by law. However, to our knowledge, there is no law that protects such information from public disclosure.

Summary

The Board of County Court at Law Judges has ordered the County Clerk to redact social security numbers only from the imaged documents available on the internet, but not from the paper document filed. The questions presented in this opinion are whether the County Clerk has the authority to designate a document filed in her office as the original document, contrary to the opinion of the County Court at Law Judges opinion as to what constitutes the original and whether the County Clerk may redact social security

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numbers only from the imaged court document available on the Clerk's website of public documents filed in her office; however, leaving the information on the paper copy filed in her office.

Thank you in advance for your time and consideration with regard to this matter. If you require any additional information to make a determination in this case, please do not hesitate to contact me.

Sincerely,



Ben W. "Bud" Childers,
Fort Bend County Attorney

cc: Honorable Dianne Wilson
Fort Bend County Clerk

Board of County Court at Law Judges