



Susan D. Reed
Criminal District Attorney
Bexar County, Texas

August 24, 2006

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OPINION COMMITTEE

Honorable Greg Abbott
Office of the Attorney General
Attn: Open Records Division
P.O. Box 12548
Austin, TX 78711-2548

CM/RRR #7005 2570 0001 4319 8260

RQ-0525-GA

FILE # ML-44969-06
I.D. # 44969

Re: Request for opinion on Public Information Request

Dear Attorney General Abbott:

On behalf of Gerry Rickhoff, County Clerk of Bexar County, I am writing to request your opinion with regard the following matter.

Issue

May funds collected by the County Clerk as part of the Record Management and Preservation Fee (Local Government Code §118.011, et seq.) be used to purchase back records that would ordinarily be part of the County Clerk's records archive?

Background

Local Government Code Sec.118.026 reads in pertinent part:

RECORDS MANAGEMENT AND PRESERVATION. (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.

Relevant definitions to this inquiry are set forth in §§118.001 and 118.025 as follows:

"Document": includes any instrument, document, paper, or record.

"Deterioration": means any naturally occurring process or a natural disaster that results in the destruction or partial destruction of a public document.

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"Preservation": means any process that:

(A) suspends or reduces the deterioration of public documents; or

(B) provides public access to the public documents in a manner that reduces the risk of deterioration, excluding providing public access to public documents indexed geographically.

"Records archive": means public documents filed with the county clerk before January 1, 1990.

"Restoration": means any process that permits the visual enhancement of a public document, including making the document more legible.

The Official Records of the Bexar County Clerk are the permanent, Official Public Records of Bexar County, Texas. Section 191.006, Texas Local Government Code reads in pertinent part: "All records belonging to the office of the County Clerk to which access is not otherwise restricted by law or by court order shall be open to the public at all reasonable times."

Further, Section 13.002 of the Texas Property Code reads, "An instrument that is properly recorded in the proper county is: (1) notice to all persons of the existence of the instrument; and (2) subject to inspection by the public. The Official Public Records of Bexar County, Texas cannot be sealed, expunged, or modified in any manner. It is the duty of the County Clerk to maintain and preserve such documents on behalf of the public.

The request for your opinion addresses a document that should be a part of the permanent Official Public Records of Bexar County, Texas. The document at issue consists of verified correspondence from William E. Howth, a Colonel under Ben Milam, and third signer of the first Declaration of Independence at Goliad, to Don Jose Antonio Navarro, dated September 10, 1838, and addresses Navarro's election to the Congress of the Republic of Texas on the grounds of "Voting Irregularities." The document is addressed to the "Republic of Texas, County of Bexar" and to Mr. Navarro and is a notice of intent to take the deposition of A.B. Col. [EFH] who is believed to have been a polling clerk or other election official.

The document records the following: *"I contend that setting aside the Two Polls, the one held at the Rancho of Madame Calvillo and the other at the La Villetta[sic] that you have not received a majority of the Legal Votes in the County of Bexar and for the purpose of taking testimony in Proof of said Grounds of objections, I hereby notify you*

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that on the 12th of this Month September at 10 O'clock A.M. at the office of Erasmo Seguiro Chief Justice of the County of Bexar in the City of San Antonio in the County aforesaid, I shall proceed to take the Depositions of A.B. Col. [EFH] and which time and place you are hereby required to attend to adduce such testimony as may be in your Power and to ask such questions of the Said Witness as you may see fit."

I have enclosed a copy of the document for your consideration. It is currently in the possession of the Bexar County Clerk who obtained the document from a private collector. It is the County Clerk's opinion that this document was originally part of the permanent records of the County and must be returned to those records as part of his duties of preservation and records retention completeness.

It is the position of the Bexar County Clerk that such document should be preserved by securing it by the County and returning it to the Official Public Records as part of that Record's completeness.

Purchase of document with Record Management and Preservation Fee

Section 118.0216(a) specifies that the records management and preservation fee collected under section 118.011 "is for the records management and preservation services" the county clerk performs after a document is filed and recorded in the clerk's office. *Id.* § 118.0216(a) (Vernon Supp. 2003). While subsection (a) articulates the fee's purpose, subsection (d) expressly limits the fee's use: "The fee may be used only to provide funds for specific management and preservation, including automation purposes." *Id.* § 118.0216(d).

The county commissioners court is required to deposit the fees into a records management and preservation fund and to "approve in advance any expenditures from the fund, which may be spent only for records management preservation or automation purposes in the county." *Id.* § 203.003(6) (Vernon 1999).

In Opinion No. GA-0118 (2003), the attorney general writes, "A 1993 opinion of the El Paso court of appeals and a 1998 opinion of this office considered what constitutes a records preservation and automation project for purposes of the pre-2001 statute. *See Hooten v. Enriquez*, 863 S.W.2d 522, 531-32 (Tex. App.-El Paso 1993, no writ); Tex. Att'y Gen. Op. No. DM-492 (1998) at 3-8. In the judicial opinion, *Hooten v. Enriquez*, a unanimous court concluded that section 118.0216 vests "exclusive authority to . . . designat[e] . . . exactly what constitutes record keeping, preservation, and automation in the county clerk's office" in the county clerk. *Hooten*, 863 S.W.2d at 531.

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In 2001, the legislature amended section 118.0216 by inserting the word "management" and changing the word "projects" to "purposes":

The fee may be used only to provide funds for specific records *management and preservation, including for* [and automation *purposes* [projects]].

Act of May 22, 2001, 77th Leg., R.S., ch. 794, § 3, sec. 118.0216, 2001 Tex. Gen. Laws 1542, 1542. As the attorney general noted, "Changing the word "projects" to "purposes" had first been proposed in the previous session, less than one year after this office invited the legislature to clarify section 118.0216, in Senate Bill 1193. *See* Tex. S.B. 1193, 76th Leg., R.S., § 3 (1999). Senate Bill 1193 did not pass in 1999, but the change from the word "projects" to the word "purposes" was carried forward to House Bill 370 in the subsequent legislature. *See* Tex. House Research Org., Bill Analysis, Tex. H.B. 370, 77th Leg., R.S. (2001) at 3. In addition, House Bill 370 inserted the words "management and" between "records" and "preservation." *See* Act of May 22, 2001, 77th Leg., R.S., ch. 794, § 3, sec. 118.0216, 2001 Tex. Gen. Laws 1542, 1542. Neither amendment was discussed during committee hearings on the bills. *See Hearings on Tex. H.B. 370 Before the House Comm. on County Affairs*, 77th Leg., R.S. (Mar. 21, Apr. 4, and Apr. 9, 2001) (tape available from House Video/Audio Department); *Hearings on Tex. H.B. 370 Before the Senate Comm. on Intergov'tl Relations*, 77th Leg., R.S. (May 9 and May 11, 2001) (tape available from Senate Staff Services Office); *see also Hearings on Tex. S.B. 1193 Before the Senate Comm. on Intergov'tl Relations*, 76th Leg., R.S. (Mar. 24 and Apr. 7, 1999) (tape available from Senate Staff Services Office)."

In the attorney general's opinion, the 2001 amendments broadened the class of permissible uses for records management and preservation fees. "Although the exact meaning of the phrase "specific records management and preservation, including for automation purposes" in section 118.0216(d) is not clear, Tex. Loc. Gov't Code Ann. § 118.0216(d) (Vernon Supp. 2003), the legislature plainly meant to alter the statute's meaning. *See* Tex. Gov't Code Ann. § 311.021 (Vernon 1998) (stating that legislature, in enacting a statute, presumes the entire statute to be effective, as well as to provide a just and reasonable result)."

"First, the added term "management" increases the number of uses to which the fee may be put. Section 118.025(a)(2) of the Local Government Code defines the term "preservation" in the records archive context to mean a process that:

(A) suspends or reduces the deterioration of public documents; or

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(B) provides public access to the public documents in a manner that reduces the risk of deterioration, excluding providing public access to public documents indexed geographically.

Tex. Loc. Gov't Code Ann. § 118.025(a)(2) (Vernon Supp. 2003); *see also id.* § 118.011(f), *as amended by* Act of May 28, 2003, 78th Leg., R.S., ch. 974, § 1, 2003 Tex. Sess. Law Serv. 2858, 2858 and Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2(105), 2003 Tex. Sess. Law Serv. 4140, 4146; *Yale-New Haven Hosp., Inc. v. Jacobs*, 779 A.2d 222, 227 n.7 (Conn. App. Ct.) (quoting Black's Law Dictionary (6th ed. 1990)) (defining the term "preservation" as "[k]eeping safe from harm; . . . saving . . . that which already exists"), *cert. denied*, 782 A.2d 1254 (Conn. 2001). By contrast, the phrase "records management" is defined for purposes of the Local Government Records Act to include numerous activities beyond preservation:"

"Records management" means the application of management techniques to the creation, use, maintenance, retention, preservation, and disposal of records for the purposes of reducing the costs and improving the efficiency of recordkeeping. The term includes the development of records control schedules, the management of filing and information retrieval systems, the protection of essential and permanent records, the economical and space-effective storage of inactive records, control over the creation and distribution of forms, reports, and correspondence, and the management of micrographics and electronic and other records storage systems.

Tex. Loc. Gov't Code Ann. § 201.003(13) (Vernon Supp. 2003); *see also id.* § 201.001 (Vernon 1999) (titling act).

"Second, the word "purposes" is broader than the word "projects." Ordinarily, the word "purpose" denotes "the thing to be accomplished." *In re Okla. Capitol Improvement Auth.*, 2003 WL 21295711, 2003 OK 59, *3 (Okla. June 3, 2003) (stating that this definition of the word "purpose" comports with the word's "natural and ordinary meaning"). A "project," on the other hand, as *Hooten* suggests, is a discrete undertaking or endeavor. *See Hooten*, 863 S.W.2d at 534; *cf.* Tex. Gov't Code Ann. § 1509.151 (Vernon 2000) (defining the phrase "garbage reclamation project"); Tex. Loc. Gov't Code Ann. §§ 245.001(3) (Vernon 1999 & Supp. 2003), 392.002(6), 392.053(a), 393.003(4), 431.021(9) (defining the terms "project" and "housing project"); Tex. Water Code Ann. §§ 12.051(a)(1) (Vernon 2000) (defining "federal project"), 15.971(5), *as amended by* Act of May 20, 2003, 78th Leg., R.S., ch. 1275, § 2(142), 2003 Tex. Sess. Law Serv. 4140, 4148 (defining "project")."

“Despite these broadening amendments, the legislature retained the adjective "specific," which suggests that the legislature intended to limit the category of the fees' permissible uses to identifiable records management and preservation purposes only. The term "specific" commonly is synonymous with the term "distinguishable." See *In re Estate of Brown*, 922 S.W.2d 605, 607 (Tex. App.-Texarkana 1996, no writ) (describing a bequest as specific if it is described in a will with such particularity that the bequeathed property is distinguished from all of the testator's other property); see also XVI Oxford English Dictionary 157 (2d ed. 1989) (defining the term "specific" as constituting one of the characteristic features of a certain class of things); Tex. Gov't Code Ann. § 311.011 (Vernon 1998) (directing a construer to define a statute's terms using the common definition).”

The Attorney General concluded, “Accordingly, records management and preservation fees may be used only for specific records management and preservation purposes. See Tex. Loc. Gov't Code Ann. § 118.0216(d) (Vernon Supp. 2003).”

Section 203.003(6) restricts the purposes for which a county commissioners court may approve the use of records management and preservation fees to "records management preservation or automation purposes in the county," *id.* § 203.003(6) (Vernon 1999)

In accordance with *Hooten*, it is the county clerk's duty to designate "exactly what constitutes record keeping, preservation, and automation in the county clerk's office" (as well as records management). *Hooten*, 863 S.W.2d at 531. As the Attorney General noted, “Given the county commissioners court must "approve in advance any expenditures" from the records management and preservation fund”, Tex. Loc. Gov't Code Ann. § 203.003(6) (Vernon 1999), “however, the county clerk and the commissioners court both play "a role" in determining the "specific records management and preservation, including for automation purposes" for which the county will spend records management and preservation fees.” See *Hooten*, 863 S.W.2d at 531; Tex. Att'y Gen. Op. No. DM-492 (1998) at 6; Tex. Loc. Gov't Code Ann. § 118.0216(d) (Vernon Supp. 2003).

The County Clerk of Bexar County has determined that the document at issue, which was submitted to the County of Bexar as a notice of deposition, was a part of the County's permanent Official Records and should be procured accordingly to preserve the integrity of those Records and assure completeness of the Clerk's Public Records file. As is the county clerk's duty to designate what constitutes specific records management and preservation purposes (although records management and preservation fees may not be expended without the county commissioners court's approval), the Bexar County Clerk believes the expenditure of funds from the collected Records Management and

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Preservation fees to secure the missing document is part of his duties of records preservation.

Accordingly, the Bexar County Clerk seeks your opinion to confirm that the funds from the collected Records Management and Preservation fees may be used to purchase the document previously described.

Should you have any questions, please do not hesitate to contact me. Thank you for your kind assistance.

Sincerely,



MARY J. IBARRA
Assistant Criminal District Attorney
Bexar County District Attorney's Office
-Civil Division
300 Dolorosa, Suite 4049
San Antonio, Texas 78205-3030
Phone No: (210) 335-2139
Fax No: (210) 335-2151

Enclosure

cc: Mr. Gerry Rickhoff
Bexar County Clerk

Republic of Texas Letter
From William E. Howth to Don Jose Antonio Navarro

Dated September 10, 1838, Howth was contesting Navarro's election to the Congress of Republic of Texas, on the grounds of "Voting Irregularities". Don Jose Navarro was a leading participant in the Texas Revolution, one of the three Mexican signers of the Texas Declaration of Independence and a leader in advancing the rights of Mexican's who fought with the Texas army. He generally endorsed the policies of President M. B. Lamar while opposing those of Sam Houston. He had for a long time favored the annexation of Texas to the United States. He was the sole Mexican delegate to the Convention of 1845, which was assembled to accept or reject the American proposal of state hood, after voting in the affirmative, he remained to help write the first state constitution, in 1845. He was subsequently twice elected to the state Senate, then in 1849 he refused to run again. In recognition of his contributions to Texas over the years, the legislature named the newly established Navarro County in his honor. The county seat was then designated Corsicana, in honor of his father's Corsican birth.

William E. Howth came to Texas in 1829, was a Colonel under Ben Milam, participated in many Battles of the Texas Revolution and was the third signer of the first Declaration of Independence at Goliad. He married Leonora (DeLyon) a member of a Spanish family who had lived in Texas for two generations. After the war, he became a railroad promoter, organized building of the first Texas railroad (Houston & Texas Central), for which he received a large land grant. He developed a small community at the headwaters of the San Antonio River, naming it Avoca, then settled in Walker County, where he donated land for the flag station of the Houston & Texas Railroad in early 1870's, which was named Howth Station. As the town grew, the post office, which opened, in 1872, shortened the name to Howth in 1877.

This letter is apparently the first recorded instance of such claims in Bexar County, however as of this date, no record of the September 12, 1838, proposed meeting has been found.

Jim Guimarin
2006

The History Shop
713 E. Houston
San Antonio, Texas 78205
210-229-9855

Republic of Texas
County of Bexar 3rd

La. San Jose Antonio Navarro

Greeting I am hereby notified that I was before
the House of Representatives of the Next Congress of the
Republic of Texas. Contest your Election to elect us that
body upon the following grounds of Objections to the Polls
held in the Precinct at the Rancho of Madama Calvillo;
and at La Villotta

1st As to the Poll at the Rancho of Madama Calvillo set
that the Polls of said Precinct were not opened at Nine
O'clock, the hour required by Law but some time afterward
2d That during this time when the Polls remained closed
and should have been opened the Judges of the Election
were employed not only in electioneering but in destroying
such Ballots as did not suit them Viewing and forcing
them on the People

3rd that when at last the Polls were opened. No Proclamation
as required by Law was made

4th That Ballots were opened by the Judges

5th that the Doors of the Polls were not closed that day
but remained open until the following

6th That two of the Officers of the Election were not Citizens of
the County and therefore were by no means entitled to sit

7th that the Judges were guilty of Corruption in admitting
Votes which they knew to be illegal when they were known to be
offend for you and rejecting others that were legal when
they were offend for me

As to the Precinct at La Villotta the whole Poll
is void and good for naught. the Judges not having
taken the Oath required by Law in consequence of
the above facts herein above set forth. I contend that sitting
aside the said Polls. the one held at the Rancho of
Madama Calvillo and the other at the La Villotta

that you have not seen the Legal Votes
in the County of Bexar. and for the purpose of taking
testimony of your grounds of objections. I hereby

Certify you that so W. observing the Acts of this Month
I appear at 10. o'clock A.M. at the office of Don Manuel
Siquero Chief Justice of the County of Bexar in the City
of San Antonio in the County aforesaid. I have proceeded
to take the Depositions of H. B. C. & H. C. and when
time and place you are hereby required to attend to
address such Testimony as may be in your Power and
to ask such Questions of the said W. as you may
deem fit.

Given under my hand this 4th day of September 1838.
Wm. E. Hoock

To Don Jose Antonio Navarro
Present