



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

October 31, 2003

Mr. Bruce A. Strange  
Assistant District Attorney  
Kaufman County  
100 West Mulberry  
Kaufman, Texas 75142

OR2003-7855

Dear Mr. Strange:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 190386.

Kaufman County (the "County") received a request for the grantor/grantee index for Kaufman County in electronic format "from 1968 to most current." The requestor states that she requests records in plain "txt" file in a space or bar-delimited format. She also states that she does not want paper copies of the index or the code to any copyrighted software. You state that paper copies of the requested records are available to the requestor and all members of the public. However, you ask whether the Act requires the County Clerk of Kaufman County to produce the requested records in an electronic format. You state that you have notified the requestor and Government Records Services, Inc./Affiliated Computer Services, Inc. ("ACS"), the County's vendor that maintains the requested records electronically, that the County is seeking an open records ruling. *See* Gov't Code § 552.304. We have received no comments from ACS concerning this request.

Section 552.228 of the Government Code governs requests for information in an electronic medium. The provision reads as follows:

- (a) It shall be a policy of a governmental body to provide a suitable copy of public information within a reasonable time after the date on which the copy is requested.
- (b) If public information exists in an electronic or magnetic medium, the requestor may request a copy either on paper or in an electronic medium, such as a diskette or on magnetic tape. A governmental body shall provide a copy in the requested medium if:

- (1) the governmental body has the technological ability to produce a copy of the requested information in the requested medium;
- (2) the governmental body is not required to purchase any software or hardware to accommodate the request; and
- (3) provision of a copy of the information in the requested medium will not violate the terms of any copyright agreement between the governmental body and a third party.

(c) If a governmental body is unable to comply with a request to produce a copy of information in a requested medium for any of the reason described by this section, the governmental body shall provide a paper copy of the requested information or a copy in another medium that is acceptable to the requestor. A governmental body is not required to copy information onto a diskette or other material provided by the requestor but may use its own supplies.

Gov't Code § 552.228; *see* 1 T.A.C. § 111.66. Thus, if requested information exists in an electronic medium, a requestor may request the information in either paper or an electronic medium, if the three conditions of subsection b are met.

The requestor states that she does not seek the code to any copyrighted software. In addition, neither you nor ACS has indicated that provision of the information in the requested medium would violate the terms of any copyright agreement between the County and ACS. However, you state that the County "is unable to reply with this request pursuant to the provisions of Government Code section 552.228(b) [of the Government Code]. In particular Kaufman County does not have the technical ability to produce copies of those documents and could not do so without acquiring additional hardware or software."

You inform us that the requested electronic records are maintained by ACS. When a governmental body has contracted with a private company to collect or maintain information for the governmental body, the information is in the constructive custody of the governmental body. *See* Open Records Decision Nos. 585 (1991), 499 (1988), 462 (1987). ACS maintains the information in electronic format "for" the County. *See* Gov't Code § 552.002(2). In the course of maintaining the County's records electronically, ACS has developed the ability to copy the information into an electronic format for the County's use. ACS's attorney has acknowledged to this office that the County Clerk sells CD updates of the County's property records to several title companies for \$100. per month.<sup>1</sup> Letter

---

<sup>1</sup>It is not clear to this office whether the updates the County sells to title companies include the information requested here. Under section 552.007 of the Act, if the County releases information to a member of the public, then the County must release the information to any member of the public who requests it. The Act prohibits selective disclosure. *See* Open Records Decision No. 490 (1988).

from Susan Denmon Gusky, attorney, to Brenda Loudermilk, Assistant Attorney General, (September 25, 2003). According to the County's Enhanced 20/20 Perfect Vision Software License Agreement, GRS has modified its software to permit the County Clerk's public records to be digitized, formatted, and copied off to a CD-Writer for sale to several purchasers. We also presume that the index can be copied since the index is copied for purposes of creating a backup copy. *See* Local Gov't Code § 193.013 (requiring backup copy of index to be created on a daily basis for certain records that are stored or maintained by computer, including official property records of real property), 13 T.A.C. § 7.75 ("Local governments must implement and maintain an electronic records security program for office and storage areas that . . . provides for backup and recovery of records to protect against information loss[.]"). Thus, the County does in fact have the technological ability to produce a copy of the requested information in the requested medium because its contractor has that ability. Similarly, the County need not purchase software or hardware to accommodate this request. Since ACS maintains the information electronically for the County and is already copying the County's information for the County, the County, through ACS, has the necessary hardware and software to copy the requested information electronically.

You state that the "custodian of the records," by which we understand you to mean ACS, has not authorized the production of copies of the electronic records. However, again, ACS maintains the information electronically for the County. *See* Gov't Code § 552.002; *see also* Local Gov't Code § 201.005(a) (declaring as "public property" local government records created or received in the transaction of official business or the creation or maintenance of which were paid for by public funds). You may consider ACS to be the "custodian" of the County Clerk's records since ACS maintains these records. ACS is not, however, the public information officer for the County Clerk's Office. Section 552.201(a) of the Government Code states that "[e]ach elected county officer is the officer for public information and the custodian, as defined by Section 201.003, Local Government Code, of the information created or received by that county officer's office." Gov't Code § 552.201. Furthermore, section 552.203 of the Government Code states that "[e]ach officer for public information, subject to penalties provided in this chapter, shall . . . make public information available for public inspection and copying[.]" *Id.* Thus, the law makes the County Clerk the custodian of the County Clerk's records and makes the County Clerk responsible for making available for inspection and copying those records. *See id.*

Moreover, in this situation, the law expressly gives the County control of the electronic information. Section 205.009 of the Local Government Code reads as follows:

A person under contract or agreement with a local government or elected county officer to create, file, or store local government record data electronically or to provide services, equipment, or the means for the creation, filing, or storage, may not, under any circumstances, refuse to provide local government record data to the local government in a timely manner in a format accessible and useable by the local government.

Local Gov't Code § 205.009. This provision prohibits ACS from refusing to provide the County the County's electronic data "under any circumstances." *See id.*; *see also* 13 T.A.C. § 7.79 ("An electronic record keeping system must not provide an impediment to access to public records."). That prohibition applies, we believe, in this circumstance where the County's duty under the Act requires it to release the information to a requestor. Thus, ACS cannot deny the County access to the County's electronic information and must provide the County the electronic records in a "timely manner" and in a "format accessible and useable" by the County. Furthermore, section 191.006 of the Local Government Code states that "[a]ll 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. A member of the public may make a copy of any of the records." Loc. Gov't Code § 191.006. Consequently, ACS's authorization for release of the County's electronic records is not required for the County to comply with this request. *See id.* §§ 191.006, 201.005, 201.009; Gov't Code § 552.002.

You also state that the commissioners court has not authorized the production of copies of these electronic records under the provisions of Local Government Code section 191.008. Section 191.008 reads in pertinent part as follows:

The commissioners court of a county by order may provide for the establishment and operation of a computerized electronic information system through which it may provide on a contractual basis direct access to information that relates to all or some county and precinct records and records of the district courts and courts of appeals having jurisdiction in the county, that is public information, and that is stored or processed in the system. The commissioners court may make records available through the system only if the custodian of the records agrees in writing to allow public access under this section to the records.

Local Gov't Code § 191.008(a). Thus, section 191.008(a) authorizes a county commissioners court by order to provide for the establishment and operation of a computerized electronic information system for providing direct access to county records through telecommunication services. Section 191.008(b)(4) provides that the commissioners court may set a reasonable fee, charged under a contract, for use of the on-line access system. Section 191.008 does not address a county commissioners court's authority to provide electronic copies of county public information or the permissible charges for providing electronic copies of public information. You seem to suggest that because section 191.008 authorizes the County to contract with ACS and since the contract between the County and ACS contains no provision establishing the charge for providing the requested information in the requested electronic format, the information is not subject to disclosure in the requested electronic format.

The fact that the County's contract with ACS does not provide for the sale of the requested information is of no consequence. The services ACS is contractually obligated to provide

the County do not define the totality of its obligations in this situation. ACS is maintaining government records for and in lieu of the County performing that function itself. No contract provision is required to bestow on a third party that maintains government records the obligation to produce those records in response to an open records request when the law deems such records subject to public disclosure. *See* Gov't Code §§ 552.002, .221; Local Gov't Code §§ 191.006, 205.009; Open Records Decision Nos. 585 at 2 (1991) (third party holding public information may withhold the information from public disclosure only if the governmental body may do so), 462 at 8 (1987) (records maintained by governmental body's law firm are "maintained" by university for purposes of Act). Thus, we conclude that the County must release to the requestor the requested information in the electronic medium and do so in accordance with the Act's cost provisions. *See* Gov't Code §§ 552.228, .262; *see also* Local Gov't Code § 118.011(e).

Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497. *See* Gov't Code § 552.262. The least expensive method of supplying requested information must be determined in accordance with the cost provisions of the Act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Gov't Code §§ 552.262 ("charges for providing copies of public information may not be excessive and may not exceed the actual cost of producing the requested information"), .268 (requiring efficient use of public resources to avoid excessive reproduction costs); 1 T.A.C. § 111.70; Local Gov't Code § 118.001(e); Open Records Decision No. 668 at 5 (2000) (governmental body can charge only for those things which are done for sole purpose of fulfilling request).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/seg

Ref: ID# 190386

c: Ms. Marian Cones  
Chief Financial Officer  
Courthouse Specialists  
P.O. Box 70558  
Houston, Texas 77270

Mr. Lanny E. Perkins  
Attorney at Law  
3838 Oak Lawn Avenue, Suite 400  
Dallas, Texas 75219