



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

September 18, 1990

Honorable Robert T. Jarvis  
Grayson County Attorney  
Grayson County Justice Center  
Sherman, Texas 75090

LO-90-62

Dear Mr. Jarvis:

You state that Mr. Horace Groff will take office as county judge in Grayson County on January 1, 1991. You also state that he was recently hired as assistant auditor and soon thereafter the commissioners court appointed him records management officer for the county. He has been paid \$500.00 a month to undertake these new duties.

On the basis of these facts, you ask whether Mr. Groff may serve as records management officer for the county and receive payment for his services both before and after he takes office as county judge. You do not ask about his service as assistant auditor, and we do not address the effect of his service in this capacity.

Your question about his service as records management officer raises an issue under article XVI, section 40, of the Texas Constitution, which provides that no one "shall hold or exercise, at the same time, more than one Civil Office of emolument, except that of . . . County Commissioner . . ." County judges are not within the exception from article XVI, section 40, for county commissioners. Attorney General Opinion JM-594 (1986).

The common law doctrine of incompatibility is also relevant to your question. This doctrine prevents a public employee from also holding a public office that appoints, supervises, and controls the employee. Ehlinger v. Clark, 8 S.W.2d 666 (Tex. 1928); Attorney General Letter Advisory No. 114 (1975). The legislature can change or abolish a common law rule by adopting an inconsistent statute. Civ. Prac. & Rem. Code § 5.001; see Local Gov't Code § 171.007(a).

Chapter 203 of the Local Government Code relates to the management and preservation of records of local governments. Subchapter A, consisting of sections 203.001 through 203.005, applies to the records of elected county officers. Subchapter B, which consists of sections 203.021 through 203.026, applies to the records of all other local government offices, including nonelective county offices. Section 203.001 provides as follows:

Each elected county officer is the records management officer for the records of the officer's office.

Local Gov't Code, § 203.001. Section 203.002 sets out the duties of each elected county officer as a record management officer.

Section 203.021 of the Local Government Code provides that the "governing body of a local government, including a commissioners court with regard to nonelective county offices," shall establish a records management program. (Emphasis added.) Section 203.025 provides for the designation of a records management officer. It states as follows:

(a) On or before June 1, 1990, the governing body of each local government shall designate a records management officer by:

(1) designating an individual; or

(2) designating an office or position, the holder of which shall be the records management officer.

. . . .

(g) An elected county officer may not be designated as records management officer for the nonelective officers of a county without the county officer's consent.

Local Gov't Code § 203.025.

A reading of these provisions shows that a county has two categories of records management officer. The first category includes each elected county officer, including the county judge, who is the records management officer for his own records. The elected officer's duties as records management officer for his own records are merely one of many statutorily-provided duties of his office; they do not constitute a separate office or employment. Therefore,

article XVI, section 40, is not violated in this circumstance. See Texas Turnpike Auth. v. Shepperd, 279 S.W.2d 302 (Tex. 1955); Attorney General Opinion M-305 (1968).

The second category of county records management officer is the records management officer for non-elective county officers, who is appointed by the commissioners court. An elected county officer, such as the county judge, may be designated records management officer for the county's nonelective offices if he consents to the designation.

It appears that Mr. Groff at present serves as record management officer for the nonelective county officers, under section 203.025(a)(1) of the Local Government Code, which permits the commissioners court to designate an individual as records management officer. Since he is not at present county judge, neither article XVI, section 40, of the Texas Constitution nor the common law doctrine of incompatibility is relevant to this service. See Purcell v. Carrillo, 349 S.W.2d 263 (Tex. Civ. App. - San Antonio 1961, no writ).

As county judge, Mr. Groff will automatically become the records management officer for his own office. He may be appointed records management officer for the nonelective officers pursuant to section 203.025(g). Since the legislature has expressly authorized the designation of an elected officer as records management officer, the common law doctrine of incompatibility is inapplicable. See generally Civ. Prac. & Rem. Code § 5.001.

Furthermore, the "records management officer" is an officer in name only; he does not hold the powers of an officer. See generally Attorney General Opinion JM-480 (1986). The definition of "public office" given in Aldine Indep. School Dist. v. Standley, 280 S.W.2d 578 (Tex. 1955) also describes the "civil officer" of article XVI, section 40:

the determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others.

280 S.W.2d at 583.

The commissioners court establishes the record management program and provides for the development of

policies and procedures for administering the program under the direction of the records management officer. Local Gov't Code § 203.021. The records management officer assists in developing those policies, administers the records management program consistently with them, prepares various lists of records required by statute and performs other duties set out by statute. Id. § 203.023. The records management officer does not carry out his duties with respect to the management and preservation of records "largely independent of the control of others." Considerable control over county records management is vested in the commissioners court, while the duties of the records management officer are largely controlled by statute and by the decisions of the commissioners court.

The county records officer is therefore not a civil officer within article XVI, section 40, of the Texas Constitution. Accordingly, that provision does not bar the county judge from being designated county records officer for the records of nonelective county officers and receiving compensation for performing the duties of that position.

Service as the records management officer for records of nonelective officers is not a duty of the county judge's office, and he cannot be given these duties without his consent. Therefore, the compensation he receives for managing the records of nonelective officers will not be additional compensation for serving as county judge.

In summary, neither article XVI, section 40, of the Texas Constitution nor the common-law doctrine of incompatibility is violated by a candidate's service as county records management officer for the records of nonelective officers and his receipt of compensation for that service both before he takes office as county judge and while he holds office.

Yours very truly,



Susan Garrison  
Assistant Attorney General  
Opinion Committee

APPROVED: Sarah Woelk, Chief  
Letter Opinion Section

SG/SW/le  
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