



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 28, 1997

The Honorable Rodney Ellis  
Chair, Intergovernmental Relations Committee  
Texas State Senate  
P.O. Box 12068  
Austin, Texas 78711

Letter Opinion No. 97-014

Re: Whether the State Library and Archives  
Commission may promulgate rules  
authorizing county and district clerks to  
destroy bogus documents that have been filed  
with them (ID# 39105)

Dear Senator Ellis:

You ask whether the State Library and Archives Commission (the "commission") has authority under chapters 202 and 203 of the Local Government Code to promulgate rules authorizing county and district clerks to destroy certain bogus documents that they have accepted for filing. This question arises because of a statement we made in Attorney General Opinion DM-389, which determined that county and district clerks need not accept for filing the kind of documents you are concerned about. This opinion describes the activities of the so-called "Republic of Texas" movement, which include, among other things,

conducting "trials" in self-styled "common law" courts of the movement's invention, and attempting to file the "judgments" resulting from those trials, and other such documents, including pleadings, in the lawful district and county courts of this state.<sup>1</sup>

We further observed that some district and county clerks had been misled by the attempt to file papers disseminated by spurious "courts," apparently because they appeared to be similar in form to documents routinely filed in Texas courts. On closer examination these papers indicated "the purported existence of the 'common-law courts of the Republic of Texas,' or similar bodies which have no legal existence."<sup>2</sup> Attorney General Opinion DM-389 (1996) concluded that a district or county clerk should not accept any such documents for filing. It noted that district and county clerks that had already accumulated a number of documents relating to the so-called "Republic of Texas," might be able to dispose of them "in accordance with those portions of the records retention statutes that relate to destruction of records," citing chapters 202 and 203 of the Local Government Code, as well as the companion provisions in chapter 441 of the Government Code concerning the duties

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<sup>1</sup>Attorney General Opinion DM-389 (1996) at 1. See *United States v. Greenstreet*, 912 F. Supp. 224, 227 (N.D. Tex. 1996).

<sup>2</sup>Attorney General Opinion DM-389 (1996) at 2.

of the commission in managing the records of local government.<sup>3</sup> Your question calls upon us to address this suggestion and to determine whether the commission may authorize the district and county clerk to destroy bogus documents in their files.

The provisions cited in Attorney General Opinion DM-389 are part of the Local Government Records Act,<sup>4</sup> a statute addressing the maintenance, preservation, and destruction of local government records. A “local government” is “a county, including all district and precinct offices of a county, municipality, public school district, appraisal district, or any other special-purpose district or authority,”<sup>5</sup> while a “local government record” is

any document, paper, letter, book, map, photograph, sound or video recording, microfilm, magnetic tape, electronic medium, or other information recording medium, regardless of physical form or characteristic . . . , created or received by a local government or any of its officers or employees pursuant to law, including an ordinance, or in the transaction of public business.<sup>6</sup>

The documents you inquire about were received by a county or district clerk “in the transaction of public business,” and thus are local government records.<sup>7</sup> The clerk, as the records management officer for the records of the clerk’s office,<sup>8</sup> must prepare and file with the director and librarian of the commission records control schedules that list all records created or received by the office and establish a retention period for each record.<sup>9</sup> In the alternative, the county or district clerk

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<sup>3</sup>*Id.* at 3 n.3.

<sup>4</sup>Local Gov’t Code chs. 201 - 205.

<sup>5</sup>*Id.* § 201.003(7).

<sup>6</sup>Excepted from this definition are certain records not relevant to your question, such as extra copies, blank forms, and library and museum materials. *Id.* § 201.003(8)(A)-(F).

<sup>7</sup>It is not entirely clear that records held by district clerks are subject to all provisions of the Local Government Records Act, Local Gov’t Code chs. 201 - 205. A district court might be within the definition of “[l]ocal government” as “any other special-purpose district or authority,” although this is an unusual way to define district court. *Id.* § 201.003(7). In contrast, sections 441.091 through 441.095 of the Government Code, which relate to the destruction of county records under the supervision of the State Library and Archives Commission, define “county record” as documents and other media containing information “created or received by a county or precinct or any county or precinct officers or employees, *including the district clerk.*” Gov’t Code § 441.091 (emphasis added). *See also* Gov’t Code § 51.304 (district clerk may provide a plan for storage of records). However, the commission has adopted a local records schedule applicable to the records of district clerks. 13 T.A.C. § 7.125. We will assume that the provisions applicable to the county clerk also apply to the district clerk.

<sup>8</sup>Local Gov’t Code § 203.002(1).

<sup>9</sup>*Id.* §§ 203.041, .042.

may file a written certification that the clerk's office has adopted records control schedules that comply with the minimum requirements established on schedules issued by the commission.<sup>10</sup>

A local government record may be destroyed if it is listed on a records control schedule accepted for filing by the director and librarian of the commission, and either its retention period has expired or it has been microfilmed or stored electronically; if it is on a list of obsolete records approved by the director and librarian; or, in the case of an unscheduled record, if a destruction request is filed with and approved by the director and librarian.<sup>11</sup> In addition, the following records may be destroyed without meeting these conditions:

(1) records the destruction or obliteration of which is directed by an expunction order issued by a district court pursuant to state law; and

(2) records defined as exempt from scheduling or filing requirements by rules adopted by the commission or listed as exempt in a records retention schedule issued by the commission.<sup>12</sup>

Except for records subject to an expunction order, records filed in a county or district clerk's office may be destroyed only if the commission has approved their destruction pursuant to a records retention schedule or approved their exemption from scheduling and filing requirements. The commission's director and librarian maintains that the commission lacks authority to authorize the removal and destruction of bogus liens and other documents from the records of Texas county or district clerks. No statute expressly addresses the destruction of bogus records. We must therefore determine whether the commission may adopt a rule authorizing the destruction of such records.

A records retention schedule must "contain a list by record title of the county records to be scheduled" and "prescribe a minimum retention period for each record that is at least as long as that prescribed by law or the county records manual or state that a retention period for the record will be assigned later."<sup>13</sup> The county records manual, which the commission was required to prepare under former law, listed the various types of county records and stated the minimum retention period for them.<sup>14</sup> Thus, it covered the kind of information now found in the records retention schedules. Records retention schedules for each type of local government are now prepared by the commission's

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<sup>10</sup>*Id.* § 203.041(a); Gov't Code §§ 441.091 - .095.

<sup>11</sup>Local Gov't Code § 202.001(a).

<sup>12</sup>*Id.* § 202.001(b)(2).

<sup>13</sup>Gov't Code § 441.094(b).

<sup>14</sup>Act of May 23, 1977, 65th Leg., R.S., ch. 463, § 2, 1977 Tex. Gen. Laws 1198 (codified as former V.T.C.S. art. 5442c, § 2 (1925)); recodified without substantive change by Act of April 30, 1987, 70th Leg., R.S., ch. 147, § 1, 1987 Tex. Gen. Laws 316, 497 (codified as Gov't Code § 441.093); repealed by Act of May 29, 1989, 71st Leg., R.S., ch. 1248, § 85(3), 1989 Tex. Gen. Laws 4996, 5044. See Attorney General Opinion JM-264 (1984) at 3.

director and librarian under the direction of the commission and distributed to the records management officers of local governments. The commission "shall adopt the schedules by rule."<sup>15</sup> Each schedule must

- (1) list the various types of records of the applicable local government;
- (2) state the retention period prescribed by a federal or state law, rule of court, or regulation for records for which a period is prescribed; and
- (3) prescribe retention periods for all other records, which periods have the same effect as if prescribed by law after the records retention schedule is adopted as a rule of the commission.<sup>16</sup>

A records retention schedule lists records "by record title," indicating that records are listed by general category, based on subject matter and purpose of the records, without distinction within a category between genuine records and imitations. The records schedules included in the Texas Administrative Code place the records in such categories.<sup>17</sup> The legislature apparently did not anticipate that the commission would have to address the destruction of bogus records accepted by a court clerk because of a facial similarity to genuine filings.

We believe, however, that it would be within the commission's overall statutory purposes to establish a subcategory for spurious records within a category or categories on a records retention schedule, giving the bogus records a short retention time, or to adopt a rule defining such records as exempt from scheduling requirements.<sup>18</sup> The Local Government Records Act states the following purpose:

Recognizing that the citizens of the state have a right to expect, and the state has an obligation to foster, efficient and cost-effective government and recognizing the central importance of local government records in the lives of all citizens, the legislature finds that:

- (1) the efficient management of local government records is necessary to the effective and economic operation of local and state government;

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<sup>15</sup>Gov't Code § 441.158(a).

<sup>16</sup>*Id.* § 441.158(b).

<sup>17</sup>*See* 13 T.A.C. § 7.125.

<sup>18</sup>*See* Local Gov't Code § 202.001(b)(2).

(3) convenient access to advice and assistance based on well-established and professionally recognized records management techniques and practices is necessary to promote the establishment of sound records management programs in local governments, and the state can provide the assistance impartially and uniformly; and

(4) the establishment of uniform standards and procedures for the maintenance, preservation, microfilming, or other disposition of local government records is necessary to fulfill these important public purposes.

The adoption of rules authorizing county and district clerks to destroy spurious documents would implement these purposes. Moreover, chapter 441 of the Government Code provides for a local government records committee that includes representatives of various local governments.<sup>19</sup> The committee reviews and approves each records retention schedule prepared for local governments, reviews and approves certain rules considered for adoption by the commission, and advises “the commission and the director and librarian on all matters concerning the management and preservation of local government records.” The legislature thus enabled representatives from various local governments to bring new matters of record management to the attention of the commission. We think that the commission would have some authority to adopt rules authorizing the destruction of bogus records filed with the county or district clerk.

However, the commission lacks authority to adopt a rule dealing with the various consequences of destroying such records, and we believe that legislation is necessary to address this issue satisfactorily. There is a question as to whether persons who filed bogus documents should have some notice of their impending destruction, if only to prevent the erroneous destruction of valid filings. When a district or county clerk refuses to accept a fallacious document pursuant to Attorney General Opinion DM-389, the proponent necessarily knows that the document has been rejected. Thus, notice was not an issue in our prior opinion, but it may be relevant to the destruction of such documents. A decision about whether county and district clerks should give notice, and, if so, what kind of notice should be given<sup>20</sup> has an effect on the duties of county and district clerks throughout the state, and should be made by the legislature. In addition, questions about the clerk’s liability for erroneous destruction of a valid document may arise, but the commission has no authority to grant the clerks immunity or a defense in such suits.<sup>21</sup> Accordingly, we conclude that the commission may provide a partial solution to the presence of bogus records filed with a district or county clerk, but that legislative action is necessary to fully address this problem.

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<sup>19</sup>Gov’t Code § 441.162(b).

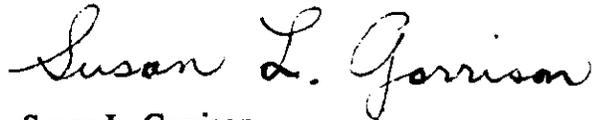
<sup>20</sup>See generally *id.* § 441.095(d) (notice of destruction of unscheduled record must be posted no later than the 10th day before the date it is destroyed).

<sup>21</sup>The clerks may also be subject to harassing lawsuits by persons whose bogus filings were destroyed, and the commission cannot shield them from these.

**S U M M A R Y**

The State Library and Archives Commission has some authority to promulgate rules authorizing county and district clerks to destroy bogus documents in their files, but it lacks authority to address related issues such as notice requirements and a clerk's liability in suits for destruction of the records. Legislative action is necessary to fully address the issues relating to the destruction of such bogus documents.

Yours very truly,

A handwritten signature in cursive script that reads "Susan L. Garrison". The signature is written in black ink and is positioned above the typed name and title.

Susan L. Garrison  
Assistant Attorney General  
Opinion Committee