

Texas State Library



Lorenzo de Zavala State Archives and Library Building
1201 Brazos



William D. Gouch
Director and Librarian

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ID# 11541
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January 23, 1991

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Opinion Committee

Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
Austin, Texas 78711-2548

Dear General Morales:

Many state agencies store their non-current state records at the Records Management Division's (RMD) records center until they dispose of them. Final disposition might be destruction or permanent transfer to the Library's State Archives Division.

The Texas State Library requests an opinion on the following four questions which relate to providing public access to state records in the physical custody of the Library's records center:

Question 1. For records stored in the Library's records center, is the Director and Librarian the officer for public records as described in the Open Records Act?

If the answer to Question 1 is YES, then the Library requests answers to the following three questions:

Question 2. Is the Library operating within its statutory authority to require the state agency where the record originated to furnish written authorization prior to providing public access to state records in the physical custody of the Library?

Question 3. Is the Library required to provide public access to original microfilm containing state records which are physically stored in the RMD's microfilm security vaults when working reference copies of the microfilms are available in the agency of origin?

Question 4. Is the Library required to create duplicate microfilm copies of the original microfilms of state records which are physically stored in the RMD's microfilm security

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vaults to fulfill an open records request, and if so, recover from the requestor the cost to create the copies?

Background

The Texas State Library received a written request for public access to a series of Hearing Files (Docket Files), 1956-85, from a private citizen, Mr. Ellis Gilleland, on January 4, 1991 (See Attachment No. 1). Access to these records was denied as indicated on Attachment No. 2, and further explained in the following paragraph.

These records were created by the Texas State Board of Veterinary Medical Examiners (Board) in connection with the transaction of official state business and were microfilmed in 1989 by the RMD of the Texas State Library at the request of the Board. The original hard copy records were legally destroyed subsequent to the filming. The original master microfilm jackets are preserved in the RMD's microfilm security vault. Reference copies of the original microfilm jackets were produced on microfiche and furnished to the Texas State Board of Veterinary Medical Examiners in 1989. The Texas State Board of Veterinary Medical Examiners is the legal custodian of the records and therefore retains authority and control over them. The Board has a duplicate copy of the original microfilm, and Mr. Gilleland was directed to the Board for access to the duplicate copies.

On January 16, 1991, Mr. Gilleland again requested written access to the original microfilm copies of the Hearing Files, stating in his request that, "The requested Hearing Files are under your (the Library's) authority and complete control" (See Attachment 4). Mr. Gilleland is claiming the Library has custody and control of the Hearing Files because the records series is not listed on the retention schedule. This is incorrect, as the Hearing Files are listed on the agency retention schedule under Agency Item Number 58 on page 6 (See Attachment 5). The official records series title for these files is "Docket files (Previously Illegals and Unethicals) Historical Data not related to #57." When the records were sent to the Library for filming, the Board referred to them as Hearing Files on all of the transmittal forms. When the retention schedule was developed, the official records series title was designated as "Docket files . . ." On the retention schedule, Attachment 5, adjacent to the Docket file entry # 58, there is a statement in the Remarks Column which states that the files covering 1965 to 1985 are being microfilmed. This is incorrect in two respects. First, the microfilming has already been completed. Second, the first date, "1965" is incorrect. It should be 1956. Apparently the last two digits were transposed.

We disagree that any records in storage at the RMD's records center are under the Library's authority and complete control. To further support our reason for denying access, the following information is provided for your review.

1. State agencies storing state records at the RMD's records center retain legal custody and control over the records. This conclusion is based, in part, on the Texas Government Code which authorizes the Texas State Library to establish and maintain a records management division. Although the Code does not explicitly differentiate between legal and physical custody, several references are made which imply that the ownership of the records in storage at the records center remains with the agency who originally received or created them. For example:
 - Texas Govt Code, §441.031(2) defines "Head of department or institution" as the "appointive or elective official with authority over the records of the department or institution." (emphasis added);
 - Texas Govt Code, §441.032(b)(1) states that the division shall "manage all state records with the cooperation of the heads of the various department or institutions in charge of the records . . ." (emphasis added);
 - Texas Govt Code, §441.037 requires agencies to "establish and maintain an active, continuing program for the economical and efficient management of the records of the department or institution";
 - Texas Govt Code, §441.038 requires that the director and librarian obtain "the consent of the head of the department or institution" before making photographic reproductions of the state records of the department or institution;
 - Although the Texas State Board of Veterinary Medical Examiners has not designated the Hearing Files as essential records, Texas Govt Code §441.059(a) makes a distinction between the storage location of essential records and the legal custodian. It states, in part, ". . .The facility must be in a place other than the legally designated or customary storage location for the records or duplicates. . . ." §441.059(b) requires the records preservation officer (the Director of the Records Management Division) to release essential state records, or their preservation duplicates, to the regularly designated custodian of an agency (emphasis added);
 - Section 5 of the Open Records Act describes the officer for public records as the chief administrative officer of the governmental body. It then requires this individual to make available public records for inspection and copying. This section also requires the officer to ". . . determine a period of time for which said records will be preserved subject to state laws governing the destruction and other disposition of state and local government records." We believe this further supports our interpretation that the agency of origin retains legal custody of the records they store at off-site locations.

2. In accordance with standards established by the Director of the Records Management Division, the head of any department or institution is required by Texas Govt Code, §441.037(3) to develop a records retention schedule for all records received or created by their department or institution. As part of the retention scheduling process, agencies must designate on the retention schedule whether the record is determined to be open or confidential in order to comply with the Open Records Act. A record designated as open (public record) on the schedule may change as a result of a legal opinion, or due to the changing composition of the content of a group of records. This may not always be communicated to the RMD in a timely manner, as the agency retention schedules are reviewed and certified for approval on an annual basis.

Since the agency of origin is the most familiar with the records it creates or receives, the agency is in a better position to remain up-to-date on the laws affecting its records. Because of this, the Library believes that the State of Texas and its citizens are best served by continuing our current policy of referring public requests for access to records in storage at the RMD's records center back to the originating agency.

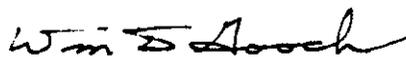
3. The Library has established procedures and guidelines to control access to all state records in storage at the RMD's records center. These procedures require the agency of origin to provide written authorization prior to releasing the records for use, and are published in the *State of Texas Records Management Manual* (see Attachment 3, which includes excerpts from the Manual).
4. State agencies are encouraged to use the RMD's records center for storing their non-current state records. By storing non-current state records in a controlled, low-cost, warehouse type facility such as the records center, considerable cost-avoidance is realized by the state. One of the selling points used to encourage state officials to use the records center is that they retain legal custody of their records, authorize destruction or final disposition of the records, and determine who has authority to obtain access to them.
5. The agency storing records in the records center is required to provide a description and location access code when requesting a record from storage. The center stores in excess of 160,000 cubic feet of records for more than 70 state agencies and cannot easily and in a timely manner determine if a particular record is in storage. The agency of origin maintains an index to the records in storage and is furnished the location access codes for each container. Since the agency works with their records on a continuing basis, it is in a better position to know the location and content of a particular record.

6. Many state records are microfilmed and the original records are destroyed to conserve storage space. Typically, the original master copy of the microfilm is stored in a microfilm security vault with security and environmental controls designed to preserve and protect the microfilm. Duplicate microfilm copies are produced at the time of filming and provided to the originating agency for daily use and reference. The original microfilm copy is accessed only for inspection purposes to ensure the continued archival longevity of the film, or for producing microfilm duplicates as requested by the owner of the records (originating agency). Routine reference of the original microfilms will cause deterioration of the film by causing scratches in the emulsion, dust accumulation, and fingerprint smudges. These problems will affect the film's archival quality and reduce the possibility of producing legible microfilm duplicates in the future. For these reasons, access to the original microfilm masters is only provided as authorized by the originating agency.

Summary

The Library's policy concerning access to records in storage at the records center has worked effectively over a number of years. Agencies receiving requests for public access to records in storage at the RMD's records center call and request the records be delivered back to their office. They provide public access and/or produce copies as required to comply with the Open Records Act. It allows for the agency of origin to access their stored records on-site at the records center, to provide written authorization for the public to view their records on-site at the records center, and allows for the proper preservation and protection of the state's records retained on microfilm. Mr. Gilleland, or any other private citizen who requests access to public information which is in storage at the records center, has an effective method for obtaining access by requesting that access through the agency who originally received or created the records, and who maintains control over the records.

Sincerely,



William D. Gooch
Director and Librarian

Attachments

pc. Sandra Weber
Bill Dyess