



WALKER COUNTY AUDITOR

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January 22, 1997

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Opinion Committee

Assistant Attorney General Sarah J. Shirley
Chair, Opinion Committee
Office of the Attorney General
State of Texas
P.O. Box 12548
Austin, Texas 78711

FILE # MC-39361-97
I.D.# 39361

RA-953

Dear Ms. Shirley,

I am submitting this request for an opinion from the Attorney General's office because I disagree with the opinions issued by the District Attorney of Walker County on the matters discussed in this letter.

BACKGROUND

The population of Walker County is less than 125,000 according to the 1990 census. The Walker County Commissioner's Court adopts the annual budget as required by Chapter 111, subchapter A, Local Government Code, for the period of October 1, through September 30 of each year. The allocation of County funds is at the discretion of the Commissioner's Court. See also D. BROOKS, COUNTY AND SPECIAL DISTRICT LAW 15.1, at 530 (Texas Practice 1989). In accordance with subchapter D of Chapter 111 of the Local Government Code, the County Auditor opens an appropriation account for each main budgeted or special item in the budget, causes to be entered to the appropriation account each warrant drawn against that appropriation account, and oversees the warrant process to ensure that the expenses of any department do not exceed the budget appropriations for that department. No expenditures of County funds may be made except in strict compliance with the budget, but the Commissioner's Court may amend the budget to transfer an amount budgeted for one item to another budgeted item without authorizing an emergency expenditure (LGC 111.010).

The Walker County Auditor also serves as the purchasing agent of the County. A County officer fills out a requisition for supplies or materials, signs it, turns it in to the purchasing clerk, who then submits the requisition to the County

Judge for approval. After the Judge approves the requisition, a purchase order number is assigned to the requisition, the funds are appropriated from the officer's expenditure budget, and the vendor is issued a purchase order. The County Auditor has adopted this procedure to assist in overseeing the warrant process to ensure that the expenses of any department do not exceed the budget appropriations for that department in accordance with LGC 111.092 and 112.001.

The Walker County Clerk collects the fee for records management and preservation as authorized by section 118.011(b)(2) of the Local Government Code. Local Government Code 118.0216 states that this fee 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. The fee may be used only to provide funds for specific records preservation and automation projects. These fees are accounted for in a records management and preservation fund. This is a separate fund, and is not co-mingled with the County general fund.

Prior to the adoption of the records management and preservation fee set under 118.011(b)(2) of the Local Government Code by the legislature, the Commissioner's Court of Walker County provided an expenditure budget from the general fund to the County Clerk in the amount of \$34,000 per year to be used for the microfilming/indexing of records in the Clerk's office. The County Clerk's employees microfilm the daily, ongoing records and documents of the County Clerk, such as any official personal property records, official real property records, official instruments, and other official records of the County Clerk with a camera and film provided by a third party vendor, send the microfilm to the third party vendor who then develops and makes an archival print of the film. The archival print is returned to the County Clerk's office, and the original film is stored with the third party vendor. The third party vendor also compiles indices of the Clerk's records, binds the indices and sends them to the County Clerk's office. This third party vendor is not under contract with the County. A previous Attorney General Opinion (JM-890) held that the microfilming of records of County Clerks office was not personal or professional services and must be competitively bid under LGC 262.021. Walker County's microfilming/indexing as of this date has not been competitively bid.

The general fund expenditure budget for microfilming/indexing has not been decreased since the adoption of the records management and preservation fee. For the fiscal year that ended September 30, 1996, the approved general fund expenditures for microfilming/indexing was approximately \$35,000. Total general fund revenue collections by the County Clerk's office for fiscal year 1995-96 were approximately \$157,150, and the general fund expenditures of the County Clerk's office were approximately \$212,150.

The County Clerk also collects the fee authorized by section 118.011(a)(1) and (2) for personal property records filing and real property records filing. Section 118.012(a) and 118.013(a) of the Local Government Code specifies that this fee is for the filing and registering or recording, including indexing, the records in the office of the County Clerk a document that is authorized or required to be filed in those records.

PROBLEM STATEMENT

In July, 1996, the Walker County Clerk received notification from the Walker County Auditor's office that he had completely expended the general fund budget in the microfilming/indexing line item and no further appropriations could be issued against his general fund budget for microfilming/indexing. Also in July 1996, the County Clerk approached the Commissioner's Court and requested his general fund expenditure budget be increased by \$18,500 for microfilming/indexing expenses. Commissioner's Court did not act on his request, asking for additional information instead. The third party vendor was notified in writing on August 22, 1996 that budgeted funds were not available to pay a recently submitted invoice, and that the invoice exceeded the amount of the appropriations.

Following the Commissioner's Court decision not to act on the request to increase the County Clerk's microfilming/indexing budget, and after he was notified that there was not any money available in his budget, the County Clerk continued to use the microfilming/indexing provided by the third party vendor and continued to incur expenditures not budgeted. In October 1996, the Auditor's office was notified of several outstanding invoices totaling \$15,632.77 due to the third party vendor for microfilming/indexing for the fiscal year ending 9-30-96. No requisitions were signed by the County Clerk and approved by the County Judge prior to the purchases for these invoices as required by LGC 113.901, and there were still no budgeted funds available to pay the invoices. The invoices were filed with the County Auditor for approval of payment prior to approval of payment by Commissioner's Court as required by LGC 113.064.

LGC 112.006(b) states that the County Auditor shall see to the strict enforcement of the law governing county finances. See also D. BROOKS, COUNTY AND SPECIAL DISTRICT LAW 15.8, at 538 (Texas Practice 1989), and VERNONS ANN. ST.CONST. art.5, Sec 8. Accordingly, the Auditor did not approve the invoices for payment as provided by LGC 113.064 because there was not a requisition, signed by the County Clerk ordering the supplies, approved by the County Judge, and delivered to the person from whom the purchase was to be made before the purchase was made (LGC 113.901), because the purchases exceeded the appropriations

for the department (LGC 111.092) and because the claim was not incurred as provided by law since there was no requisition and no funds appropriated for the expenditure (LGC 113.065). See also Attorney General Opinions # C-499 (Auditor may not approve claim if budget line depleted), # O-3146 (Auditor may not approve claim not in budget), Smith v. McCoy (Civ. App. 1976) 533 S.W. 2d 457, error dismissed (Auditor has responsibility, before approving a claim against the County, to determine whether it strictly complies with law governing County finances).

Since the Auditor's approval for payment of invoices is required by LGC 113.064 prior to the presentation of the invoices for approval for payment by Commissioner's Court under LGC 115.021, the invoices may not be approved for payment by Commissioner's Court. See also Wyatt Metal & Boiler Works v. Lipscomb, 87 S.W. 2d 331 (Tex. Civ. App.) writ ref'd., Attorney General Opinion # O-6663 (Commissioner's Court does not have authority to consider bills which have not been approved by the Auditor, and Commissioner's Court has no authority to issue a writ of mandamus directing County Auditor to approve or reject certain claims), Attorney General Opinion # O-6784 (County Auditor has authority to reject claims authorized by Commissioner's Court if they have not been contracted as provided by law, and Commissioner's Court is without authority to allow such claim over the disapproval of the Auditor, and County Clerk does not have authority to issue and deliver a warrant which has not been approved by the County Auditor).

In an executive session of the Commissioner's Court held on January 15, 1997, the Walker County District Attorney, who also serves as the County Attorney to the Walker County Commissioner's Court, advised the Commissioner's Court that the invoices that were not approved by the Auditor should be paid. Commissioner's Court then approved a budget amendment to the fiscal year 1996-97 budget to increase the microfilming/indexing line item in the County Clerk's budget by \$15,633 to pay the fiscal year 1995-96 invoices of the third party vendor. The District Attorney contended the recording and filing fee revenue charged to the public and collected by the County Clerk under LGC 118.011(a)(1) and (2) is a fee that must be "dedicated" to the microfilming/indexing expenditures and used at the County Clerk's discretion. The District Attorney's opinion was based in part by the fact that the amount of recording and filing fee revenue collected by the County Clerk for fiscal year 1995-96 under LGC 118.011(a)(1) and (2) was more than the amount spent by the County Clerk on microfilming/indexing the records with the third party vendor who provided the microfilming/indexing for fiscal year 1995-96.

I disagree with the District Attorney's opinion. Article 7, Section 18 of the Texas Constitution provides in relevant part: "The Commissioner's Court shall exercise such powers and jurisdiction over all County business, as is conferred by this Constitution and the law of the State, or as may be hereafter prescribed." Among those powers conferred by the laws of this State to the Commissioner's Court is the power to determine and adopt the County's budget. The Walker County Commissioner's Court adopts the annual budget in accordance with subchapter A of Chapter 111 of the Local Government Code. I believe Commissioner's Court has the authority to set the general fund expenditure budget for the County Clerk, and that the budget is not a dollar for dollar match of fees collected to expenditures by office.

I also believe the fee collected under LGC 118.011(a)(1) and (2) for real and personal property records filing is NOT "dedicated" solely to microfilming/indexing expenditures of the official personal property records, official real property records, official instruments, and other official records of the County Clerk. I believe this is the fee charged to the public and collected by the County Clerk for the service rendered for filing and recording, including indexing, those documents. I believe the expenditures for filing and recording the official records of the County Clerk could include, as budgeted by the Commissioner's Court, all items necessary for the recording and filing of the documents, such as the cost of the office personnel who perform the filing and recording and oversee the records, the cost to the County of the copies made to file the records, the monthly lease on the copy machine, and various other expenditures made by the County Clerk's office in order to file and record documents.

I also believe the District Attorney's opinion of the use of the filing and recording fees collected by the County Clerk under LGC 118.011(a)(1) and (2) as being "dedicated" to microfilming/indexing and not to any of the other expenditures incurred in filing and recording the documents is incorrect. I believe the District Attorney's opinion would make the recording and filing fee charged to the public and collected by the County Clerk under 118.011(a)(1) and (2) analogous to the "Hot Check Fund" and interest accrued on special inventory tax escrow accounts, which would be used at the discretion of the Clerk, and placed beyond the budgetary controls of the Commissioner's Court.

The District Attorney also maintains the fee collected by the County Clerk for the records management and preservation fund under LGC 118.011(b)(2) may not be spent on microfilming/indexing the daily, ongoing records and documents of the County Clerk, such as official personal property records, official real property records, official instruments, and other official records of the County Clerk. He contends this fee may only be used by the Clerk on those records that the Clerk determines qualify as specific records preservation and automation projects.

I disagree. I believe the Clerk has the discretion to develop the policies and records management procedures in the most efficient and cost effective manner in the performance of governmental functions, as those policies relate to the County Clerk's office. Attorney General Letter Opinion #92-81 plainly states "the Commissioner's Court is responsible for allocating County funds, including monies collected as records management and preservation fees."

"Preserve" is defined in WEBSTER'S DICTIONARY as "1: to keep safe from injury, harm, or destruction ; PROTECT; 2 a: to keep alive intact or free from decay b: MAINTAIN; 3 a: to keep or save from decomposition; 4: to keep up and reserve for personal or special use." The County Clerk is currently using microfilming and microfilming/indexing to preserve the daily, ongoing, records and documents such as official personal property records, official real property records, and other official records of the County Clerk's office. If the Commissioner's Court determines that microfilming/indexing the daily, ongoing records such as official personal property records, official real property records, and other official records of the County Clerk's office is a specific records preservation project, I believe the Commissioner's Court could approve the payment out of the records management and preservation fund established by LGC 118.011(b)(2) the microfilming/indexing of the daily, ongoing records of the Clerks office such as official personal property records, official real property records, and other official records of the County Clerk.

Because the District Attorney and I have differing opinions, I would ask that the Attorney General's office provide your opinion on the following questions.

Who is responsible for allocating County funds to departments for microfilming/indexing expenditures as described above, and who determines at what level that expenditure amount is to be?

Is the amount of microfilming/indexing expenditures to be paid to a third party vendor either under contract or not under contract with the County "dedicated" in the same amount as the filing fee revenue collected by the County Clerk under LGC 118.011(a)(1) and (2) for real and personal property records filing, or is the Commissioner's Court responsible for determining, within budget constraints, the amount of microfilming/indexing expenditures for the County Clerk?

Is the filing fee revenue collected by the County Clerk under LGC 118.011(a)(1) and (2) for real and personal property records filing "dedicated" in the same amount as the filing fee revenue collected to discretionary expenditures at the will of the County Clerk, or is it similar to the "Hot Check" fund, or is it under the control of the Commissioner's Court?

May the County auditor approve the invoices in question for payment?

Are the filing fee revenues collected as provided for under LGC 118.011(a)(1) and (2) for real and personal property records filing to be used at the discretion of the County Clerk for expenditures in the same amount or a lesser amount as the fees collected, or does the Commissioner's Court have the authority to determine what expenditures are reasonably allocated to the filing fee provided under LGC 118.011(a)(1) and (2)?

If the Commissioner's Court determines that the expenditures for microfilming/indexing the daily, ongoing documents such as the official personal property records, official real property records, and other official records of the County Clerk's office are a specific records preservation project performed after a document is filed and recorded in the records of the County Clerk's office, may any additional expenditures incurred by the County Clerk above the general fund budget for microfilming/indexing the daily, ongoing documents such as the official personal property records, official real property records, and other official records of the County Clerk's office be charged to the records management and preservation fund established by LGC 118.011(b)(2) by the Commissioner's Court?

The County Clerk's employees microfilm the daily, ongoing documents of the County Clerk with a camera and film provided by a third party vendor, and send the microfilm to the third party vendor who then develops and makes an archival print of the film. The archival print is returned to the County Clerk's office and the original of the film is stored with the vendor. The third party vendor also compiles indices of the Clerk's records, binds the indices and sends them to the County Clerk's office. Can the Commissioner's Court consider this "services performed by the County Clerk after the filing and recording of a document"?

May the Commissioner's Court order payment of an invoice that has not been approved for payment by the County Auditor?

Were the invoices in question incurred as provided by law?

May the Commissioner's Court amend the fiscal year ending 9-30-96 budget four months or more after the close of that budget year in order to pay invoices for supplies or materials ordered by an elected official who did not have a requisition approved by the County Judge nor was it delivered to the person from whom the purchase was made prior to the purchase as provided by law and for which funds were not available when the work was performed?

May the Commissioner's Court amend the fiscal year 96-97 budget to pay invoices for supplies or materials that were ordered by an elected official in the fiscal year ending 9-30-96 that did not have a requisition approved by the County Judge nor was it delivered to the person from whom the purchase was made prior to the purchase as provided by law? See also AG Opinion O-6132(budget may not be amended to pay previous road and bridge obligation), O-4830(obligation cannot be incurred unless in the budget), and O-2937(road and bridge bills incurred in December may not be paid for with next year's budget)

Is the Auditor under a ministerial duty or is it a discretionary act to approve a claim against the County that, in his opinion, was not incurred as provided by law? See also 533 S.W. 2D 457, Smith v. McCoy, (Tex.Civ.App 5 Dist 1976); Lovell v. Bynum(Civ. App 1958) 315 S.W. 2d 20, ref, n.r.e.

Is the County Clerk authorized to obligate the County to expend funds not provided in his budget? If not, what recourse does the County have?

Respectfully submitted,



Dan C. Clower, CPA CGFM
Walker County Auditor



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APR 28 1997

Opinion Committee

JEFFREY D. HERRINGTON
CRIMINAL DISTRICT ATTORNEY

ANDERSON COUNTY
ANDERSON COUNTY COURTHOUSE

500 North Church Street
Palestine, Texas 75801
903/723-7400

April 25, 1997

FILE # MC-39530-97

I.D.# 39530

The Honorable Dan Morales
Attorney General State of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

RQ-953 # I.D.#
FILE

Re: Request for Attorney General's Opinion

Dear Dan:

I am requesting an Attorney General's Opinion with regard to the following question:

May the County continue to expend funds dedicated for the exclusive purpose of records management and preservation when the County Clerk requests such payments cease being paid from said fund.

Factual Summary

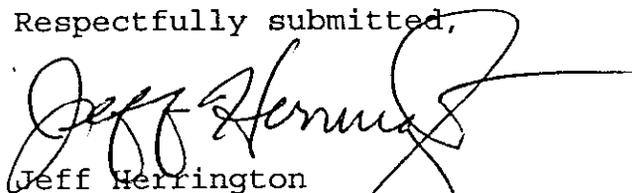
On March 10, 1995 the Commissioner's Court approved the request of the County Clerk to expend funds to lease Electronic Cashiering Equipment for use by the County Clerk. These funds were paid from the dedicated fee account established for the benefit of the County Clerk's Office for the exclusive purpose of records management and preservation. See, Tex. Local Government Code Ann. §§ 118.011, 118.0216. This was done with the County Clerk's consent and approval. On August 16, 1996, the County Clerk expressed concerns that the lease of the Electronic Cashiering Equipment was not a proper use of funds from the Record Management & Preservation account. On January 23, 1997, a private attorney retained by the County Clerk threatened legal action should the Commissioner's Court fail to discontinue the above expenditure. Subsequently, the Commissioner's Court voted to suspend payments of the above expenditure pending an Attorney General's Opinion.

Legal Summary

The leading case on this issue is Hooten v. Enriques, 863 S.W.2d 522 (Tex. App. - El Paso 1993). Hooten states that the county clerk has "the exclusive authority to designate exactly what constitutes record keeping, preservation, and automation in the County Clerk's Office." Hooten at 531. It would seem clear that even though the the County Clerk originally stated that the lease of the equipment was a proper use of dedicated funds, her subsequent decision to the contrary is binding on the Commissioner's Court.

I would very much appreciate your response in this matter. If you have any questions, feel free to contact me.

Respectfully submitted,



Jeff Herrington
Criminal District Attorney
Anderson County, Texas
Texas Bar Card #09538500
Anderson County Courthouse
500 N. Church Street
Palestine, Texas 75801

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Hot Checks
Joyce Owen
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NOV 25 1996

Opinion Committee

November 21, 1996

FILE # MC39270-96

T.D.# 39270

RQ-953

Dan Morales, Attorney General
Attention: Opinion Committee
Office of the Attorney General
Price Daniel, Sr. Building
209 W. 14th Street and Colorado Street
P. O. Box 12548
Austin, Texas 78711-2548

Re: Question related to the allocation of monies collected as records management and preservation fees by the County Commissioners Court to pay for "specific records preservation and automation projects".

Dear Opinion Committee:

The Bowie County Clerk has requested our office to obtain an Attorney General's Opinion regarding the following question:

1. Whether the County Commissioner's Court has the authority to allocate monies collected from the records management and preservation fee to pay for the preservation/microfilming of records specified through Section 118.0216 of the Local Government Code?

By way of a short explanation - the County Commissioner's Court authorized and allocated a portion of the monies collected by the County Clerk through the records management and preservation fee to be used to pay for the microfilming of records specified under Section 118.0216 and the County Clerk feels these funds and the allocation/expenditure of the fees collected through the records management and preservation fee are to be used solely at her discretion.

We have read and reviewed Letter Opinion No. 92-7, Letter Opinion No. 92-81, and Letter Opinion No. 93-102, and are of the opinion that the County Commissioner's Court has the authority to allocate the funds provided they expend the monies only for specific records preservation set out by Section 118.0216.

Has there been any recent opinion or is the committee considering any more clarifications of Letter Opinion No. 92-7 or any new, yet unpublished, opinions concerning our question above?

Thank you for your consideration of this issue and I look forward to your response.

Sincerely,

A handwritten signature in black ink that reads "Bobby Lockhart". The signature is written in a cursive style with a large initial "B".

Bobby Lockhart
Criminal District Attorney

BL/mf