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Submitted via email to opinion.committee@oag.texas.gov

RE: Use of funds collected pursuant to Local Government Code Section 118.0216

Dear General Paxton:

I am writing to get clarification on the proper use of funds collected pursuant to the fee for “Records Management and Preservation” authorized by Local Government Code Sections 118.0216 and 118.011(b)(2). There are no prior Attorney General Opinions directly on point with the question and facts herein.

QUESTION PRESENTED

Can the fee that is collected by the McLennan County Clerk pursuant to Local Government Code Section 118.0216 and 118.011(b)(2) be used by the McLennan County Clerk for a records management and preservation project that includes records of the McLennan County District Clerk?

STATUTES IN QUESTION

In 1991 the Texas Legislature added Section 118.0216 to the Local Government Code. In addition, the Texas Legislature amended Section 118.011 to allow a County Clerk to charge a fee of not more than \$5.00 as a Records Management and Preservation Fee. In 2013 the Texas Legislature amended Section 118.011 to increase the amount that the County Clerk could charge to a fee of not more than \$10.00.

Section 118.0216(a) identifies the services performed by the County Clerk that allow the collection of the fee,

“The fee for “Records Management and Preservation” under Section 118.011 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.” Tex. Loc. Gov’t Code Ann. § 118.0216(a) (West).

Section 118.0216(d) then limits what the fee may be used for,

“The fee may be used only to provide funds for specific records management and preservation, including for automation purposes.” Tex. Loc. Gov’t Code Ann. § 118.0216(d) (West).

PROPOSED USE OF THE FEE

The McLennan County Clerk has requested that the funds generated from the “Records Management and Preservation” fee be used for a project that would preserve records contained in both the County Clerk’s Office and the District Clerk’s Office. The project would include the digitizing, electronic storage, and preservation of documents that are filed in both the County Clerk’s and District Clerk’s offices.

During a review of the proposed use of the funds, a disagreement between county officials has arisen as to whether the use of the funds collected pursuant to Section 118.0216 can be used for the records management and preservation of county records, including the District Clerk’s records, or can they only be used on records within the County Clerk’s Office.

SIMILAR STATUTE

Section 118.025 of the Texas Local Government Code is similar to Section 118.0216. Section 118.025 allows the commissioners court of a county to adopt a “records archive fee” under Section 118.011(f) in an amount of not more than \$10.00. Section 118.025(b) contains similar language to Section 118.0216(a) which describes the services that the County Clerk performs that entitles the clerk to collect the fee. Additionally, Section 118.025(e) limits what the fee may be used for,

“The funds generated from the collection of a fee under this section may be expended only for the preservation and restoration of the county clerk's records archive.” Tex. Loc. Gov’t Code Ann. § 118.025(e) (West).

Section 118.025 then has additional restrictions that exclude the use of the funds for certain computer software. Tex. Loc. Gov’t Code Ann. § 118.025(f) (West)

Although Section 118.025(e) and Section 118.0216(d) are similar, there is also a key distinction between the two sections. Section 118.025(e) limits the use of the funds to be expended only for the preservation and restoration of **the county clerk’s records archive**. However, Section 118.0216(d) only limits the expenditure of the fee for specific records management and preservation, including for automation purposes. The language of Section 118.0216(d) does not limit the records to those records of the County Clerk’s office.

It is this difference in the language of the expenditure restriction between the two statutes that has caused the disagreement between county officials.

DISAGREEMENT

The primary disagreement between the officials is whether the language contained in Section 118.0216(a) operates as an additional limitation to the use of the funds under Section 118.0216(d). Several officials believe that the language in Subsection (a) that the 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”. These officials believe that this language of subsection requires that the fee only be used for the management and preservation services of records within the clerk’s office. Several other officials believe that the

language is Subsection (a) describes the services performed that entitle the clerk to collect the fee and that the limitations on the use of the fee is controlled by Subsection (d). These officials believe that when comparing this statute with the similar statute in Section 118.025 there is a clear difference in the language that the legislature used between the two statutes. These officials are relying on the rule of statutory construction that “We presume the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen. TGS–NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432, 439 (Tex. 2011). Under this reasoning, because the legislature chose to specifically use the term “county clerk's records archive” under the limitation for the use of the fee under Section 118.025(e) and the legislature specifically omitted language limiting the use of the fee to only county clerk’s records under Section 118.0216(d), then the statutes must be read in a way that would operate to give meaning to specific language and differences in language used by the legislature in each statute. Additionally, these officials believe that reading Section 118.0216(a) as a limitation on the use of the fee collected would essentially make Subsection (d) obsolete and superfluous. Courts must not interpret the statute “in a manner that renders any part of the statute meaningless or superfluous.” Crosstex Energy Servs., L.P. v. Pro Plus, Inc., 430 S.W.3d 384, 390 (Tex. 2014). Therefore, these officials believe that the proper reading of the statute would be that Section 118.0216(a) has been carefully crafted by the legislature to address only when and why the fee is being collected and that Section 118.0216(d) has been carefully crafted by the legislature to address when and for what purpose the fees collected may be expended.

CONCLUSION

Therefore, I respectfully request that the Attorney General’s Office issue an opinion that clarifies the proper use of the fees collected under Section 118.0216 of the Texas Local Government Code and specifically, whether those funds may be used for the records management and preservation of records that are already in possession of the county in both the County Clerk’s and the District Clerk’s offices. There is no pending or anticipated litigation involving this issue.

Respectfully submitted,



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