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OPINION COMMITTEE

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The State of Texas



Nandita Berry
Secretary of State

FILE # ML-47604-14

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RQ-1209-BA

July 3, 2014

The Honorable Greg Abbot
Attorney General of Texas
Attn: Opinion Committee
Post Office Box 12548
Austin, Texas 78711-2548

Re: Authority of a notary public to withhold or redact certain information from a notary public record book

Dear Mr. Attorney General:

Chapter 406 of the Government Code ("Chapter 406") charges the Office of the Secretary of State (the "Office") with commissioning, educating, investigating, and disciplining Texas notaries public ("notaries"). Section 406.014 of the Government Code expressly makes public the entries in a notary's record book. Secretary of State Nandita Berry seeks your assistance in resolving the questions of whether and under what circumstances a notary may withhold or redact certain information from the notary's record book in response to a request for certified copies of the book from the public.

Background

Section 406.014 of the Government Code sets forth the requirements for maintaining notary records. Specifically, Section 406.014(b), (c)¹ provide that entries in a notary record book are public information and that certified copies of the records must be provided upon request. The statute does not provide for any exceptions.

Chapter 121 of the Texas Civil Practice and Remedies Code also governs officers who take acknowledgements or proofs of written instruments, including notaries. Section 121.012(e) provides that statements of acknowledgement recorded by an officer are original public records, open for public inspection and examination at all reasonable times.²

¹Tex Gov't Code Ann. § 406.014 (b), (c) NOTARY RECORDS.

(b) Entries in the notary's book are public information.

(c) A notary public shall, on payment of all fees, provide a certified copy of any record in the notary public's office to any person requesting the copy.

² Civ. Prac. & Rem. Code § 121.012 (e) RECORD OF ACKNOWLEDGEMENT.

(e) The statements of acknowledgement recorded by the officer are original public records, open for public inspection and examination at all reasonable times. The officer must deliver the book to his successor in office.

The Office, in its administrative rules, Title 1 of the Texas Administrative Code, Section 87.40, has placed limitations on recording personal identifying information or the release of any such information that may be maintained within a notary book.³ This includes identification numbers assigned by a governmental agency or the United States, or any number that may be used to identify the individual. The rule expressly provides that this does not apply to numbers related to the residence of the individual. The rules provide that if a notary has inadvertently included personal identifiable information in their record book contrary to Section 87.40, the notary must redact that information.⁴

The position of the Office has been that the information contained in the record book is public information and therefore must be provided in its entirety upon request, unless the record book contains personal identifiable information, as defined in 1 Tex. Admin. Code §87.40, or the record book is used by an employee of a governmental body for work purposes and contains information deemed confidential under Chapter 552 of the Government Code. Our Office has recently received a complaint against a notary public based on the fact that when the complainant requested copies of the notary's record book, the copies provided were almost completely redacted. The notary, through her attorney, responded to the complaint citing the First Amendment right of association and the National Labor Relations Act (29 U.S.C. §§ 151-169) as the grounds for redacting information. Your Office's Open Records Division has previously considered the application of federal law to a notary record book:

Under the Supremacy Clause of the United States Constitution, the United States Constitution and duly-enacted federal statutes are "the supreme law of the Land," and states have a responsibility to enforce federal law. *See* U.S. Const., art. VI, cl. 2; *Howlett v. Rose*, 496 U.S. 356, 367-69, 110 S.Ct. 2430, 2438-39, 110 L.Ed.2d 332 (1990). As a federal law, constitutional privacy preempts any conflicting state provisions, including section 406.014 of the Government Code. *See Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law).

Tex. Att'y Gen. OR2009-09229.

With that in mind, we seek your opinion regarding the grounds under which a notary may prevent compelled disclosure of information in their records on constitutional, statutory, and common law reasons, and how those justifications should be evaluated by this Office.

³ 1 Tex. Admin. Code §87.40 PROHIBITION AGAINST RECORDING PERSONAL INFORMATION
(a) A notary public (other than a court clerk notarizing instruments for the court) shall not record in the notary's record book:

(1) an identification number that was assigned by a governmental agency or by the United States to the signer, grantor or maker and that is set forth on the identification card or passport presented as identification; or

(2) any other number that could be used to identify the signer, grantor or maker of the document.

(b) This section does not prohibit a notary from recording a number related to the residence of the signer, grantor or maker of the document or the instrument.

⁴ 1 Tex. Admin. Code §87.42. PUBLIC INFORMATION. Entries in the notary public record book are public information. On payment of all fees, the notary shall promptly provide a certified copy of any record in the notary public's record book to any person requesting the copy. If the notary has inadvertently included personal identifiable information in the record book contrary to §87.40 of this title (relating to Prohibition Against Recording Personal Information), the notary must redact that personal information prior to release of the information.

Specific Issues for Consideration

- 1) *May a notary public withhold or redact information from a notary record book on the grounds of federal constitutional or statutory reasons?*
- 2) *Are there other grounds, such as the privileges noted in Article 5 of the Texas Rules of Evidence, under which a notary public may withhold or redact information from a notary record book?*
- 3) *What is the scope of the Office's authority to take disciplinary action against a notary public's commission, including suspension or revocation of the commission, on the grounds of withholding or redacting information contained in a record book which the notary claims is protected by state or federal law?*

If you have any questions regarding this request or need further information, please contact Ms. Carmen Flores, Director, Business & Public Filings.

Sincerely,



Wroe Jackson
General Counsel to Secretary of State Nandita Berry