

# Before the Presiding Judges of the Administrative Judicial Regions

## Per Curiam Rule 12 Decision

**APPEAL NO.:** 09-005

**RESPONDENT:** Richard Owen, Justice of the Peace, Precinct 1, Llano County

**DATE:** December 15, 2009

**SPECIAL COMMITTEE:** Judge Stephen B. Ables, Chairman; Judge John Ovard, Judge David Peeples, Judge Kelly G. Moore, Judge Jeff Walker

On July 16, 2009, Petitioner requested copies of all written correspondence generated or produced by Respondent or Respondent's office regarding the county attorney's or an assistant county attorney's ability to conduct a private law practice on county property. Petitioner sent identical requests to three other Llano County officials. On July 31, Judge Owen responded that the Public Information Act did not apply to judicial records, that the information Petitioner requested was not considered "public information" as defined by the Act because it constituted private communications not subject to disclosure under the Act. He also stated that he did not have any information that was responsive to her request. Petitioner sent a complaint to the Office of the Attorney General (OAG) and was informed by the OAG that the records she was seeking were judicial records and that her recourse was under Rule 12 of the Rules of Judicial Administration.

On August 11, 2009, Petitioner sent a second request to Judge Owen further describing the information requested and clarifying that the request was made pursuant to Rule 12. Respondent replied on August 19, 2009, providing a letter Respondent had sent to Llano County Judge Wayne Branscom that was responsive to the request. However, Petitioner also received two additional documents from other officials to whom she had sent similar requests. One was a document that was provided to the Commissioners Court of Llano County that contained information for the commissioners court to consider when drafting a resolution authorizing an assistant county attorney to maintain a private law practice in the courthouse. It is undisputed that Respondent provided this document to the commissioners court during one of its meetings. The second document is a string of emails between the county auditor of Llano County and Respondent regarding the county's obligation to establish the amount of any benefit for tax purposes derived from the personal use of courthouse space by the county attorney. After receiving these documents, Petitioner sent a new request to Judge Owen stating that he had not provided emails and other correspondence sent between Respondent and Commissioner No. 1 of Llano County, the Llano County auditor, the Texas Association of Counties (TAC), private citizens, Llano County residents, and other elected/appointed Llano County and district officials. Respondent replied to this last request stating that he found no judicial records dealing with the county attorney or assistant county attorney's ability to conduct a private law practice on county property that he had not already provided to Petitioner.

Petitioner appeals Respondent's denial of her request for access to the records and also asserts that Respondent did not provide her with the appropriate information regarding her right to appeal the denial of her access to judicial records.

The first issue in this appeal is whether Respondent should have provided to Petitioner the two documents she received from the other county officials pursuant to her requests for records. As described above, the first document is a list of suggestions for the commissioners court to consider prior to adopting a resolution for an assistant county attorney to maintain a private law practice in the courthouse. Respondent states that he provided this to the commissioners court, not in his official capacity, but as an interested member of the public. The document is not on letterhead and does not indicate who prepared or submitted it. It states that the court should receive the benefit of counsel from an independent disinterested attorney. Respondent claims that this document is not responsive to Petitioner's request because it was not created or maintained by his court in its regular course of business and that he provided it to the court as "a private citizen in the exercise of my first amendment rights."

The threshold issue in a Rule 12 appeal is whether the records are "judicial records" as defined by Rule 12.2(d) as follows:

*"Judicial record means a record made or maintained by or for a court or judicial agency in its regular course of business but not pertaining to its adjudicative function, regardless of whether that function relates to a specific case. A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record."*

Respondent is correct in that a record must be made or maintained by or for a court or judicial agency in its regular course of business in order for it to be a judicial record. He is also correct that he may participate in government activities as a regular citizen. However, public officials must be mindful of how they proceed in this regard. For example, if Respondent had represented to the commissioners court that he was providing the information as a fellow elected official or in his official capacity or if he had provided the document on his official letterhead, Respondent could arguably have made this activity one that falls within the regular course of business of the office he holds. In this case, such representations were not made. We therefore find that this is not a judicial record of the Respondent's court.

The next record is an email string between the county auditor and Respondent that also contains an email from a TAC employee. The emails discuss Llano County's obligation to establish the amount of the benefit received by a county attorney who operates a private practice from the courthouse for income tax purposes. Respondent argues that this document is not responsive to Petitioner's request because it does not relate to "the County Attorney or an assistant County Attorney's **ability** to conduct a private law practice on County property." We agree with Respondent.

Because we find that Respondent did not deny Petitioner access to records that are responsive to her request, Respondent was not obligated to provide a notice of denial under Rule 12.

Petitioner's appeal is denied.