



**THE ATTORNEY GENERAL
OF TEXAS**

January 13, 1989

**JIM MATTOX
ATTORNEY GENERAL**

The Honorable Jack Rains
Secretary of State
P.O. Box 12697
Austin, Texas 78711-2697

Open Records Decision No. 517

Re: Whether article 4331a, V.T.C.S., authorizes the Secretary of State to withhold certain computer programs from required disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. (RQ-1518)

Dear Mr. Rains:

You ask whether article 4331a, V.T.C.S., authorizes the secretary of state to withhold certain computer programs from required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S.

The Phonetic Algorithm Method (PAM) is a series of computer programs developed to conduct searches of the corporate and Uniform Commercial Code (UCC) records stored on the secretary of state's computer. The secretary of state, NCR Corporation, and a University of Texas linguistics professor developed the programs in the early 1970's. In 1984, the secretary of state was granted copyright protection for the PAM programs. Additionally, in 1987, the secretary of state obtained legislative approval to develop and market such software, as well as to provide direct computer access to information stored on the secretary's computers. V.T.C.S. art. 4331a.

Computer programs are not the sort of thing generally considered a "record." Typically, records are thought of as the tangible inscription of information or data. Computer programs, on the other hand, are methodologies or algorithms used to compile and analyze information or data.

Section 2(2) of the Open Records Act states:

'Public records' means the portion of all documents, writings, letters, memoranda, or other written, printed, typed, copied, or

developed materials which contains public information. (Emphasis added.)

Section 3(a) of the act provides, in part:

All information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body, with the following exceptions only. . . . (Emphasis added.)

The form in which information is stored does not determine its availability; computer tapes are covered by the act. Attorney General Opinion JM-672 (1987). This office has indicated that computer programs created by a governmental body also are subject to the act. See Open Records Decision No. 401 (1983); see also Fla. Op. Att'y. Gen. No. 86-94 (Oct. 28, 1986).

Generally, all information held by governmental bodies is open to public inspection unless the information falls within an exception to disclose under the Open Records Act. See Attorney General Opinion JM-672 (1987). You assert that these programs are protected from disclosure under sections 3(a)(1), 3(a)(4), and 3(a)(10). Additionally, you claim that article 4331(a), V.T.C.S., governs access to this information.

As stated above, the Open Records Act generally controls access to information held by governmental bodies. This is not, however, necessarily the exclusive method of access, and the legislature is free to modify or change the method of access to particular information. With regard to the information requested here, the legislature, through article 4331a, has provided a different method of access.

Article 4331a provides, in section 2:

The secretary of state may:

- (1) develop computer software to facilitate the discharge of the constitutional and statutory duties of the office;
- (2) enter agreements to transfer the software on the terms and conditions specified in the agreements; and
- (3) assess a reasonable fee for the transfer. (Emphasis added.)

Article 4331a deals expressly with access to computer programs developed by the secretary of state. Article 4331a grants to the secretary of state the power to enter into agreements to transfer software, and to charge a fee for this transfer. This, in effect, authorizes the secretary of state to control access because it provides for both agreements governing access and payment for access. Article 4331a does not, however, expressly except computer programs developed by the secretary of state from the Open Records Act.

The Open Records Act also controls access to information of this type held by a governmental body. Standing side by side, the two statutes appear irreconcilable. Under the Code Construction Act, when two statutes enacted at different sessions of the legislature are irreconcilable, the statute enacted latest in date prevails. Tex. Gov. Code Ann. § 311.026. This principle of construction presumes that the legislature knows of the presence and scope of existing statutes. The Open Records Act was enacted in 1973. Acts 1973, 63rd Leg., ch. 424, at 1112. Article 4331a was enacted in 1987. Acts 1987, 70th Leg., ch. 432 at 1999, 2000. Although the Open Records Act has been amended a number of times since 1973, the provisions governing information covered by the act have not been amended. Therefore, article 4331a, and not the Open Records Act, controls access to computer software within the scope of article 4331a.

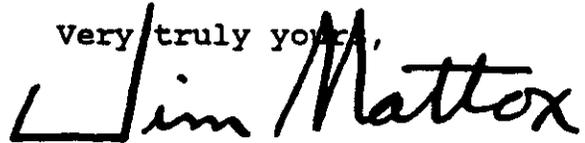
To fall within the scope of article 4331a, computer software must have been developed to facilitate the discharge of the constitutional and statutory duties of the secretary of state. Your letter states that this software is used to perform phonetic searches of the UCC and corporation files maintained by the secretary of state. Section one of article 4331a provides that the secretary of state "may establish a system to provide access. . .to information" stored in its computers. Because the PAM software would do this, access to the PAM software is controlled by article 4331a.

S U M M A R Y

Article 4331a, V.T.C.S., provides the means of access to computer software developed by the secretary of state pursuant to article 4331a. This article, and not the Texas Open Records Act, article 6252-17a, V.T.C.S., determines who must be given access. Therefore, the secretary of state is

authorized to withhold the computer programs
in question.

Very truly yours,

A handwritten signature in black ink that reads "Jim Mattox". The signature is written in a cursive style with a large, prominent "J" and "M".

J I M M A T T O X
Attorney General of Texas

MARY KELLER
First Assistant Attorney General

LOU MCCREARY
Executive Assistant Attorney General

JUDGE ZOLLIE STEAKLEY
Special Assistant Attorney General

RICK GILPIN
Chairman, Opinion Committee

JENNIFER S. RIGGS
Chief, Open Government Section
of the Opinion Committee

Prepared by Jennifer S. Riggs
Assistant Attorney General