

ID# 11677 TP-GON



Office of the
SECRETARY OF STATE

John Hannah, Jr.
SECRETARY OF STATE

February 11, 1991

RQ-46

RECEIVED

FEB 13 91

Opinion Committee

EXECUTIVE DIVISION
P.O. Box 12697
Austin, Texas 78711-2697
(512) 463-5701

ELECTIONS DIVISION
P.O. Box 12060
Austin, Texas 78711-2060
(512) 463-5650

Disclosure Filings
P.O. Box 12070
Austin, Texas 78711-2070
(512) 463-5704

DATA SERVICES
DIVISION
P.O. Box 12887
Austin, Texas 78711-2887
(512) 463-5609

SUPPORT SERVICES
DIVISION
Financial Management
P.O. Box 12887
Austin, Texas 78711-2887
(512) 463-5600

Staff Services
P.O. Box 12887
Austin, Texas 78711-2887
(512) 463-5600

STATUTORY FILINGS
DIVISION
Corporations
P.O. Box 13697
Austin, Texas 78711-3697
(512) 463-5555

Statutory Documents
P.O. Box 12887
Austin, Texas 78711-2887
(512) 463-5654

Texas Register
P.O. Box 13824
Austin, Texas 78711-3824
(512) 463-5561

Uniform Commercial Code
P.O. Box 13193
Austin, Texas 78711-3193
(512) 475-2705

The Honorable Dan Morales
Attorney General
Supreme Court Building
Post Office Box 12548
Austin, Texas 78711

Re: Opinion request concerning whether, pursuant to the Open Records Act, a requesting party may dictate the media for access to public information

Dear General Morales:

Pursuant to Tex. Rev. Civ. Stat. Ann. art. 6252-17a, § 7 (Vernon Supp. 1991), the Office of the Secretary of State requests your opinion regarding whether the Open Records Act requires that the secretary of state generate and reproduce public information in the exact form specified by the requesting party when other media provide full disclosure of that information. On February 1, 1991, WishLIST submitted a written request demanding a copy of the sixteen "Print Image" 9 track tapes containing information regarding "Active and Dead File" corporate information.

This request for public information may be satisfied without reproduction of the print image computer tapes. The data requested is currently available in both different media and the same media in a different format. The primary issue presented for your consideration is whether a requesting party can specify the method by which public information must be provided. If you decide that the print image computer tapes should be released, I would like a determination pursuant to the Open Records Act and Tex. Gov't. Code Ann. § 405.031 (Vernon 1990) as to the costs which may be assessed for generation and reproduction of the tapes. Additionally, I would like your opinion as to which statute, the Open Records Act or Tex. Gov't Code Ann. §§ 405.018, 405.031 (Vernon 1990), governs access to the records requested.

ACCOMPANIED BY ENCLOSURES --
FILED SEPARATELY

February 11, 1991

Page 2

The numerous demands on the secretary of state for access to the public information in the corporations, uniform commercial code, and notary public records are satisfied through a number of different media and in a variety of formats. In the early 1980's, application programs were designed to allow direct computer access into the public information stored in the secretary of state's mainframe computer. The Seventieth Legislature gave the secretary of state authority to establish a system to provide direct computer access, and the secretary is currently providing on-line access to the corporations, limited partnership, assumed name, and uniform commercial code data. WishLIST has requested data that is available through on-line access.

The secretary of state sells copies of the corporations, limited partnership, assumed name, and uniform commercial code databases on magnetic tape. The companies purchasing magnetic tape of the database generally supplement the database by purchasing a daily transaction tape from this office which allows them to continuously update their databases in an attempt to mirror the information stored on the secretary of state's mainframe. These companies then allow their subscribers on-line access to this secondary database for a fee. The data on the print image tape requested by WishLIST is available on magnetic tape in a record format.

Bulk users who do not utilize a computer or a computer connection may access the database on microfiche. One of the final steps in unloading and providing a database on magnetic tape in a record format is to produce a print image tape. Microfiche of the database is then produced from the print image tape. Copies of the microfiche are sold to users requesting public information. There are no current procedures in place to reproduce the print image tape. WishLIST has requested data that is contained on the microfiche.

In addition to satisfying the needs of bulk users, the secretary of state provides access to individual records. A person interested in accessing a corporation record may request to inspect or duplicate the documents filed by the corporation; access the computer database through terminals located in the offices of the secretary of state; submit a written request for a computer extract of information on a particular corporation; or receive information over the telephone.

The secretary of state does not dispute that the records requested are public records and public information within the meaning of sections 2(2) and 3(a) of the Open Records Act. In addition, the secretary of state recognizes that it is well-settled that the form in which information is stored does not determine its availability and that computer tapes are covered by the Act. Attorney General Opinion JM-672 (1987).

It is the position of this office that a party requesting public information does not have the right to dictate the format in which the requested information should be provided. The secretary of state's office can provide full and complete disclosure of the corporations, limited partnership, and assumed name records contained on the print image tape without reproducing the print image tape.

February 11, 1991

Page 3

In 1975, the Attorney General in Open Records Decision No. 65 advised the Department of Public Safety that in order to comply with an open records request that "it is not necessary that your department build and maintain files of data which it needs in a format dictated by a requesting party." Op. Tex. Att'y Gen. No. ORD-65 (1975). Nor does the Open Records Act require a custodian of records to prepare information in a form or on a schedule dictated by the requesting party. Op. Tex. Att'y Gen. Nos. JM-672 (1987), ORD-145 (1976).

Information on corporations, limited partnerships, and assumed names is currently available and provided on magnetic tape in record format. If a request is made for the data in this format, the secretary of state has no objection to providing the data. The secretary of state currently has no procedures in place to reproduce the print image tape. The option of access to the records of information does not include the right to access in a format specified by the requesting party, nor the right to control and specify the means of access to public information.

Reproducing records from a computer bank is not the same as running a hard copy document through a copy machine. Op. Tex. Att'y Gen. No. JM-114 (1983). To reproduce the sixteen tapes, the computer operations staff must interrupt its processes to take a number of actions to complete reproduction. These actions are time consuming and costly. If a requesting party can dictate the means of access to public information in specified formats, irrespective of the availability of that information in another format, the ability of this office to satisfy demands for access to public information will be impaired. Every user may have individual needs with respect to format or media. The intent of the Open Records Act is not to permit individuals to dictate the media by which disclosure will be made, but rather to ensure full disclosure of public information. The print image computer tapes do not have any different "information" or "data" than the magnetic tape in record format. The print image tapes simply contain coded instructions to facilitate the production of computer output microfiche. The secretary of state should not be compelled to reproduce the print image tape when alternative media provide full disclosure of the requested public information.

I respectfully request your concurrence that the current methods of access to the corporations, limited partnership, and assumed name data are sufficient to fully comply with the Open Records Act and that it is not necessary to provide the data in the format specified by WishLIST.

If you determine that the secretary of state must alter current procedures and provide additional means of access to the public information, please advise me as to which costs may be assessed for the reproduction of the tapes. As section 9 of the Open Records Act indicates, charges made for access to public records in computer record banks shall give due consideration to the expenses involved in providing the public records making every effort to match the charges with the actual cost of providing the records. That section further provides that the cost shall include amounts reasonably necessary to cover all costs related to providing the recording, including costs of materials, labor, and overhead. The Data Services Division of this office has an automated charge-back system to calculate the cost of running particular jobs. Those costs include CPU time, disk, tape, print charges, set-up fees, as well as employee time.

The production of the print image computer tapes is a multi-step operation beginning with an unload of the corporations database. There are six different computer jobs required to produce the tapes. A flow chart of the process and a list of the jobs are attached to this letter. The entire cost of running these jobs and taking the steps specified in the flow chart should be included in the cost of producing the sixteen print image computer tapes. The requesting party has indicated that he considers the appropriate cost of obtaining the print image computer tapes to be the incremental costs of duplicating those tapes rather than the cost of extracting the data and loading it on the tapes.

As the Texas Supreme Court indicated in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S. W. 2d 668, 687 (Tex. 1976), "Section 9 of the Act makes clear that all costs incurred in providing access to public records must be borne by the requesting party." The requesting party should not be able to step in mid-stream and request reproduction of a tape or tapes and pay only the charges for duplicating the tape. Without the extract, unload, sort, and other activities detailed in the flow chart, the tape could not be produced.

The secretary of state does not presently include, in its open records charges, those costs associated with filing and inputting the data in the computer databank or of maintaining those records in the computer databank. The Attorney General offered the following comments regarding cost of access to open records stored in computer databanks:

Unlike a piece of paper containing information, information stored in computer banks, on microfilm, etc., cannot simply be handed to a requestor. Something must be done to put the information in a meaningful form: a computer program must be run and a printout obtained; microfilm records must be reproduced in another form, unless the actual microfilm or a copy thereof is provided; and similar operations must be performed where other "similar record keeping systems" are used. We believe the legislature's intent in authorizing access charges for the records enumerated in subsection (b) must have been to allow governmental entities to recover those reproduction costs incurred in putting information in computer record banks, on microfilm, etc., into a form which can be used by the requestor. Such costs might, for example, include the costs involved in running the computer or in reproducing records stored on microfilm. . .

Op. Tex. Att'y Gen. No. JM-114 (1983) (emphasis added). On scheduled unloads, the policy of the secretary of state is to determine the total cost of the extract of the database and to divide such cost among the potential requesting parties. Database extracts and unloads are scheduled twice annually and the total computer costs of extracting the data and producing the data on magnetic tape for corporations is in excess of \$18,000. This amount is divided by six potential users and each user is charged \$3,000. On many occasions, the users requesting the tapes are fewer than six. In such instances, the secretary of state has not adjusted the \$3,000 per user fee upwards. If the user population grows, the per user fee would naturally decrease. With over 1.2 million active and inactive corporations, limited partnerships, and assumed names, the per user cost of obtaining the data on an individual corporate record is \$0.0025. The secretary of state will accommodate a request for an unload at times other than those normally scheduled, but would request an opinion directing

that I may charge the requesting party the entire cost of \$18,000 under such circumstances. With respect to the issue of the permissible costs of providing access to open records, your attention is directed to Section 405.031 of the Government Code which authorizes the secretary of state to charge an additional amount to a commercial user. Commercial user is defined to mean a bulk purchaser of microfilm, computer taper, and microfiche for the purpose of selling, advertising, or distributing a commodity or rendering professional or personal services.

Your attention is directed to a discussion of cost of providing access to public information in a matter considered by the United States Court of Appeals for the Second Circuit. Legi-Tech, Inc. v. Keiper, 766 F. 2d 728 (2d Cir. 1985) involved the constitutionality of a statute that empowered officials of the State of New York to deny access to a state-run electronic legislative information retrieval service. The matter was ultimately settled between the parties without providing electronic access. In remanding the matter to the district court for consideration of other issues, the second circuit indicated that the "true cost" of allowing the plaintiff electronic access was the revenue the state would lose as a consequence of the plaintiff's retransmission of the state information. Legi-Tech, 766 F. 2d at 736. When the secretary of state is providing bulk data in the forms of magnetic tape and the users of the magnetic tape then resell the information, Texas loses revenue. Persons requesting access to public information can retrieve that information from those bulk purchasers. Instead of paying the State for copies or direct access fees, the public pays the bulk purchaser. The Open Records Act is used to subsidize the bulk purchaser. A record purchased from the State at \$0.0025 is resold to the public at substantially higher fees. Please advise the secretary of state whether the loss of revenue from the resale of information can be considered as a cost of providing the bulk data.

Finally, I ask that you determine whether sections 405.018 and 405.032 of the Government Code or the Open Records Act controls access to the information stored in the computer record banks maintained by the secretary of state. Section 405.018(a) provides, in pertinent part:

- (a) The secretary of state may establish a system to provide access by electronic data transmittal processes to information that is:
 - (1) stored in state computer record banks maintained by the secretary of state;
 - (2) not classified as confidential under a statute or court decision. . .

Subsection (d) authorizes the secretary of state to set and charge a fee for access to the information.

In Open Records Decision No. 517 (1989), the Attorney General determined that

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.

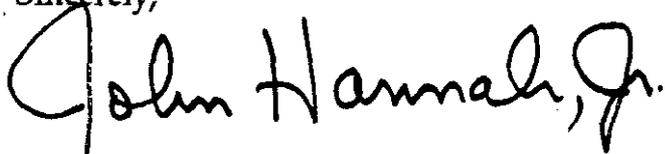
Op. Tex. Att'y Gen. No. JM-517 (1989). The Attorney General held that access to the computer programs discussed in section 405.018(b) was not controlled by the Open Records Act. I request that the Attorney General consider whether access to the information in 405.018(a) is controlled by section 405.018 or the Open Records Act. Section 405.032 of the Government Code is also applicable to access to information stored in state computer banks maintained by the secretary.

February 11, 1991

Page 6

I am available to assist your office and to cooperate fully to ensure compliance with the Texas Open Records Act. Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "John Hannah, Jr." The signature is written in a cursive style with a large initial 'J'.

John Hannah, Jr.
Secretary of State

JH/ljs

Enclosures:

Request from WishLIST
Process Flow Diagram
Cited Material

c: John Bird