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TLTA
TEXAS LAND TITLE ASSOCIATION

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November 5, 2010

The Honorable Greg Abbott
Office of the Attorney General
P.O Box 12548
Austin, TX 78711-2548

RE: *RQ-0916-GA, Atascosa County*

Dear Attorney General:

The Texas Land Title Association ("TLTA"), representing over 1,000 title agents and underwriters licensed to do business in Texas (collectively hereafter "Title Companies"), appreciates the opportunity to provide comments on the recent letter by the County Attorney for Atascosa County ("County Attorney"). This letter requests an opinion on whether the County Clerk's ("Clerk") current rules and request forms are reasonable such that they appear to only authorize the use of a handheld scanner for the purpose of copying the public records. Specifically, the County Attorney seeks the Attorney General's blessing for the Clerk's outright prohibition of an entire class of technology known as sheet feed scanners ("Feed Scanner") used to copy records held under the custody of the Clerk.

Although there is not a Title Company involved in this request, TLTA is very interested in continued access by the public to the public's records for which a Clerk is the custodian. In order for access to be meaningful, it is important to preserve all elements of the ability to access and copy these records. This ability is key to the quality of the assurance the title industry provides to the public, as well as, maintaining the certainty necessary to ensure a healthy and vibrant real estate economy in Texas.

In order to be licensed and operate as a Title Company in Texas, the Title Company must maintain and keep current records, which can only be obtained at courthouses and clerks' offices. This statutory requirement bestows a special consideration for Title Companies when considering the nature of access to County records. The Texas Title Industry is completely regulated and serves a unique and important function in Texas' economic and public policy. The *Tarrant County v. Rattikin Title Co*. court recognized that "abstract companies are a necessary instrument of modern business life and are themselves agents of the public…" (*Tarrant County*, 199 S.W.2d at 272.) The court continued:

> This court takes judicial notice that all reputable abstractors should have *free and unhampered access* to the use of the public records located in the County Clerk's office, subject, of course, to reasonable rules and regulations set out by the County Clerk to protect the records and to minimize the interference in the Clerk's office, for several reasons.
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> First, abstract offices are the only convenient place where a person can obtain an abstract of title to real property.

> Second, to retard the efficiency and speed in preparing abstracts would retard business transactions in real estate, which in turn would decrease the county's income derived from an increase in tax renditions in a far greater amount that [sic] the cost of preparing the space allotted to persons to copy said records.
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> Third, to hamper the compiling of abstracts would in effect slow down the trial of lawsuits in civil cases involving title to real estate.
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> Fourth, the records of reputable abstract companies under certain circumstances may become competent prima facie evidence of title to real estate in case the original records are destroyed or lost. [*Tarrant County v. Rattikin Title Co*., 199 S.W. 2d 269 (Tex. Civ. App. – Fort Worth 1947, no writ) *emphasis added*]

It is also worth noting that a recent amendment to Section 2501.004(b), Insurance Code, states that an abstract plant maintained and used by Title Companies must "cover a period beginning not later than January 1, 1979." Prior to its enactment in September 2009, Title Companies had to maintain a plant going back only 25 years on a rolling basis. This means that many Title Companies must build their plant back at least another 5 years. This translates into a significant amount of statutorily mandated copying and scanning at County Clerks' offices throughout Texas, which in order to meet the statute must be completed by January 1, 2014. It is recognized that "when a statute commands or grants anything, it impliedly authorizes whatever is necessary for executing its commands or whatever is indispensable to the enjoyment or exercise of the grant." (*Austin Road Co.,* 499 S.W.2d at 203). Thus, it is reasonable to conclude that this new statute in harmony with the Local Government Code implies the right of access using the necessary equipment in order to practically meet the demands of the statute. [Tex. Loc. Gov't Code Ann. §191.006 (Vernon 1999)]

In a survey of TLTA members, 60% of the 181 respondents stated that they currently have copy or scanning equipment located in their county courthouse. Of these, 72% answered that this equipment is "self feeding." Therefore, we can conclude that the practice of Title Companies locating and using self feeding copiers and scanners is quite common. Typically, those who do not use such equipment in this manner have an arrangement with the County Clerk to purchase previously scanned documents in a digital format. The use of a Feed Scanner is a practical necessity where such an option for access to digital files does not exist.

Although the reasonableness of the use of this particular machine in this particular instance is a fact question, the Attorney General can and should offer the opinion that the outright prohibition of the use of a Feed Scanner is unreasonable as a matter of law since it unreasonably limits the ability for "a member of the public" to "make a copy of any of the Records" in accordance with the statute. [Tex. Loc. Gov't Code Ann. §191.006 (Vernon 1999)] In 2010, the most reasonable fulfillment of the statutory purpose includes the use of Feed Scanners as demonstrated by both the ubiquity of the use of these scanners by Title Companies in counties throughout Texas and by the increased necessity of their use in order to remain compliant with other recently amended areas of the statute.

In her letter, the County Attorney claims that use of such a device would require the pulling of documents from binders "one by one" and that this presents a disruption by taking the Clerk away from his or her "regular duties." Yet, the use of a Feed Scanner in actuality would eliminate the need for "one by one" page removal. Hypothetically, if the scanner which is the subject of the request was used, then up to 5400 pages per hour could be processed given its ability to hold up to 200 sheets at a time and process 90 pages per

minute. Comparing this to the perhaps one page per minute speed of a hand held scanner, it becomes clear that Feed Scanners would decrease the amount of disruption by allowing for more efficient use of both the Clerk's time and space.

Given its ubiquity and necessity, a County Clerk's prohibition of the use of Feed Scanners is unreasonable on its face in that it, in the most practical terms, denies the "right to full and free access to the records…[which] included is the right to copy from those documents." (*The Permian Report v. Lacy*, 817 S.W.2d at 177) This is unreasonable, much in the same way that denying the use of a photographic copy "apparatus" in 1937 was unreasonable, denying a reasonable accommodation for a typewriter and accompanying personnel in 1947 was unreasonable, or denying the use of a microfilm equipment in 1991 was unreasonable. [*Tobin v. Knaggs*, 107 S.W.2d 677, (Tex. Civ. App.1937 - San Antonio 1937, writ ref'd) and *Tarrant County v. Rattikin Title Co*., 199 S.W. 2d 269 (Tex. Civ. App. – Fort Worth 1947, no writ)]

Resistance by county clerks to new technologies in the access of public records has been a common theme throughout the decades as the legislative history recitation in *Tobin* notes, "…in 1905, when typewriters were just coming into general use," an emergency amendment to the statute was introduced, "on account of the great public demand and necessity of the citizens of this State to examine and obtain copies of the records and the refusal on the part of the county and district clerks to allow such examination and copies to be made." [*Tobin v. Knaggs*, 107 S.W.2d 677, (Tex.Civ.App.1937 - San Antonio 1937, writ ref'd)] Just as the ability to use a typewriter because of its obvious advancement over the quill pen became a necessity in the proper fulfillment of the statutory objective, the passage of time and progression of technology has rendered the use of a Feed Scanner a necessity for the same.

The County Attorney continues in her letter to portend the developments which would ensue as the county slides down the slippery slope of liberal access and acceptance of modern technologies. However, there is little evidence offered up to support the concerns. Too, the concern about electrical outlets has been raised in nearly every case and attorney's general opinion request on this subject since *Tobin* and has not found a sympathetic audience. [*Tobin v. Knaggs*, 107 S.W.2d 677, (Tex.Civ.App.1937 - San Antonio 1937, writ ref'd), *The Permian Report v. Lacy*, 817 S.W.2d at 177] In fact, it is the duty of the county to ensure that courthouses are in good repair complete with adequate, heat, and power. [*Crosby v. County Commissioners of Randall County*, 712 S.W.2d 246 (Tex. App. 7th Dist. 1986) ref. n.r.e.; Tex. Att'y Gen. Op. No. 0-2219 (1940); Tex. Att'y Gen. Op. No.0-6085 (1944)]

Likewise, providing access to the records of which the Clerk is a custodian constitutes a "regular duty" in which we can reasonably expect the Clerk to be engaged. The provision of access and its accompanying actions should not be considered a "disruption."

TLTA believes that the County Attorney is requesting the determination of a fact question which is unreachable by the Attorney General, however, that the Attorney General can and should take this opportunity to recognize that the outright prohibition of a Feed Scanner in the Clerk's rules is a *prima facie* unreasonable prohibition as a matter of law. Moreover, Title Companies' right of access and ability to use necessary equipment for the purposes of building and maintaining title plants enjoys a unique and special status as a matter of law.

The County Attorney's letter appears to acknowledge, and we agree, that the reasonableness of Atascosa County's prohibition of Feed Scanners is a fact intensive question. As such, it would not be appropriate for the Attorney General's office to judge the impact of the requested use of the Feed Scanner in question relative to the Clerk's

operations and relevant space. *See* Tex. Att'y Gen. Op. No. GA-0003 (2002) at 1 (stating that the opinion process does not determine facts).

The nature of the County Attorney's request demonstrates quite well the reason why this is the case. We have no way of validating the assertions made in the letter. The County Attorney asserts that the Clerk has "limited space." However, this is of little help in evaluating the situation since all terrestrial spaces are finite and therefore in the most technical sense "limited." Further, the County Attorney suggests that the individual requesting the use of a Feed Scanner will use a "significant amount of space" and goes on to suggest that this will lead to "much less space" being available for other members of the public. Yet, it is TLTA's understanding that the device in question is a Fujitsu 6670 with the dimensions of 12 x 17 x 12 inches which has been described as being "a little bigger than a bread box." TLTA is in no better position than the Attorney General in assessing the reasonableness of this particular use of space and its overall impact because we have not been provided the context and full exploration that a trier of fact could demand.

In summation, as courts and the Legislature have often recognized, the ability of Title Companies to efficiently and effectively have unhampered access to and copy County records is an important societal value which should not be easily or carelessly frustrated. Any County Clerk rules which prohibit outright the use of the class of equipment known as Feed Scanners is arbitrary, without justification, and unreasonable as a matter of law. A test of the reasonableness of a particular prohibition of a singular piece of equipment or the circumstances of its use is a fact question which should be left to a court to resolve.

Thank you for your consideration.

Sincerely,

Aaron Day
TLTA Director of Government Affairs and Counsel
State Bar No. 24037899