



## The Attorney General of Texas

November 7, 1983

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Mr. Edward H. Perry  
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Open Records Decision No. 401

Re: Availability of computer  
programs under the Open Records  
Act

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Dear Mr. Perry:

You have asked if the Texas Open Records Act, article 6252-17a, V.T.C.S., requires the city of Dallas to make computer programs used by its public works department available to a requestor. The programs requested include (1) programs written by city employees for city use, (2) programs written by other governmental agencies and modified by city employees for city use, and (3) programs obtained by the city from private sources, either by purchase or loan.

Computer "programs" are not the same thing as computer "tapes" that hold stored information, although some programs may be held in tape form. See Open Records Decision No. 352 (1982). "Programs" are sequences of coded instructions that can be inserted or entered in a computer to give it a plan or system under which the computer may progress toward a goal, such as solving a mathematical problem, generating useful data, or retrieving information from computer memory banks. In other words, computer programs instruct computers -- step by step -- how to accomplish particular objectives. See Apple Computer, Inc. v. Franklin Computer Corp., 52 U.S.L.W. 2134 (3rd Cir. Aug. 30, 1983). Cf. 17 U.S.C. §101, as amended by the Computer Software Copyright Act of 1980, Pub. L. 96-517 §10(a), 94 Stat. 3028.

The Texas Open Records Act makes available to the public "[a]ll information collected, assembled, or maintained by governmental bodies . . . [in] the transaction of official business," with certain specified exceptions. V.T.C.S. art. 6252-17a, §3(a). Your initial contention is that the Open Records Act does not require release of programs because they do not come within the act's definition of "public records." We examine that question first.

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.

You argue that the programs are not public records because the data they contain are not in one of the forms specified in section 2(2), and because computer programs do not contain "public information" as contemplated by section 3(a). You maintain that data comprising computer programs are merely scientific notations indicating how information (that is either held in storage or is to be later keyed in by an operator) is to be used (a) to produce additional information, or (b) to employ information in a new way. Taken alone, you contend, a program is a mere "formula" without independent public significance and does not fall within the parameters of the Open Records Act.

The policy of the act, declared in the first section thereof, is that all persons are, unless otherwise expressly provided by law,

entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials or employees. (Emphasis added).

It is not necessary that an item of information have "independent public significance" to come within the act. It need only constitute "information collected, assembled, or maintained by [a governmental body in] . . . the transaction of official business . . ." The Open Records Act speaks of "information" in the ordinary, comprehensive sense. The term includes all knowledge obtained from investigation, study, or instruction. See Webster's New Collegiate Dictionary (1977), at 592. Information does not escape the act merely because it is expressed as a "formula" or is in some other coded form. Cf. Open Records Decision No. 305 (1982).

Nor is information outside the act merely because it is captured and exchanged by means of magnetic tape or disks rather than paper documents. The term "developed materials" used in section 2(2) is comprehensive enough to include mediums of information not yet devised at the time the act became law. See Open Records Decision Nos. 352 (1982); 182 (1977); 65 (1975); 32 (1974).

Inasmuch as we conclude the computer programs sought are developed materials which contain information collected, assembled or maintained in the transaction of official business, they must be released unless they fall within one of the act's eighteen exceptions. You have expressly invoked two exceptions: the "advantages to competitors or bidders" exception found in subsection 3(a)(4) of the act; and the subsection 3(a)(10) "trade secrets and commercial or financial information" exception. A third, the subsection 3(a)(1) "confidential by law" exception, is raised by the character of the material requested and by your arguments. Cf. Open Records Decision No. 344 (1982).

A handwritten or printed computer program is somewhat analogous to a written or printed musical score. The input notations --

meaningless to those not trained to read them -- can be converted by the use of instruments into a performance (output) capable of being recorded or preserved on tape, disk or other medium. The object of a musical performance is ordinarily satisfaction of the senses; the object of a computer's performance is ordinarily the satisfactory solution of a technical, business or other problem. In both cases, the notations and the patterns of recorded performances contain information arranged to achieve the objective, but access to performances alone (or their patterns) will not ordinarily reveal the source notations in detail. Just as the term "music" can describe both a symphony performance and its written score, the term "computer program" can properly describe the recorded, object-coded, performance pattern on the computer as well as the source-coded instructions that resulted in the performance. See 3 Computer/Law Journal 1, Another Look At Copyright Protection of Software: Did The 1980 Act Do Anything For Object Code?

A composer may limit the persons able to perform his symphony exactly as he wrote it by restricting access to the score (even if copies of its performance have been widely distributed). Similarly, the creator of a computer program can prevent the plagiarized use of his creation by restricting the coded source of the produced performance. Often, there will be a need to protect the product, as well as its source, from unauthorized use. We understand from your letter that the city of Dallas wishes to protect both source-code programs and produced, object-code programs in its possession.

Subsection 3(a)(4) of the Open Records Act allows the suppression of "information which, if released, would give advantage to competitors or bidders." This provision, never construed by Texas courts, has been limited by this office to situations where there is a showing of some specific, actual or potential harm in a particular competitive context. See Open Records Decision No. 331 (1982). Similarly, this office has concluded that the subsection 3(a)(10) exception for "trade secrets" does not protect anything not already protected by the subsection 3(a)(1) "confidential by law" exception, and is more limited. See Attorney General Opinion H-258 (1974); Open Records Decision Nos. 233 (1980); 173 (1977).

Because the penumbra of section 3(a)(1) will generally cover everything excepted by sections 3(a)(4), 3(a)(10), and more, it is often advantageous to examine it first. In its entirety, the provision excepts: "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." The phrase "by judicial decision," means pursuant to law, including the common law, as interpreted by the courts. See generally Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976); Open Records Decision No. 309 (1982). The application of subsection 3(a)(1) is not limited to "particular competitive situations," nor to information "obtained from a person," but some of the programs at issue would be protected in any event.

We are advised that the private firm that loaned two of the programs to the city restricts knowledge of their content and limits their use to a few of its employees. The source codes for the programs are kept under lock, and only load (object code) modules are ordinarily available to such users. The programs are used to plot cross-sections of streams from raw data, increasing the efficiency of engineers and reducing costs, which gives the firm a competitive edge that would be lost if the programs were released to others. Both programs were developed over a period of several years at substantial cost. The firm which supplied the programs to the city objects to their release and demands that all copies possessed by the city be destroyed if they cannot be protected from disclosure. Cf. Open Records Decision Nos. 296 (1981); 175 (1977).

This office has followed the lead of National Parks and Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). See Open Records Decision No. 309 (1982). There, the court declared that for purposes of an exemption found in the federal Freedom of Information Act, 5 U.S.C. §552(b)(4), that is similar to the subsection 3(a)(10) exemption of the Open Records Act, commercial or financial matter is confidential if disclosure would likely impair the government's ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained. Cf. Apodaca v. Montez, 606 S.W.2d 734 (Tex. Civ. App. - El Paso 1980, no writ).

It appears that both effects would likely result from the release of the two loaned programs. The prospective competitive harm has been described above, and you advise that both private and governmental entities would be reluctant voluntarily to supply the city with programs in the future if programs of such a character are released to the public. To the extent that the release of these or any other of the requested programs would have the effect of substantially damaging the competitive position of private suppliers of programs, or impair the ability of the city to obtain programs from private suppliers in the future, they may be withheld. See Open Records Decision Nos. 292 (1981); 256 (1980).

The release of wholly government-generated programs will seldom cause "competitive harm" to a government or impair the ability of one governmental unit to obtain them in the future from another unit if the programs concern only governmental functions and are of a type not protected from disclosure in the hands of the forwarding governmental body. Cf. V.T.C.S. art. 6252-12a, §5A; Open Records Decision Nos. 231, 227 (1979); 124 (1976); 99 (1975). But not all government-generated computer programs are unprotected. To the extent that use of a program would enable the user to gain access to a government computer or its memory banks in an unauthorized fashion, for example, the program may be withheld.

Programs that give access to computer-stored information are analogous, in that respect, to the combinations of safes. Safe combinations are merely notations of mechanical adjustments that must be made to gain access to the contents of the safe. The security of the information can be very important, even vital, depending on the contents. The same is true of information allowing access to government computers. Just as there is a difference between (a) making public particular documents kept in a safe and (b) releasing the safe's combination, there is a difference between (a) making available information stored in a computer and (b) making available information about how to get into the computer. The Open Records Act does not require governmental bodies to disclose information that would breach the security of government computers or computer files any more than it requires them to disclose the combinations of safes that might be on their premises.

No statute specifically makes the combinations of government safes, or programs accessing government computers, confidential information. Cf. V.T.C.S. art. 2558a, §14; V.T.C.S. art. 6252-13b, §5A. Nevertheless, the duty to guard them from unauthorized access is implied by statutory provisions such as section 4.01, article 601b, V.T.C.S., reading in part:

(a) [The State Purchasing and General Services Commission] shall have charge and control of all public buildings, grounds and property of the state, and is the custodian of all public personal property, and is responsible for the proper care and protection of such property from damage, intrusion, or improper usage . . . . (Emphasis added).

See also V.T.C.S. art. 2558a, §14; V.T.C.S. art. 4413(32h), §9(a).

In Attorney General Opinion H-483 (1974), subsection 3(a)(1), of the Open Records Act was said to protect from disclosure the questions on examinations given by a state board, although no express provision of law made the questions confidential. The opinion noted that the board had a statutory duty to conduct examinations, that revealing the questions to be asked would render the examinations useless, and that a grant of an express power carries with it by necessary implication every other power necessary for the execution of that power. See 53 Tex. Jur. 2d, Statutes §141; 47 Tex. Jur. 2d, Public Officers §110.

Statutory responsibility for the proper care and protection of the property of the state from damage, intrusion or improper usage (1) implies a power to reasonably maintain the confidentiality of information if release of it could result in such damage, intrusion or improper usage and (2) satisfies the requirement that exceptions to the Open Records Act entitlement to information be "expressly provided by law." Cf. V.T.C.S. art. 601b, §4.13. Of course, an agency's

determination of the "reasonableness" of withholding information on such grounds in a particular case is subject to review by this office. V.T.C.S. art. 6252-17a, §7. In Industrial Foundation of the South, Inc. v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976), our supreme court said:

The means of access to information in government records may be controlled by the determination of what records must be disclosed, insofar as the procedure must adequately protect information deemed confidential from improper disclosure. If a direct computer tie-in could not be effectuated without giving the Foundation access to information to which it is not entitled, then of course the procedure would not be acceptable.

540 S.W.2d at 687.

"Security," however, is not the only basis for protecting the confidentiality of government created computer programs. Under certain circumstances, they can be subject to copyright protection, trade secret protection, and the protection of patent laws. See 6 A.L.R. Fed. 156, Patentability of Computer Programs; 3 Computer/Law Journal 211, Trade Secret Protection for Software Generally and In the Mass Market; 3 Computer/Law Journal 19, The Supremacy of Federal Copyright Law Over State Trade Secret Law for Copyrightable Computer Programs Marked with a Copyright Notice. Programs are not necessarily devoid of such protection merely because they have been generated or created by or on behalf of governmental units. Cf. V.T.C.S. art. 601b, §3.26; Southwestern Broadcasting Company v. Oil Center Broadcasting Company, 210 S.W.2d 230 (Tex. Civ. App. - El Paso 1947, writ ref'd n.r.e.), holding approved, University Interscholastic League v. Midwestern University, 255 S.W.2d 177 (Tex. 1953).

We are aware that Open Records Decision No. 231 (1979) declared the following:

The fundamental policy of openness established by enactment of the Open Records Act does not permit a governmental body to use secrecy to gain competitive advantage over private entities. Governmental bodies may not be regarded as being in competition with private enterprise so as to permit them to withhold information under section 3(a)(4). Open Records Decision No. 99 (1975); see Open Records Decision Nos. 217 (1978); 124 (1976) . . . .

We conclude, however, that the foregoing statement is too broad. Governmental bodies sometimes act in a proprietary capacity rather than a governmental capacity. See Reeves, Inc. v. Stake, 447 U.S. 429

(1980); City of Galveston v. Posnainsky, 62 Tex. 118 (1884). Cf. State v. Morgan, 170 S.W.2d 652 (Tex. 1943), explaining State v. Elliot, 212 S.W. 695 (Tex. Civ. App. - Galveston 1919, writ ref'd). The decision on which the statement was based, Open Records Decision No. 99 (1975), involved information developed and held by the city of Dallas in its governmental capacity, and did not purport to rule on information held in a proprietary capacity. Nor has any decision of this office, other than Open Records Decision No. 231, purported to do so. See Open Records Decision Nos. 227 (1979); 153 (1977); 124 (1976).

There is no "fundamental policy" of the Open Records Act that deprives governmental bodies of the act's express exceptions for proprietary information. If the information is developed or held by a governmental body in a proprietary capacity, it may be withheld under subsection 3(a)(1) on the same statutory or common law grounds that allow protection for proprietary information obtained from private persons under the same circumstances. Cf. Hustead v. Norwood, 529 F.Supp. 323 (S.D. Fla. 1981).

Open Records Decision No. 231 also incorrectly construed the subsection 3(a)(11) exception for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than one in litigation with the agency." The subsection is patterned after a counterpart in the federal Freedom of Information Act, and in its "discovery" aspect, makes confidential certain information protected from discovery by statute or rule of civil procedure. See Attorney General Opinion H-436 (1974); Open Records Decision Nos. 308 (1982); 251 (1980). At least to that extent, subsection 3(a)(11) also reaches matters which are "deemed confidential by law" and are protected under subsection 3(a)(1).

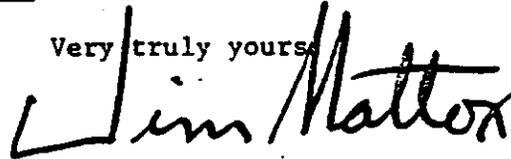
In Federal Open Market Committee v. Merrill, 443 U.S. 340 (1979), a decision rendered several months before Open Records Decision No. 231 was issued, the United States Supreme Court held that the "discovery" feature of the federal exception incorporated a limited privilege for government-generated commercial and financial information -- contrary to the conclusion in Open Records Decision No. 231. Open Records Decision No. 231 may have reached the proper result, but it was based on faulty reasoning. Its rationale is disapproved.

We do not have sufficient information to determine whether all of the programs requested here should be "deemed confidential by law" in whole or in part, either because of their proprietary character, the security risk that would be entailed in releasing them, or the discovery privilege. Except for the two programs loaned by the private supplier and discussed above (which may be withheld from the public in their entirety), you should make an initial determination about the disclosability of each program or part thereof requested, based on the foregoing discussion. For each of them that you consider

excepted from required disclosure, you must provide this office with a detailed explanation of the reasons therefor within ten days of your receipt of this decision.

We caution that authority to withhold programs, even when the authority is available, does not necessarily mean that information "collected, assembled, or maintained" by the use of the programs may be withheld as well. Information extracted from computer files by computers using computer programs is not different qualitatively from information on paper or another medium, and information that would be releasable in a different form will not ordinarily be protected from disclosure merely because it is kept in the form of a computer tape or disk. See Open Records Decision No. 352 (1982). Cf. Yeager v. Drug Enforcement Administration, 678 F.2d 315 (D.C. Cir. 1982); Long v. United States Internal Revenue Service, 596 F.2d 362 (9th Cir. 1979).

Very truly yours,



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