



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

April 11, 1988

Honorable Bob Bullock
Comptroller of Public
Accounts
LBJ State Office Building
Austin, Texas 78774

Open Records Decision No. 492

Re: Whether information that is stored in a private entity's computer and that is available to a governmental body only through telephone link access is subject to the Texas Open Records Act, article 6252-17a, V.T.C.S. (RQ-1265)

Dear Mr. Bullock:

Attorney General Opinion JM-672 (1987) addressed the public availability under the Texas Open Records Act, article 6252-17a, V.T.C.S., of information provided to the State Comptroller by an economic forecasting company. The decision noted that information stored by computer is subject to the act. The decision held that the comptroller must allow members of the public to inspect information even if it is protected by copyright but that the comptroller need not furnish copies. The information at issue could not be withheld simply because the company requested and the comptroller agreed that the information would be kept confidential. The decision did not address the question of whether the information may be protected by one of the act's specific exceptions to disclosure.

In light of Attorney General Opinion JM-672, you ask two questions. First, you ask whether certain data that is stored in the economic consultant's computers and that is available to your office only through telephone link access with the consultant's computers is covered by the Open Records Act at all. Additionally, you ask whether two specific documents in your custody -- economic forecasts -- are protected by subsections 3(a)(10) and/or 3(a)(11) of the act.

Sections 2(2) and 3(a) of the act indicate what information is covered by the Open Records Act. Section 2(2) defines "public records":

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) defines "public information":

[a]ll information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business.

The physical location of information is not necessarily dispositive of whether the information is covered by the Open Records Act. See Open Records Decision Nos. 462 (1987); 445, 437 (1986); 332 (1982). Decisions interpreting the scope of "public records" do not apply a precise standard to determine whether information held by an outside consultant to a governmental body is subject to the Open Records Act; they apply a functional analysis, examining a number of factors. As a general rule, the act does not apply to information held by the consultant unless: 1) the information relates to the governmental body's official duties or business; 2) the consultant acts as an agent of the governmental body in collecting the information; and 3) the governmental body has or is entitled to access to the information. Open Records Decision No. 462 (1987). In Open Records Decision No. 462, this office determined that the act applies to information collected by a law firm hired by a state university to investigate allegations of misconduct in the university's intercollegiate athletic program. The university allowed the law firm to exercise the university's authority to require the cooperation of students, coaches, and university personnel in the investigation. The university was entitled to access to the information collected by the law firm. Similarly, Open Records Decision No. 437 (1986) determined that records prepared by bond underwriters and the attorneys of a utility district and by the outside operator of another district contained information covered by the act. In contrast, Open Records Decision No. 445 (1986) determined that the act does not apply to interview information that formed the basis of a management study performed by a consultant for a city. The city did not have possession of the information, did not know the contents of the information, and was not entitled to receive the information; the city had only the final report.

The information at issue here falls somewhere in between the holdings in Open Records Decision Nos. 462 and 437, on one hand, and Open Records Decision No. 445, on the other. You indicate that, pursuant to contract, the economic consultant provides the comptroller's office with direct access, through a telephone link, to data stored in the consultant's computer. Open Records Decision No. 462 articulated three factors in determining whether such information is subject to the Open Records Act. The first factor, whether the information relates to the governmental body's official business, is met here because the comptroller has an official responsibility to make revenue forecasts. See Tex. Const. art. III, § 49a. Another factor met here is that of a right of access to the information. However, the requirement that the consultant act as an agent of the governmental body in collecting the information is not met. The economic consultant collects raw data and makes projections through the efforts and expertise of its own staff. In contrast with the situations addressed in Open Records Decision Nos. 462 and 437, these efforts are not contingent upon the authority or approval of the governmental body. Consequently, the raw data collected and maintained by the economic consultant is not covered by the Open Records Act.

Nevertheless, the raw data and projections that are actually accessed and stored or that appear in the comptroller's revenue estimates pursuant to its contract with the consultant are covered by the Open Records Act. If the comptroller accesses and stores specific data for a particular revenue projection, the Open Records Act applies to the data just as if the information was provided to the comptroller in hard copy. Like the written report furnished to the city in Open Records Decision No. 445, this information is "collected" by a governmental body within the meaning of section 3(a) of the act. See Lombardo v. Handler, 397 F.Supp. 792, 802 (D.D.C. 1975) (information subject to the FOIA upon transmittal to governmental agency); Wolfe v. Weinberger, 403 F.Supp. 238 (D.D.C. 1975) (transcripts of private advisory committee meeting are subject to the FOIA because the transcripts were submitted with the committee's report and were used in the government agency's deliberations). Whether or not this information is subject to disclosure depends upon whether it falls within any of the act's specific exceptions to disclosure.

This decision is in line with federal court decisions interpreting the Federal Freedom of Information Act (FOIA). See 5 U.S.C. §§ 552(a)(3), (a)(4)(A). Although construction of the federal act does not control construction of the Texas Open Records Act, much of the state act was based on the federal act. Consequently, federal cases interpreting the scope of the federal act are instructive. See Attorney General Opinion H-436 (1974). Neither the federal act nor the state act defines the essential scope of "agency records" or "public records," respectively; both acts provide only general definitions and enumerate examples of the types of information that constitute public records. Interpretation of the acts depends on the general purpose of the acts -- providing access to government records.

The federal decisions interpreting "agency records" indicate that data generated, owned, and possessed by a private entity receiving federal funds are not "agency records" when copies of the data have not been obtained or directly relied upon by the federal agency. See Forsham v. Harris, 445 U.S. 169 (1980); Ciba-Geigy Corporation v. Mathews, 428 F.Supp. 523 (S.D.N.Y. 1977). In Forsham v. Harris, the United States Supreme Court addressed the applicability of the federal act to raw data held by the University Group Diabetes Program (UGDP), a research consortium funded by federal grants. Although a supervisory federal agency had a right of access to the raw data, it relied primarily on final reports and had not obtained all of the data sought under the FOIA. 445 U.S. at 173. The court held that neither a right of access nor indirect reliance on data not actually obtained by a federal agency transforms the data into "agency records." See 445 U.S. at 185. In Ciba-Geigy Corporation v. Mathews, 428 F.Supp. at 529, the federal court addressed the same situation in greater detail and articulated a test of whether the information is government-owned or subject to substantial governmental control or use. The court stated, "[m]ere access without ownership and mere reliance without control will not suffice to convert [private] data into agency data." 428 F.Supp. at 531. The court distinguished between control and use of final reports and indirect reliance upon the documentation underlying the final reports and emphasized that the data was compiled and assembled according to the methodology of private researchers. 428 F.Supp. at 531-32. The Open Records Act, as written, does not cover this data. If the legislature wishes to address problems arising because of

government access to this type of data, it should do so expressly.

Consequently, if information is not actually accessed and stored, the information is not covered by the act. If information is accessed and stored, the availability of the information depends on whether the information falls within one of the act's specific exceptions to disclosure.

You also ask whether two specific documents held by the comptroller's office are protected from required disclosure by sections 3(a)(10) and/or 3(a)(11) of the act. As indicated, all information held, as described in section 3(a), by governmental bodies is open unless the information falls within at least one of the act's specific exceptions to disclosure.

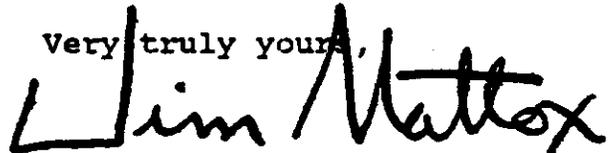
Section 3(a)(11) protects inter-agency and intra-agency memoranda or letters that contain advice, opinion, or recommendation intended to play a role in the governmental entity's deliberative process. Open Records Decision No. 464 (1987). Although section 3(a)(11) was intended to encourage openness in the internal give and take of a governmental entity's decision-making, section 3(a)(11) can apply to outside consultants with an official reason or duty to provide information to a governmental body. See Open Records Decision Nos. 466 (1987); 429 (1985); see also Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980); Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972), cert. denied 410 U.S. 926 (1973). The documents at issue constitute advice and recommendations regarding economic estimates which assist the comptroller in forecasting revenue needs. We have reviewed the information and your description of the role it plays in the comptroller's decision-making process and have determined that it falls within section 3(a)(11). See Bureau of National Affairs v. United States Department of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984) (non-binding budgetary recommendations protected from disclosure under federal act's exception, analogous to section 3(a)(11), for predecisional deliberative materials); Open Records Decision No. 460 (1987) (proposed budget protected under section similar in scope and purpose to section 3(a)(11)); see also Open Records Decision No. 179 (1977) (staff memo regarding salaries in the private sector provided as advice in city's collective bargaining process protected by section 3(a)(11)).

S U M M A R Y

Raw data and economic projections maintained by a private consultant and provided to the State Comptroller, a governmental body, only on an as-needed basis through a direct telephone link to the consultant's computers, are not subject to the Texas Open Records Act, article 6252-17a, V.T.C.S., when collection of the data is not dependent on the authority of the governmental body. Only the raw data and projections that are actually accessed and stored or that appear in the comptroller's revenue estimates are covered by the Open Records Act.

Specific economic forecasts that the comptroller submitted for review that have been provided by an outside consultant pursuant to a contract with the State Comptroller and were provided as advice and recommendation to assist the comptroller in forecasting revenue needs are protected from required disclosure by section 3(a)(11) of the Open Records Act.

Very truly yours,



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

Prepared by Jennifer Riggs
Assistant Attorney General