



**THE ATTORNEY GENERAL
OF TEXAS**

October 3, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Mr. William J. Pitstick
Executive Director
North Central Texas
Council of Governments
P. O. Drawer COG
Arlington, Texas 76005-5888

Dear Mr. Pitstick:

The North Central Texas Council of Governments received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for the council's "Transportation Analysis Process" computer software and "Transportation Information System" data base. The council is a regional planning commission created pursuant to article 1011m,¹ V.T.C.S., to help participating local units of government coordinate land development for transportation projects in their regions of the state.

Under the Open Records Act, all information held by a governmental body must be released unless one of the act's exceptions protects the information from disclosure. Attorney General Opinion JM-672 (1987). The council suggests that federal copyright law prohibits copying the program and data base without the council's consent.

In Open Records Decision No. 517 (1989), this office indicated that computer programs are subject to the Open Records Act. 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

1. Article 1011m was repealed and replaced, effective September 1, 1987, with sections 391.001 through 391.015 of the Local Government Code. See Acts 1987, 70th Leg., ch. 149, §§ 1, 49, at 1195-99, 1306.

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 federal court in SDC Dev. Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976) addressed the applicability of the federal Freedom of Information Act, 5 U.S.C. § 552, to computer programs. Although the federal courts' construction of the scope of the federal Freedom of Information Act clearly does not control construction of the scope of the Texas Open Records Act, it often provides instructive analogies. In SDC Development Corporation, the court addressed the availability to the public of a computerized system for storing, indexing, and retrieving medical bibliographical data prepared by the National Library of Medicine. 542 F.2d at 1117. The library developed the index system, at tremendous cost, pursuant to an express statutory mandate. The statute authorized charging the public for access to the system. 542 F.2d at 1120. The court concluded that the system did not constitute "agency records" within the scope of the federal Freedom of Information Act. Id.

The court reasoned that:

There is, then, a qualitative difference between the types of records Congress sought to make available to the public by passing the Freedom of Information Act and the library reference system sought to be obtained here. The library material does not directly reflect the structure, operation, or decision-making functions of the agency, and where, as here, the materials are readily disseminated to the public by the agency, the danger of agency secrecy which Congress sought to alleviate is not a consideration. (Emphasis added.)

Id. The court based its conclusion on its determination that the federal act was intended to apply primarily to records that deal "with the structure, operation, and decision-making procedure of the various governmental agencies." 542 F.2d at 1119; cf. Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (distinguished in SDC Development Corporation).

A similar construction does not, however, control the Texas Open Records Act. In Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 674-75 (Tex. 1976), cert. denied, 430 U.S. 930 (1977), the Texas Supreme Court held that information is not excluded from the Open Records Act simply on the basis that the information is or includes "private" information; the scope of the act is not limited to information related only to "affairs of government." This characteristic of the act is implicit in the act's exceptions to disclosure that protect certain "private" or non-governmental information. See, e.g., V.T.C.S. art. 6252-17a, § 3(a)(1), 3(a)(19). Such protection would not be necessary if the act did not apply to the information in the first place.

A recent decision of the Florida Attorney General determined that a computer program developed by a public agency to perform certain financial and accounting functions is a public record for purposes of the Florida Public Record Law. See Op. Fla. Att'y Gen. No. 86-94 (Oct. 28, 1986). The Florida statute defines "public records" as

all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

Fla. Stat. § 119.011(1) (1988). The Florida opinion acknowledged that the Florida Supreme Court interprets this language to include only material intended to perpetuate, communicate, or formalize knowledge of some type. See Shevin v. Byron, Harless, Schaffer, Reid and Assoc., Inc., 379 So.2d 633, 640 (Fla. 1980). The Florida Attorney General opinion considered a computer program that performs certain financial and accounting functions as the perpetuation, communication, or formalization of knowledge. The Florida statute's definition of "public records" is similar

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to the Texas act's definition of "public records" in section 2(2) and description of public information in section 3(a).

Neither the Texas courts nor this office have addressed directly whether a governmental body may claim copyright protection from public copying under the Open Records Act for computer programs and data bases created by governmental bodies. Cf. Open Records Decision No. 517 (1989). Computer programs and data bases are proper subjects of copyright protection under the Federal Copyright Act. 17 U.S.C. §§ 101, 102, 117; Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983), cert. denied, 464 U.S. 1033 (1984). Additionally, nothing in the federal Copyright Act prohibits state or local governments from obtaining copyrights for their works. In fact, you suggest that the federal act preempts the Open Records Act to the extent that the Open Records Act purports to require the copying of government works without the consent of the governmental body. The requestor of these documents counters that, even if the council holds a copyright to the computer software and data bases, the state has mandated consent to release by enacting the Open Records Act.

Neither argument, however, addresses the preliminary issue of whether governmental bodies have the authority to copyright their works. The fact that the federal act does not prohibit state and local governmental entities from claiming copyright protection for their works does not constitute a grant of authority to do so. Similarly, the fact that the Open Records contains exceptions that protect government interests that could be characterized as "commercial" does not constitute an affirmative grant of authority to engage in all of the commercial activities these exceptions may cover.

Political subdivisions such as regional planning commissions hold only those powers granted expressly or by necessary implication in Texas law. See Grimes County Taxpayers Ass'n v. Texas Mun. Power Agency, 565 S.W.2d 258 (Tex. Civ. App. - Houston [1st Dist.] 1978, writ dism'd). Section 391.003(e) of the Local Government Code does not contain express authority granting to entities the right to copyright the computer programs they create. The power to copyright computer programs to circumvent the Open Records Act cannot be "necessarily" implied from the general powers granted in section 391.003. In Industrial Foundation, 540 S.W.2d at 677, the court held that a governmental body must have express authority to close records under the Open

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Records Act. Otherwise, any governmental body could copyright any document or other type of information it was authorized to create in order to exempt itself from the act's coverage. This would emasculate the Texas Open Records Act.

We recognize that a computer program may be created at great expense to governmental bodies and that, in the context of private enterprise, computer programs may constitute intellectual property entitled to legal protection from unauthorized appropriation. Governmental bodies do not, however, operate under the same legal principles as private business entities. If the Texas Legislature wishes to protect government-generated computer programs, it must do so expressly.

The council also contends that sections 3(a)(4), 3(a)(5), 3(a)(10), and/or 3(a)(11) protect the program and database at issue. Section 3(a)(5) excepts:

information pertaining to the location of real or personal property for public purposes prior to public announcement of the project, and information pertaining to appraisals or purchase price of real or personal property for public purposes prior to the formal award of contracts therefor.

Section 3(a)(5) ordinarily protects a governmental body in its planning and negotiation with regard to a particular transaction. Information may be withheld under section 3(a)(5) as long as it relates to good-faith negotiations that have not yet been completed. For example, a report regarding possible sites for a city sludge disposal plant was held to be excepted from disclosure under section 3(a)(5), but only until the purchase of the site was complete. Open Records Decision No. 222 (1979). Similarly, plans, locations, and estimates regarding a proposed city reservoir project were also held to be excepted from disclosure until the purchase of the site was complete. Open Records Decision No. 234 (1980).

The council uses the program and data base at issue here on a continuing basis for a number of proposed projects; in other words, the data base and program are not site-specific. You indicate that many of the council's transportation plans identify and evaluate alternative transportation modes and freeway routes. Often a plan will

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recommend purchase of specific right-of-way, and sometimes creation of an entire transportation network. You indicate that the local governments comprising the council rely on the council's program and data base for a number of specific projects and for long-range planning. We agree that release of the program and data base would impair the interests protected under section 3(a)(5); therefore, they may be withheld.² For this reason, we do not address the other exceptions you raise.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-323.

Yours very truly,

Open Government Section
of the Opinion Committee
Jennifer S. Riggs
Chief, Open Government Section
of the Opinion Committee

JSR/bc

Ref.: RQ-979

cc: Stephen Cormac Carlin
Seth S. Searcy III

2. This does not mean, however, that all reports and feasibility studies generated from the data base and program are automatically excepted.