



August 13, 1999

The Honorable Carl E. Lewis
County Attorney
Nueces County Courthouse
901 Leopard, Room 206
Corpus Christi, Texas 78401-3680

Open Records Decision No. 660

Re: Whether section 52(a) of article III of the Texas Constitution prohibits the Port of Corpus Christi from complying with a request under chapter 552 of the Government Code for a computer version of a digital map of the Port of Corpus Christi and related questions (ORQ-14)

Dear Mr. Lewis:

The Port of Corpus Christi Authority (the "Port") has asked whether article III, section 52(a), of the Texas Constitution prohibits the Port from releasing a digital version of an AutoCad[®] generated map of the Port. You contend that section 52(a) of article III of the Texas Constitution, as applied through section 552.101 of the Government Code, prohibits release of the requested information. The requested map was apparently created with the AutoCad Map[™] software, and the requestor is seeking the map in its electronic format.¹ The Port states that it has spent more than \$50,000 in developing the map.²

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 52(a) of article III of the Texas Constitution provides in part:

¹In Open Records Decision No. 581 (1990), this office determined that certain computer-related information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Accordingly, to the extent that the requested information consists of computer source codes, flow charts, and software documentation, it is not subject to the Public Information Act. Gov't Code § 552.002.

²We are assuming that the computer version of the map is a "thing of value" under section 52(a). See *Key v. Commissioners Court of Marion County*, 727 S.W.2d 667, 669 (Tex. App.—Texarkana 1987, no writ) (what is "thing of value" is question of fact); cf. Attorney General Opinion DM-268 (1990) (salvage/surplus property not thing of value).

(a) Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company.

TEX. CONST. art. III, § 52(a).³ Texas courts have concluded that the purpose of this and similar constitutional provisions is to prevent the gratuitous application of public funds to private use. *Byrd v. Dallas*, 118 Tex. 28, 6 S.W.2d 738, 740 (1928); *Brazoria County v. Perry*, 537 S.W.2d 89, 90 (Tex. Civ. App.--Houston [1st Dist.] 1976, no writ). However, the constitution does not invalidate an expenditure which incidentally benefits a private interest if it is made for the direct accomplishment of a legitimate public purpose. *Barrington v. Cokinos*, 161 Tex. 136, 145, 338 S.W.2d 133, 140 (1960).

We first turn to the question of whether release of requested information under chapter 552 of the Government Code serves a legitimate public purpose. No fixed rule delineates exactly what constitutes a “public purpose.” See *Davis v. City of Taylor*, 67 S.W.2d 1033, 1034 (1934) (quoting 6 MCQUILLIN ON MUNICIPAL CORPORATIONS § 2532, at 292 (2d ed. 1940)) (“What is a public purpose cannot be answered by any precise definition further than to state that if an object is beneficial to the inhabitants and directly connected with the local government it will be considered a public purpose.”).

Texas courts defer to the legislature’s determination of what is a public purpose, since deciding what is a public purpose is primarily a legislative function. *Bullock v. Calvert*, 480 S.W.2d 367, 370 (Tex. 1972); *State v. Austin*, 331 S.W.2d 737 (1960); *Young v. Houston*, 756 S.W.2d 813, 814 (Tex. App.--Houston [1st Dist.] 1988, writ denied) (partial publication). Chapter 552 of the Government Code governs the public’s access to a governmental body’s information. The purpose of the Public Information Act (the “act”) is articulated in section 552.001 of the Government Code, which provides:

The people insist on remaining informed so that they may retain control over the instruments they have created. The provisions of this chapter shall be liberally construed to implement this policy.

³The Port is a “political subdivision” of the state and, therefore, subject to the provisions of section 52(a). See *Pillsbury Co. v. Port of Corpus Christi Auth.*, 66 F.3d 103 (5th Cir. 1995), cert. denied, 517 U.S. 1203 (1996) (for purposes of Eleventh Amendment, Port of Corpus Christi indistinguishable from Port of Houston Authority which court had concluded was political subdivision); see also *Kamani v. Port of Houston Auth.*, 702 F.2d 612, 613 (5th Cir. 1983) (Port of Houston Authority is political subdivision of state for Texas Tort Claims Act); *Guaranty Petroleum Corp. v. Armstrong*, 609 S.W.2d 529, 530 (Tex. 1980) (holding that Brownsville Navigation District could enter into mineral leases because it is political subdivision of state). See TEX. CONST. art. III, §§ 51, 53.

The Texas legislature has further established that public information encompasses information in an electronic format. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, §§ 2, 15, 17, 1995 Tex. Gen. Laws 5127, 5134-39; *see* Gov't Code §§ 552.002, .003, .228, .231, .262, and .272. Based on the preceding analysis, we conclude that the release of information held by the Port to the public serves a legitimate public purpose, because release of the digital map will promote public access to such information.

Next, we must consider whether sufficient controls exist on the release of the information to ensure that the public purpose is accomplished. This office has typically required controls on the transaction to achieve the public purpose. *See, e.g.*, Attorney General Opinions DM-268 (1993), JM-324 (1985), JM-220 (1984), MW-89 (1979); Attorney General Letter Opinion Nos. 96-008 (1996), 93-79 (1993).⁴ Therefore, following the line of Attorney General Opinions that require controls on the "transaction" to ensure that the public purpose is accomplished, we must determine whether these controls exist to ensure the public's access to government information.

A governmental body must respond "promptly" to requests for information. Gov't Code §§ 552.221(a), .228(a). Further, a governmental body must treat all requests for information uniformly. *Id.* § 552.223. If no previous determination as to whether requested information falls within one of the exceptions to disclosure exists, and a governmental body believes the information falls within one of the exceptions to disclosure, the governmental body must ask the Attorney General's Office for a decision as to whether the information falls within that exception within ten business days of receiving the request. *Id.* § 552.301(a). The Attorney General must render a decision on all such requests within a legislatively mandated period. *Id.* § 552.306(a). Additionally, either a requestor or the Attorney General may file for a writ of mandamus compelling a governmental body to make information available to the public if the governmental body fails to ask for a decision from the Attorney General or fails to comply with an Attorney General decision that the information is public. *Id.* § 552.321. A person who willfully destroys, removes, or alters public information commits a misdemeanor. *Id.* § 552.351. An officer for public information or the officer's agent who, with criminal negligence, fails or refuses to give access to public information also commits a misdemeanor. *Id.* § 552.353. We believe that these controls set out in chapter 552 of the Government Code, put into place by the legislature, are adequate controls to ensure that the public purpose of access to government information is accomplished.

⁴There also was and sometimes still is a requirement that adequate consideration be received in return for the grant of money or thing of value. *See Brazos River Auth. v. Carr*, 405 S.W.2d 689, 693-94 (Tex. 1966); *Byrd v. City of Dallas*, 6 S.W.2d 738 (1928); GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 232 (1977) ("If the 'grant' is announced in advance and requires something in return, there is a quid pro quo and the 'grant' has become something else."). In Braden's commentary and in the more recent court decisions, it appears that the public benefit is the consideration. *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 739-40 (Tex. 1995); *Graves v. Morales*, 923 S.W.2d 754, 757 (Tex. App.--Austin 1996, writ denied); BRADEN at 234 ("Under the new rule, the question is, of course, whether the grant or loan is for a public purpose. In a sense, this is no more than asking whether the public benefit is too remote, indirect, or general to serve as a 'quid pro quo.'").

The Port argues that the requestor will use the information for a commercial purpose.⁵ The Port urges that this private individual's commercial purpose is not a public purpose. Similarly, the Port contends that, even assuming "there were a public service appropriate to the Port, the Port staff asserts they would have no way to maintain control over [the requestor] or his company to ensure that any such public purpose is actually achieved." First, we believe that the public purpose at issue here is the public purpose served by the Port releasing information to the public in an open democracy. Second, the legislature has prohibited governmental bodies from inquiring into the motives of a requestor in seeking information. Gov't Code § 552.222(b). Third, an officer for public information is not responsible for "the use made of the information by the requestor." Gov't Code § 552.204(1).

As an additional basis for withholding the requested information, you state that because the Port holds a copyright on the digital map, the information is excepted from required public disclosure.⁶ In other words, you ask whether copyright law provides the Port a basis to refuse to comply with the Public Information Act.⁷ At the outset, we recognize that a full analysis of the Federal Copyright Act (the "FCA"), title 17 of the United States Code, is beyond the scope of this ruling. The FCA, however, gives copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a); *see also id.* § 103; *see generally Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359-60 (1991) (copyright laws protect work or compilation, not amount of effort expended); John Kidwell, *Open Records Laws and Copyright*, 1989 WIS. L. REV. 1021, 1025 (1989). The

⁵The issue of commercial use of government information was discussed in connection with House Bill 1718:

A great deal of attention was given to how these records, especially when on electronic media, might be used for commercial purposes. Several proposals were made to find a way to ensure that those using the records for commercial purposes were set apart from those using the records for informational purposes. However, the privacy problems associated with asking requestors the purpose of the information that they request left only one option: treating everyone equally.

House Comm. on State Affairs, Bill Analysis, H.B. 1718, 74th Leg., R.S. (1995); *see* Bob Etnyre, Comment, *The Texas Open Records Act: A Section-by-Section Analysis*, 14 HOUS. L. REV. 398, 425-27 (1977); *see also Barrington v. Cokinos*, 338 S.W.2d 133, 145 (Tex. 1960).

⁶We are not aware that the Texas Legislature has authorized the Port to take steps to protect this type of information. *See generally* 17 U.S.C. § 105 ("copyright protection under this title is not available for any work of the United States Government"); *see, e.g.,* Transp. Code § 201.205 (Texas Legislature has authorized Texas Department of Transportation to take steps to protect its intellectual property rights under FCA).

⁷The Public Information Act requires a governmental body to "promptly produce public information for inspection, duplication, or both on application by any person." Gov't Code § 552.221; *see also id.* § 552.021.

FCA gives copyright owners the exclusive right to control the use of copyrighted works. *See* 17 U.S.C. § 106. This right is subject to exceptions, the most important of which may be the “fair use” of the works. *See id.* § 107.

The FCA does not make information confidential, but rather gives the copyright holder the exclusive right to reproduce his work, subject to another person’s right to make fair use of it. *See id.* §§ 106, 107. Assuming that the Port in fact holds a legal, enforceable copyright on the map, we believe that any use must be consistent with federal copyright law. *See id.* §§ 101 *et seq.*; Attorney General Opinion JM-672 at 2-3 (1987) (custodian of public records must comply with copyright law and is not required to furnish copies of copyrighted records owned by third parties). Since you represent that the Port, and not a third party, holds the copyright to the digital map, we believe that, under the Public Information Act, the Port must allow the requestor access to or copies of the information. *See* Minn. Op. Atty. Gen. 852, 1995 WL 775042; Miss. Op. Atty. Gen. (May 23, 1991), 1991 WL 577834 (Mississippi Highway Department may not deny public access to public records or refuse to copy public records when properly requested under Mississippi Public Records Act). Accordingly, the requestor assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 9 (1990).

In reaching our conclusion, we believe the Public Information Act and the FCA are compatible. While the act prohibits a governmental body from making an inquiry of a requestor, *see* Gov’t Code § 552.222, it does not address the subsequent use of public information. *Cf.* Gov’t Code § 552.204 (officer for public information is not responsible for requestor’s use of information released under act). The act, however, does not prohibit a governmental body from protecting its copyright by entering into licensing or use agreements, or exercising its rights under the FCA. *See generally* Minn. Op. Atty. Gen. 852, 1995 WL 775042 (state agencies may place reasonable restrictions on use of their “original works of authorship” consistent with rights of copyright owner under FCA); Miss. Op. Atty. Gen. (May 23, 1991), 1991 WL 577834 (“main purpose in copyrighting is to require anyone reproducing the maps and data for commercial purposes to disclose the source of data”). Thus, we conclude that, while the Public Information Act requires the Port to provide access to or copies of public information, the Port may place reasonable restrictions on the use of its copyrighted works consistent with the rights of a copyright owner under the FCA, to the extent the information at issue is subject to copyright protection.⁸ *See* 17 U.S.C. §§ 102, 103. Consequently, the FCA may not be used to deny access to or copies of the information sought by the requestor under the Public Information Act.

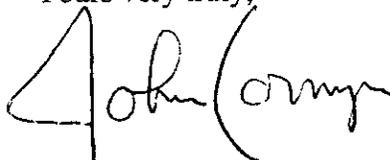
⁸We do not believe this office is the proper forum to address the issue of whether the information at issue is copyrightable under the common-law or federal law or whether a particular use of the information is a “fair use” under section 107 of the FCA. *See* Attorney General Opinion DM-98 at 3 (1992) (attorney general cannot resolve fact questions in opinion process); Open Records Decision No. 426 at 5 (1985).

Based on the preceding analysis, we believe that the controls put in place in chapter 552 of the Government Code are adequate to ensure that a public purpose is achieved. We, therefore, conclude that the Port is not prohibited by section 52(a) of article III of the Texas Constitution or under the Federal Copyright Act from releasing the requested information.⁹

S U M M A R Y

Section 52(a) of article III of the Texas Constitution does not prohibit the Port of Corpus Christi Authority from releasing a computer generated digital map, created by the Port with public funds, in response to a request made under chapter 552 of the Government Code. Furthermore, the Federal Copyright Act may not be used to deny access to or copies of the public information under the Public Information Act when the governmental body owns the copyright. We conclude, however, that, while the Public Information Act requires the Port to provide access to or copies of public information, the Port may place reasonable restrictions on the use of its copyrighted works consistent with the rights of a copyright owner under the FCA.

Yours very truly,



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⁹We suggest that if you have any concerns over the costs associated with providing the requestor with the requested digital version of the map of the Port, you contact the Open Records Administrator for the General Services Commission. See Gov't Code §§ 552.261-.274.