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Opinion Committee

August 26, 1993

The Honorable Dan Morales
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711

RE: Request for reconsideration of OR93-414

Dear General Morales:

On behalf of TRW-REDI, which made the request for information that initiated the process resulting in the issuance of OR93-414, I would respectfully request that you reconsider that ruling.

I recognize that TRW-REDI is not permitted under section 7 of the Open Records Act to request a decision directly. There is, however, ample precedent for the Attorney General to reconsider an open records decision at the request of someone other than the governmental entity that was authorized to request the decision directly. In fact, Open Records Decision No. 18A (1974), which was the first Open Records Decision to be reconsidered, was written at the urging of the entities requesting information rather than the governmental body that had originally sought the decision under section 7. Tex. Open Rec. Dec. No. 18A (1974) ("because of the questions raised by the news media as to the decision's effect . . ., we take this opportunity to expand upon that Open Records Decision.").

OR93-414 should be reconsidered because (1) it is based on a mistaken assumption of fact, (2) to the extent that it states that a governmental body's obligation to provide records is no more extensive than what it has provided in the past, it is contrary to the requirements of the Act, and (3) to the extent it suggests that there is no obligation to make minimal extractions of information contained in computer record systems, it is inconsistent with the decision of the Texas Supreme Court in Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 687 (Tex. 1976) and with Attorney General Opinion No. JM-672 (1987).

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OR93-414 is based on a mistaken assumption of fact.

OR93-414 is based entirely on Attorney General Opinion No. DM-41 (1991) which is cited as being "[a] previous determination of this office . . . which resolves [the] request." Thus, if the relevant facts are different here than they were in DM-41, the underlying rationale of the current decision is not applicable.

The school district's letter seeking your decision stated

- This information can only be retrieved by producing a "computer tape". Tapes with this information have never been prepared at the District. To provide Mr. Smith with the requested information, the District would be required to generate a computer tape.

In apparent reliance on this representation, OR93-414 provides

You also contend that because the district does not maintain the requested information in the form sought by the requestor, the district need not comply with the request.

It is incorrect, however, to conclude that the District does not maintain the information in the form sought. The District maintains the information on computer tapes and routinely generates such tapes. What it does not do is to routinely generate tapes that already segregate the specific data requested on a separate tape. Of course, that will almost always be the situation in a request involving computer records. The purpose of a computer record keeping system is to permit a massive number of pieces of information to be stored on a tape, disc, or other device so that smaller quantities of data can be identified and extracted. Indeed, one of the great benefits of computer record keeping is that data can be stored without segregating it into discrete, pre-prepared compilations as would be required with paper records.

In DM-41, the requestor was asking the governmental body to provide the information with coded formatting instructions. The Secretary of State had no problem providing the information requested and providing it on the medium (nine-track computer tape) sought. The objection was to providing the coded instructions for the requestor's computer. Here the issue is not whether the school district must generate and produce formatting instructions or other software that is not a governmental record in the first place--it is not being asked to do so. All that is asked is that it produce a limited number of governmental records that it maintains in a computer record keeping system--an obligation that the state agency involved in DM-41 recognized and met. Thus, in DM-41 it was recognized that the government had to do what is requested here--provide requested information on computer tape. What DM-41 decided was that the government did not have to generate and provide

computer formatting instructions--an issue that does not arise here. As the facts of this request are different than were assumed in OR93-414, DM-41 does not provide a precedent that applies to the current request. Accordingly, OR93-414 should be reconsidered.

To the extent that OR93-414 suggests that the obligation of a governmental entity to provide information in its possession does not arise unless it has previously segregated and compiled the requested records in the past, it is inconsistent with the purpose of the Act.

If OR93-414 is intended to suggest that computer records are unavailable unless the particular compilation of records has previously been transferred to a tape or disc, it clearly would be inconsistent with the purpose of the Act. Indeed, such an interpretation would be essentially the same as saying that a collection of paper records was unavailable unless the file clerk had previously pulled those particular files from the cabinet and compiled them in the order requested by the citizen seeking the information.

The computer request at issue here is precisely analogous to that situation. It is just as if there were 100,000 paper files in a group of file cabinets, and TRW asked the custodian to pull and make copies of 50 of them. There is no request to create new documents or to generate additional information. All that is sought is to make copies of certain files that are already in existence.

In this case, the requested information is maintained in the form sought, i.e., on computer tape. The fact that the school district may not have prepared a tape containing precisely the computer records sought by the requestor is no more relevant than the fact that a file clerk may not previously have removed requested documents from a paper file system. What is important is that the records exist and that they are maintained in the form requested. The fact that the district may have to gather the data from the central storage unit, whether that storage unit is a file cabinet containing paper documents or is a computer memory device containing magnetic impulses that encode information, is simply not significant under the Act. Indeed, the Attorney General has held as much in Attorney General Opinion No. JM-672 (1987) which states

It would be inconsistent with the spirit of the Open records Act to deny access to information simply because obtaining the information requires a minimal computer search. Performing a sequence of operations on a computer will, in many instances, require no more effort on a computer than physically locating a file in a particular file cabinet.

To the extent that OR93-414 suggests that there is no obligation to make minimal extractions of information from computer record keeping systems, it is in direct conflict with the decision of the Texas Supreme Court in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (1976).

The Act establishes a policy that governmental bodies are required to minimize costs of reproduction and access. For example, section 9 provides

(c) It shall be the policy of all governmental bodies to provide suitable copies of all public records within a reasonable period of time after the date copies were requested. Every governmental body is hereby instructed to make reasonably efficient use of each page of public records so as not to cause excessive costs for the reproduction of public records.

. . .

(h) If a governmental body refuses or fails to provide copies of public records at the actual cost of reproducing the records as provided in Subsections (a) and (b) of this section, a person who overpays shall be entitled to recover three times the amount of the overcharge; provided, however, that the governmental body did not act in good faith in computing the costs.

The Texas Supreme Court has made it abundantly clear in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (1976), a case involving a computer record keeping system, that there is an affirmative obligation to utilize the least expensive method of providing records. There the Court said

The least expensive method of supplying the information requested by the Foundation must be determined by the Board of Control and the custodian of the records in accordance with the guidelines set out by Section 9.

Industrial Foundation. 540 S.W.2d at 687 (emphasis added). In large volume requests the least expensive means of providing the information will almost always not be by paper copy.

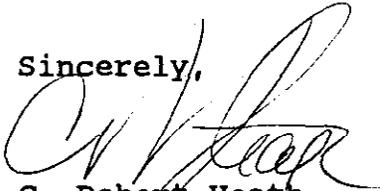
In this case all that is being sought is to recover already existing records. No new information is required to be created or generated. There is an inexpensive, non-disruptive¹ method of

¹Commercially available additions to the district's existing software package would permit the requested data to be extracted by using only a few keystrokes. The requestor is willing to pay for

providing the requested records. Under the Act, it is not permissible for the governmental body to eschew that method and insist on utilizing a more expensive and inconvenient method. See Attorney General Opinion No. 672 (1987).

Although not cited in OR93-414, Attorney General Opinion No. DM-30 (1991) discusses the form in which records must be provided. It determined that only "suitable" copies need be produced and that accordingly it was unnecessary to produce duplicate microfilm in lieu of a paper copy. That opinion is undoubtedly correct when a citizen asks to examine a handful of records. If, however, a large volume request is involved, paper copies may not be suitable. Thus, for example, if a person asks for copies of 10,000 records, the clerk is not permitted to require the person to purchase photocopies at a cost of more than \$1,000 and with a delay of days or weeks when the same data is available on existing rolls of microfilm which might cost only \$10-\$20. See Industrial Foundation of the South, *supra*.

Since OR93-414 is based on a mistake of fact and Attorney General Opinion No. DM-41 is accordingly not applicable, we ask that OR93-414 be reconsidered and that a revised ruling be issued that relies on Industrial Foundation and Attorney General Opinion No. JM-672.

Sincerely,

C. Robert Heath

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that package and have it installed by the district's existing software vendor to minimize any expense or inconvenience to the district. The district apparently recognizes that there is no difficulty in providing the information in the form requested, as it has agreed that it will do so if TRW agrees not to make it available to certain title companies that currently purchase the information directly from the district. The dispute arises because TRW will not agree to limit its use of the information as the district requests.