



**THE ATTORNEY GENERAL
OF TEXAS**

August 15, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Charles D. Travis
Executive Director
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744

Dear Mr. Travis:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 6943; this decision is OR89-245.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The Texas Parks and Wildlife Department received a request for "a list of all properties located in Real County, Texas, which have been included in the Natural Areas data base of the Texas Natural Heritage Program." This information is contained within a series of electronic databases maintained and used by the department's Natural Heritage Program. The databases contain information on the location of rare and endangered plant and animal species on public and private land. You have submitted computer printouts containing various data.

The department wishes to withhold this information under sections 3(a)(1) and 3(a)(5) of the act. You claim that the requested information is protected from disclosure under section 3(a)(1) because some of it is unpublished information that belongs to the Nature Conservancy and is merely licensed to the Texas Parks and Wildlife Department for its use only. You contend that disclosure would violate an agreement between the Nature Conservancy and the department that such information may be provided to third parties

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only with the consent of the Nature Conservancy and that it would also violate copyright protections afforded to the Nature Conservancy by 17 U.S.C §§ 101 et seq. You claim that section 3(a)(5) protects the information because the department uses it to evaluate the value of private property for future acquisition programs. The information is also used to provide information to land and project developers who, during their activities, wish to avoid adversely affecting rare and endangered species. Normally, the department provides species and habitat information related to locations already identified by the requestor.

Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Information is not confidential under the Open Records Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977). The law charges persons dealing with state agencies and officers with notice of the legal limits on the agencies' and officers' powers. State v. Ragland Clinic-Hospital, 159 S.W.2d 105, 107 (Tex. 1942); see Fazekas v. Univ. of Houston, 565 S.W.2d 299, 304-306 (Tex. Civ. App. - Houston [1st Dist.] 1978), appeal dismissed, 440 U.S. 952 (1979). A contract or agreement cannot overrule or repeal the Texas Open Records Act. Attorney General Opinion JM-672 (1987). Consequently, any agreement between the Texas Parks and Wildlife Department and the Nature Conservancy to keep information licensed to the department confidential cannot form a legitimate basis for withholding the requested information under section 3(a)(1).

Nor does copyright law provide a basis for withholding the information. In Attorney General Opinion MW-307 (1981), the attorney general held that the Railroad Commission was required to allow public access to copyrighted maps, though the agency was not required to furnish copies of the maps and expose itself to liability for copyright infringement under 17 U.S.C. 106, 107. (Members of the public have the right to make copies of copyrighted materials held as public records "unassisted by the state.") The department is therefore required to allow access to copyrighted information; it is not protected under section 3(a)(1) simply because the information may be copyrighted. This decision does not address the issue of whether the material in question here is actually copyrighted. See also Open Records Decision No. 109 (1975).

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You also suggest that the requested information is protected under section 3(a)(5), which exempts from required disclosure,

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) is narrow and fairly clear on its face. The purpose of the section is to protect a governmental body in its planning and negotiation with regard to a particular transaction. Open Records Decision No. 357 (1982). Information may be withheld under this section as long as it relates to good faith negotiations that have not yet been completed. You claim that the requested information here is used by the department to evaluate the value of private property for future acquisition programs and that disclosure of it could affect adversely the future prices that the department would have to pay for acquisition of such private land. You do not, however, indicate that the information requested relates to the appraisal or location of real property that is currently being considered for acquisition or that is currently the subject of negotiations. Section 3(a)(5) does not protect information relating to any property that might conjecturally be sought for acquisition by a governmental body at some future date. Information may not be withheld under section 3(a)(5) unless it relates to the location or appraisal of real property that is currently being considered for acquisition or is the subject of ongoing negotiations. Further, information about endangered species is not information related to the location or appraisal of property.

We note that the request is for a list of properties. The data you have supplied to this office as responsive to the request is somewhat broader. While you must supply the information requested, you need not supply information that is not requested. Also, you appear to indicate that some of the information sought may be supplied to individual land and project developers who identify the specific land they are working on, i.e., the land location is already known to the requestor, not provided by the department. The Open Records Act prohibits selective disclosure. Open Records Decision No. 463 (1987); see Open Records Decision No. 454 (1986). Once a governmental body exercises its discretion to release certain information, it must release it "to any person" who requests it. V.T.C.S. 6252-17a, § 14(a). Nor

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may a governmental body consider the motives of the requesting party in determining whether public information must be disclosed. Open Records Decision No. 161 (1977).

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 OR89-245.

Yours very truly,

*Open Government Section
of the Opinion Committee*

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Prepared by David A. Newton
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DAN/bc

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