



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 28, 1996

Mr. Joel V. Roberts  
City Attorney  
City Odessa  
P.O. Box 4398  
Odessa, Texas 79760-4398

OR96-0810

Dear Mr. Roberts:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 19739.

The City of Odessa (the "city") has received a request for an economic study prepared by a private consulting firm and donated to the city. The city has no objection to allowing the public to view and make copies of the "hardbound" version of the information that is kept at the offices of the City of Odessa, Ector County, and Greater Odessa Chambers of Commerce. You object, however, to providing a copy of copyrighted material on a computer disk on the basis that the information is excepted from public disclosure under sections 552.101 and 552.104 of the Open Records Act.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim the information on the computer disk is protected by the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*, and that pursuant to the Copyright Act "it [is] illegal for the [city or the requestor] to make a copy of the computer disk without the approval of the copyright owner." You also argue that "[t]he Copyright Act supercedes the Open Records Act and cannot diminish the federally granted and protected rights of a copyright holder."

Prior determinations by this office have addressed the relationship between the Open Records Act and the copyright laws. Generally, this office has concluded that a requestor may inspect copyrighted records and make copies of such records unassisted by the state. Attorney General Opinions JM-672 (1987) at 3, MW-307 (1981). However, this office is aware of the difficulty in trying to comply with both laws. Attorney General Opinion MW-307 addressed the relationship between the Open Records Act and the copyright laws, stating that:

The Open Records Act requires the custodian of public information to "produce such information for inspection or duplication." V.T.C.S. art. 6251-17a, § 4. He is prohibited by the act from making any inquiry of a person who seeks to inspect and copy public records beyond what is necessary to establish identification and the records being requested. [*Id.* §] 5(b).

In contrast, the copyright law gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. 17 U.S.C §§ 106, 107 (1976). Any copying of such records must be consistent with the copyright law. A state that infringes a copyright may be liable in damages to the holder. Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979).

Thus, the custodian of copyrighted records, when asked for a copy of them under the Open Records Act, is faced with a difficult problem. He can make the copy as a ministerial act and risk a suit for infringement. He can seek to determine whether the proposed use is a fair use. This is a difficult task at best, since it requires an inquiry into the purpose of the use and its effect on the potential market for the copyrighted work. It is rendered impossible by the Open Records Act's prohibition against making any such inquiry of the requestor. Moreover, the supremacy clause of the United States Constitution would prohibit the custodian from following the Open Records Act where it conflicts with the copyright law. See Antoine v. Washington, 420 U.S. 194 (1975).

The custodian of public records must comply with the copyright law and is not required to furnish copies of such records that are copyrighted. Members of the public have the right to examine copyrighted materials held as public records and to make copies of such records unassisted by the state. Of course, one so doing assumes the risk of a copyright infringement suit.

Attorney General Opinion MW-307 at 1-2.

The information at issue in Attorney General Opinion MW-307, however, consisted of paper documents. In that instance it was possible for the requestor to make copies without assistance by the governmental entity. The information at issue here consists of computer records. The city contends that it cannot make a copy of the requested information. We are unaware of a practical way for the requestor to make a

copy of the requested information without assistance from the city.<sup>1</sup> Disputed questions of fact are not resolvable in the open records process, and therefore, the attorney general must rely on the representations of the governmental body or third parties who may have proprietary interests in the requested information. Open Records Decision Nos. 554 (1990), 552 (1990). Accordingly, in this case where the facts are distinguishable from our prior determinations regarding copyright materials, we cannot reconcile the Open Records Act and the federal copyright laws. The federal law must prevail. *See English v. General Elec. Co.*, 110 S.Ct. 2270, 2275 (1990) (state law is pre-empted to extent it actually conflicts with federal law); Attorney General Opinion MW-307 at 1-2. The question of whether the "fair use" standard of the federal copyright law applies to this situation is a fact question that cannot be answered by this office.

We wish to stress, however, that this ruling must not be construed to restrict access to inspect copyrighted documents. A governmental body must allow inspection of copyrighted materials unless an exception to the Open Records Act applies to the information.<sup>2</sup> Attorney General Opinion JM-672 (1987); *see generally* Gov't Code §§ 552.224 (comfort and facility of person requesting public records), .225 (time for examination of public records). Since the city did not raise any exception to the Open Records Act that would except this information from public inspection, the city must allow public access to the information. However, based on the representations of the city, we conclude that the city is not required to provide the requested *copy* of a computer disk since to do so may violate federal copyright laws.<sup>3</sup>

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<sup>1</sup>The Open Records Act does not give a member of the public an unrestricted right to use the governmental body's computer to make his own computer search for public records. Open Records Decision No. 571 (1990).

<sup>2</sup>We note that in your letter you claim the requested information is excepted from required public disclosure under section 552.104. Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." Section 552.104 is designed to protect the interests of the governmental body as in a competitive bidding situation for a contract or benefit. Open Records Decision No. 592 (1991) at 8. It is not designed to protect the interests of private parties submitting information to a governmental body. *Id.* at 8-9. The information in question was donated to the city. It does not relate to an on-going competitive bidding situation. Furthermore, the requestor has already been provided access to view the information in question. When members of the public are permitted to examine information that could be withheld under most exceptions to the Open Records Act, the information becomes available to any person. Open Records Decision Nos. 412 (1984), 400 (1983). Accordingly, section 552.104 does not except the information in question from required public disclosure.

<sup>3</sup>In a letter to the city secretary, dated March 26, 1993, the requestor claims that "[i]n accordance with [the city attorney's] March 2, 1993 memo, [he] made no computer diskette copy of Section F (Impact Section), nor did [he] make handwritten notes." Although we found nothing in the city attorney's March 2, 1993 memorandum indicating that the city prohibits the making of handwritten notes, we stress that we are unaware of any state or federal law that gives the city authority to prohibit an individual from making handwritten notes of copyrighted materials. Of course, one so doing assumes the liability of complying with federal copyright laws and the risk of incurring a copyright infringement suit.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Records Division

LRD/LBC/rho

Ref.: ID# 19739

Enclosures: Submitted records

cc: Mr. Frank F. Trombley  
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(w/o enclosures)