



Office of the Attorney General
State of Texas

August 25, 1998

DAN MORALES
ATTORNEY GENERAL

Ms. Jennifer D. Soldano
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701-2483

OR98-2035

Dear Ms. Soldano :

You ask that we reconsider Open Records Letter No. 98-1074 (1998). Your request for reconsideration was assigned ID# 116784.

Open Records Letter No. 98-1074 (1998) involved a request for "complete and currently updated specifications" of the department's herbicide spray equipment system. You inform us that the requestor clarified that he is seeking both the software the department developed for its computerized herbicide injection system and the specifications for the herbicide machine itself. The decision determined that the Texas Department of Transportation (the "department") need not release copies of the requested information if the information is copyrighted, but that, as the department did not establish the applicability of section 552.110, the department may not deny the requestor the right to inspect the information.

You state that the department "claims common-law copyright to the software that the department developed for its computerized herbicide injection system [and] . . . is in the process of applying for a registered copyright with the U.S. Copyright Office for this software." You also state that the "department also claims a copyright to the design of the [herbicide] machine. At this time, it is a common-law copyright, and we may register it with the U.S. Copyright Office." You now "ask that as a copyright owner, the [department] be able to prevent inspection and copying." In other words, you ask whether copyright law provides the department a basis to refuse to comply with the Open Records Act (the "ORA").

The ORA 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.* § .021.¹ The Federal Copyright Act (the "FCA"), title 17 of the United States Code, gives copyright protection to "original works of authorship fixed in any tangible medium of

¹The ORA contains thirty exceptions to required public disclosure. Gov't. Code §§ 552.101-.130.

expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, whether directly or with the aid of a machine or device.” The Texas Legislature has authorized the department to take steps to protect its intellectual property rights under the FCA. Transp. Code § 201.205. Generally, the FCA gives copyright owners the exclusive right to control the use of copyrighted works, including the right “to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” *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 fair use of a copyrighted work includes use “for purposes such as criticism, comment, news reporting, teaching, scholarship or research.” *See id.*

We believe the ORA and the FCA are compatible. While the ORA prohibits a governmental body from making an inquiry of a requestor, *see id.* § 552.222, it does not address the subsequent use of public information. The ORA does not prohibit a governmental body from protecting its copyright by entering into licensing or other use agreements. Thus, we conclude that, while the ORA requires the department to provide access to or copies of public information, or both, the department may place restrictions on the use of its copyrighted works consistent with the rights of a copyright owner under the FCA.² Consequently, the FCA may not be used to deny access to or copies of department information sought under the ORA.

We are resolving this matter with this 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 may 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,



Kay Hastings
Deputy Chief
Open Records Division

KHH/mjc

²We 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 (1992) at 3 (attorney general cannot resolve fact questions in opinion process); Open Records Decision No. 426 (1985) (same).

Ref.: ID# 116784

cc: Mr. Gene Vincent
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(w/o enclosures)