



**THE ATTORNEY GENERAL  
OF TEXAS**

June 23, 1988

**JIM MATTON  
ATTORNEY GENERAL**

Honorable James E. Nugent  
Chairman  
William B. Travis Bldg.  
Railroad Commission of  
Texas  
P.O. Drawer 12967  
Austin, Texas 78711-2967

Open Records Decision No. 496  
  
Re: Whether certain information made confidential by published rules of the Federal Interstate Commerce Commission is totally excepted from the Open Records Act, article 6252-17a, V.T.C.S., or from disclosure under the act pursuant to section 3(a)(1). (RQ-1290)

Dear Chairman Nugent:

You ask about the public availability under the Texas Open Records Act, article 6252-17a, V.T.C.S., of "waybill samples" provided to the Texas Railroad Commission by the Interstate Commerce Commission (ICC). A waybill is a document prepared from the bill of lading contract or shipper's instructions about the disposition of freight. 49 C.F.R. § 1244.1(c). It forms the basis for determining freight charges and interline settlements. Id. The ICC collects a vast amount of data regarding waybills in its regulatory efforts. See, e.g., 49 U.S.C. § 10,321. Agency rules expressly make public a great deal of this information. See 52 Fed. Reg. 12,415, 12,416, (to be codified at 49 C.F.R. § 1244.8(b)(5)). Highly sensitive commercial and financial data is, however, protected from public disclosure. See 52 Fed. Reg. at 12,416 (to be codified 49 C.F.R. § 1244.8(b)(2), (3), (4)).

The ICC promulgated rules governing its procedures on the release of such data. 52 Fed. Reg. 12,415 (April 16, 1987). The "ICC Waybill Sample" is provided to the states as follows:

Each requesting State may obtain any waybill record pertaining to traffic that was originated, terminated, interchanged in, or

that passed through its State subject to the same requirements imposed on federal agencies under paragraphs (b)(2)(i) through (v) of this section.

52 Fed. Reg. at 12,416 (to be codified at 49 C.F.R. § 1244.8(b)(3)). Paragraphs (b)(2)(i) through (v) impose the following requirements:

Each requesting Federal agency (including quasi-governmental agencies) may obtain any waybill record from the ICC Waybill Sample subject to the following requirements:

(i) The Federal agency shall make the information contained in the ICC Waybill Sample available only to its employees or those contractors working on the particular project or study requiring the waybill data.

(ii) The Federal agency will ensure that railroads and shippers are afforded the same privilege and protection against disclosure of the waybill data as the Commission provides.

(iii) The Federal agency will not release any data to the public unless the data elements are aggregated to contain at least three shippers and to prevent identification of an individual railroad.

(iv) The Federal agency will refer any requests for waybill data and accompanying documentation to the ICC for processing and will so inform the requesting party of such referral to the Commission.

(v) The Federal agency must sign an agreement annually with the Commission agreeing to these restrictions. (Emphasis added.)

52 Fed. Reg. at 12,416 (to be codified at 49 C.F.R. § 1244.8(b)(2)).

In light of these provisions, you ask the following questions:

1. Do the ICC's rules, insofar as they prescribe procedure for, and limitations on, the release of waybill data, preempt application of the Open Records Act, article 6252-17a, either in its entirety or as an exception under section 3(a)(1) of the act?

2. If the answer to 1. is yes, and if the Commission subsequently receives a request or requests for this data, may the Commission refuse to release the data based on the attorney general's ruling on this issue, or must it, on a case-by-case basis, go through the procedures outlined in section 7 of the Open Records Act?

You also suggest that the information at issue is protected under section 3(a)(10) of the Open Records Act.

As a general rule, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. See Attorney General Opinion JM-672 (1987). Section 3(a)(10) excepts:

trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

Section 3(a)(10) is patterned after exemption 4 of the Federal Freedom of Information Act (FOIA), 5 U.S.C. section 552(b)(4), and protects third party interests that are protected by statute or by judicial decision. Open Records Decision Nos. 494 (1988); 309 (1982); 107 (1975). Section 3(a)(10) consists of two parts: trade secrets, and commercial or financial information. Different tests are applicable under each part.

In applying section 3(a)(10) to commercial or financial information, open records decisions rely on federal cases ruling on exemption 4 of the federal act. See, e.g., Open Records Decision Nos. 494 (1988); 309 (1982). The federal test is as follows:

commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: 1) to impair the Government's ability to obtain

necessary information in the future; or  
2) to cause substantial harm to the competi-  
tive position of the person from whom the  
information was obtained. (Emphasis added.)

National Parks and Conservation Association v. Morton, 498  
F.2d 765, 770 (D.C. Cir. 1974).

The ICC's rules making certain waybill sample data "confidential" constitute its decision that the data is protected under exemption 4 of the FOIA. Under the federal act, each federal agency covered by the FOIA determines the applicability of the act's exceptions to information held by that agency. See 5 U.S.C. § 552(a)(6)(A). These federal agency decisions are subject to prioritized judicial review. See 5 U.S.C. § 552(a)(4)(B). In contrast, the Texas Open Records Act requires state agencies to submit particular information to the Texas Attorney General for review to determine whether the information fits one of the act's exceptions. Art. 6252-17a, § 7. The fact that information falls within one of the federal act's exceptions does not mean the information is automatically protected under the Texas Open Records Act. See generally Attorney General Opinion MW-95 (1979) (the FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision No. 124 (1976).

As indicated, however, section 3(a)(10) protects commercial or financial information if disclosure of the information would impair the agency's ability to obtain the information in the future. See 49 C.F.R. § 1244.8(b)(3). In light of the ICC's rules protecting waybill sample data, releasing the protected data to the public would clearly impair the Railroad Commission's ability to obtain the information in the future. Consequently, it may be withheld under section 3(a)(10). Because this matter has been resolved under section 3(a)(10), this decision does not address whether the ICC's rules protecting certain waybill sample data from disclosure under the federal act either preempt the state act or constitute "confidentiality" under section 3(a)(1) of the state act.

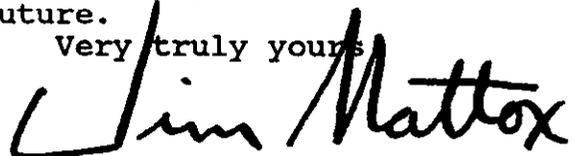
You also ask whether you must request an attorney general's decision each time a request is made for waybill sample data. In future cases, if you receive a request under the Open Records Act for the specific items listed in the ICC's rules, see 52 Fed. Reg. at 12,418, you may rely on this decision to withhold those items. Because the items listed in the federal rules are explicit and are clearly

commercial or financial information on their face, this office need not actually review the specific data requested.

S U M M A R Y

Section 3(a)(10) of the Texas Open Records Act, article 6252-17a, V.T.C.S., protects from required disclosure commercial or financial data comprising the "waybill sample" of the Interstate Commerce Commission because release of the data would impair the Texas Railroad Commission's ability to obtain the information in the future.

Very truly yours



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