



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

February 23, 1989

Honorable Jim Hightower  
Commissioner of Agriculture  
P. O. Box 12847  
Austin, Texas 78711

Dear Mr. Hightower:

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# 5319; this decision is OR89-68.

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.

You received a request for information on water wells sampled for pesticide contamination, including the name and address of the well owner, and a physical description of the well. You claim this information is exempt from required public disclosure under sections 3(a)(1), 3(a)(8), 3(a)(10), and 3(a)(13) of the act. This office believes most of the information requested is public.

Section 3(a)(1) protects from required public disclosure:

information deemed confidential by law,  
either Constitutional, statutory, or by  
judicial decision.

Although this exception covers a broad range of information, its primary purpose is to protect privacy interests.

You stated in your letter that release of the requested information might result in embarrassment to the well owners. If the information requested is exempt, it must be exempt under one of the accepted theories of common-law privacy. Texas courts recognize four categories of common-law privacy; only public disclosure of private facts could potentially apply here.

The Texas Supreme Court in Industrial Found., of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied 430 U.S. 930 (1977), set forth the primary test for "the public disclosure of private facts" privacy protection applicable under section 3(a)(1). Information may be withheld under section 3(a)(1) only if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. See 540 S.W.2d at 683-85.

The information at issue here is not highly intimate or embarrassing in itself. Additionally, there is a legitimate public interest in knowing the extent and location of the pesticide levels in the wells. The information is not exempt under common-law privacy.

Nor is the information exempt under Constitutional privacy. It does not fall within one of the constitutionally protected "zones of privacy." Roe v. Wade, 410 U.S. 113 (1973); Paul v. Davis, 424 U.S. 693 (1976). The information is not protected under section 3(a)(1).

Section 3(a)(1) also protects information deemed confidential by statute. A memorandum prepared by your legal staff suggests that sampling data may be kept confidential by application of rule promulgated by the United States Environmental Protection Agency based on that agency's enabling statutes and exemption 6 of the federal Freedom of Information Act, 5 U.S.C. section 552(b)(6). None of the other attachments sent with your request for this decision indicates whether the EPA promulgated such a rule of confidentiality. We will presume, therefore, that no such rule prohibits disclosure of sampling results.

You also claim section 3(a)(8) as an exception to disclosure of sampling results. Section 3(a)(8) exempts:

records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

Information is excepted from disclosure by section 3(a)(8) if release of the information will unduly interfere with law enforcement and crime prevention.

This office has held that section 3(a)(8) applies to law enforcement agencies. Open Records Decision No. 199 (1978). An agency whose function is essentially regulatory is not a "law enforcement agency" for purposes of section 3(a)(8). Id. In Attorney General Opinion MW-575 (1982), this office held that the Department of Agriculture is not a law enforcement agency. The opinion concluded, however, that records collected by the department as part of pesticide complaint investigatory files may be withheld under section 3(a)(8) if a law enforcement agency demonstrates how and why the release of the information would unduly interfere with law enforcement, unless the information on its face demonstrates that fact. The requested information does not relate to a pesticide complaint. You state that the sampling results are part of an investigation that could result in an enforcement action. However, you do not explain how release of the results would unduly interfere with law enforcement, and your description of the requested information does not indicate that it meets the section 3(a)(8) test on its face. Consequently, we conclude that the information is not exempt under section 3(a)(8).

You also raise section 3(a)(10). Section 3(a)(10) excepts from required disclosure:

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 designed to protect third-party interests that have been protected by courts. It does not protect anything that is not also within the scope of section 3(a)(1). See Open Records Decision No. 319 (1982).

You stated that the information is commercial. Some of the wells are used for irrigation, and some for drinking water. Commercial or financial information is excepted under section 3(a)(10) if disclosure of the information 1) is likely to impair the government's ability to obtain necessary information in the future or 2) to cause substantial harm to the competitive position of the person from whom the information was obtained. Open Records Decision Nos. 406 (1984); 309 (1982). These two tests are alternates. The determination of whether commercial or financial information is excepted depends on the facts in a particular case.

You expressed concern about the department's ability to gain access to wells for sampling in the future. To meet the test described above, the governmental body must verify and explain to this office that its ability to obtain the information in the future will be impaired by disclosure. You stated in your letter that "[p]remature and careless release of the information could also jeopardize our ability to conduct further surveys." You state that well owners might resent the department's sampling efforts if previous sampling had resulted in economic loss or harm to other well owners. You concede, however, that there are other procedures available for obtaining this information, and that the department's guiding interest is to avoid the delay that these procedures may involve. We believe this argument is insufficient to meet the test for withholding the information under section 3(a)(10).

Finally, you asserted section 3(a)(13). Section 3(a)(13) excepts:

geological and geophysical information and data including maps concerning wells, except information filed in connection with an application or proceeding before any agency or an electric log confidential under Subchapter M, Natural Resources Code.

The purpose of section 3(a)(13) is to protect the commercial value of geological and geophysical information. See Open Records Decision No. 479 (1987). Because only the descriptions of the wells, and not the sample results, could be classified as geological information, only that portion of the information will be considered under section 3(a)(13).

In the few cases in which section 3(a)(13) has been invoked, the attorney general concluded that the information

at issue was clearly within section 3(a)(13). See, e.g., Open Records Decision Nos. 337, 312 (1982). The attorney general has recently held that the general principles applicable under section 3(a)(10) for commercial information should be applied to the geological data protected under section 3(a)(13). You have not alleged that the information at issue here has any commercial value, and as discussed above, the information is not exempt under section 3(a)(10). This office believes the information is not exempt from disclosure under section 3(a)(13). The information is public.

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 OR89-68.

Yours very truly,

*Open Government Section*  
*of the Opinion Committee*

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