



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

August 15, 1989

Honorable Kent Hance
Chairman
Railroad Commission of Texas
P. O. Drawer 12967
Austin, Texas 78711-2967

Dear Mr. Hance:

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# 7113; this decision is OR89-249.

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 Railroad Commission of Texas (RRC) received an open records request for certain information relating to an RRC investigation of the Western Company of North America. You state that you were able to locate only one of the requested documents: a "witness affidavit" of Gerald D. Tipton. You contend that subsections 3(a)(1), 3(a)(3), and 3(a)(8) of the Open Records Act protect this affidavit from required public disclosure.

Section 3(a)(3) of the act protects information relating to civil or criminal litigation only if the release of the information would adversely affect the governmental body's litigation interests. Open Records Decision No. 493 (1988). You have not shown that the possibility of litigation is more than mere conjecture nor have you demonstrated how the release of information would affect RRC's litigation interests or strategy; consequently, you may not withhold this information pursuant to section 3(a)(3).

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Similarly, you may not withhold the information pursuant to section 3(a)(8) because you have not demonstrated how the release of the information would "unduly interfere" with the RRC law enforcement efforts. See Ex parte Pruitt, 551 S.W.2d 706 (Tex. 1977). Nor have you shown that the Railroad Commission is a law enforcement agency within the meaning of section 3(a)(8).

We also note that the requested information does not fall within the protection of the "informer's privilege" aspect of section 3(a)(1) of the act, which excepts "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Because part of the purpose of the privilege is to prevent retaliation against informants, the privilege does not apply if the informant's identity is known to the party complained of. See Open Records Decision No. 208 (1978); see also Tex. Rules Crim. Evid. R. 508 (informers privilege applies only if informant will not be witness). You must, therefore, release the affidavit.

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 OR89-249.

Yours very truly,

*Open Government Section
of the Opinion Committee*

Open Government Section
of the Opinion Committee
Approved by Jennifer S. Riggs
Chief, Open Government Section

JSR/RWP/bc

Ref.: ID# 7113
ID# 7037

cc: Mr. H. B. Dodge, Jr.
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