



**THE ATTORNEY GENERAL
OF TEXAS**

August 23, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Mr. Allen P. Beinke
Executive Director
Texas Water Commission
P. O. Box 13087
Austin, Texas 78711-3087

Dear Mr. Beinke:

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# 6180 this decision is OR89-272.

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 Texas Water Commission (the Commission) received an open records request for all information pertaining to its enforcement actions taken against Poly-Cycle Industries, Inc. Although you initially contended that the Commission's entire file on this matter should be withheld from public disclosure pursuant to section 3(a)(3) of the Open Records Act, the assistant attorney general representing the Commission indicates to this office that only information reflecting settlement negotiations between the Commission and Poly-Cycle, attorney work product, and privileged communications between the Commission and its attorneys should be withheld.

Section 3(a)(3), known as the litigation exception, excepts from required public disclosure information relating to settlement negotiations, but only if the information has not been made available to the party opponent; no section 3(a)(3) interest exists with respect to information already obtained by all parties to the litigation. Open Records Decision No. 349 (1982). Consequently, you must release to the requestor correspondence between the Commission and

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Poly-Cycle that reflects settlement negotiations. Additionally, the final terms of the settlement, once reached, must be released. Open Records Decision No. 245 (1980).

The remaining information at issue, attorney work product and privileged communications, is deemed confidential by law. See Tex. R. Civ. Proc. 166b; Tex. R. Evid. 503. Information deemed confidential by law is excepted from disclosure under section 3(a)(1) and must be withheld. The remaining information in the enforcement file must be released.

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 OR89-272.

Yours very truly, .

*Open Government Section
of the Opinion Committee*

Open Government Section
of the Opinion Committee
Approved by David A. Newton
Assistant Attorney General

DAN/RWP/bc

Ref.: ID# 6180
ID# 6705

cc: Mr. Jack Carter
AG - Environmental Protection Division