



**THE ATTORNEY GENERAL
OF TEXAS**

September 28, 1989

**JIM MATTOX
ATTORNEY GENERAL**

Honorable Kent Hance
Chairman
Texas Railroad Commission
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# 5752; this decision is OR89-320.

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 received a request under the Open Records Act for access to and copies of all documents, records and files from its investigation of Dowell Schlumberger Incorporated with respect to well cementing and acidizing and fracturing operations. The commission contends that the requested information is covered by sections 3(a)(3), 3(a)(8), and 3(a)(11) of the Open Records Act and is therefore excepted from disclosure.

Under the Open Records Act, a governmental body requesting an open records decision from this office bears not merely the burden of stating which exceptions to disclosure apply to the requested information, but also the burden of explaining why the exceptions protect the requested information. See Open Records Decision No. 252 (1980). None of the correspondence from your office concerning this request explains why sections 3(a)(3),

3(a)(8), or 3(a)(11) apply in this case, and the samples of the requested information submitted for our review do not clearly disclose on their face whether any of the exceptions apply.

The samples do not, for example, reveal whether the Railroad Commission is or may be a party in pending or reasonably anticipated litigation involving this matter or whether the information relates to the pending or anticipated litigation, the two prongs of the test for section 3(a)(3). See Open Records Decision No. 478 (1987). Beyond your statement that the commission's investigation may result in civil or criminal liability and statements in a file concerning the possibility of obtaining a grand jury subpoena, you do not show how release of the information will unduly interfere with law enforcement and crime prevention, the test under section 3(a)(8). See Open Records Decision No. 456 (1987); Attorney General Opinion MW-575 (1982).

Also, you do not explain how the information consists of advice, opinion, or recommendation that is used in the deliberative process, the test under section 3(a)(11). See Open Records Decision No. 464 (1987). Consequently, because we are unable to conclude that the information is excepted under any of the cited exceptions, it must be disclosed to the requestor.

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 OR89-320.

Yours very truly,

*Open Government Section
of the Opinion Committee*

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of the Opinion Committee
Prepared by Steve Aragon
Assistant Attorney General



SA/bc

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