



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

October 27, 1989

Mr. Russell Harding  
Executive Director  
Texas Motor Vehicle Commission  
P.O. Box 2293  
Austin, Texas 78768-2293

Dear Mr. Harding:

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# 7642; this decision is OR89-348.

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. Attorney General Opinion H-436 (1974). The act does not require this office to raise and consider exceptions that you have not raised.

The Texas Motor Vehicle Commission (the commission) received an open records request for all records held by the commission concerning a particular car dealership. You contend that the requested information comes under the protection of sections 3(a)(1) and 3(a)(3) of the Open Records Act.

Section 3(a)(3) of the Open Records Act, known as the litigation exception, excepts from required public disclosure information relating to litigation of a civil or criminal nature and settlement negotiations to which the state or a political subdivision is, or may be, a party. You contend that section 3(a)(3) excepts this material from required disclosure because it relates to "reasonably anticipated" litigation involving the commission and the dealership.

To secure the protection of section 3(a)(3), a governmental body must first demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. Open Records Decision Nos. 452 (1986); 360 (1983). The mere chance of litigation will not trigger the 3(a)(3) exception. Open Records Decision No. 328 (1982). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. You have not shown that the requested material meets this first test, and in fact your letter dated July 31, 1989, to the dealership in question indicates that the commission is planning no litigation against the dealership at this time; consequently you may not withhold any of the requested information pursuant to section 3(a)(3).

Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," including information coming within the protection of the "informer's privilege." The informer's privilege aspect of section 3(a)(1) protects the identity of persons who report violations of the law or who assist in an investigation of a possible violation of a law. Open Records Decision No. 515 (1988). In this instance, the complainant is reporting violations of sections 1.03, 5.03, and 5.04 of article 4413(36), V.T.C.S. (the Texas Motor Vehicle Commission Code), which carry civil penalties. The letters notifying the commission of possible violations of law may therefore be withheld so long as the "informer" will not serve as a witness in a case against the individual subject to the complaint. The privilege does not, however, protect the contents of communications if they do not reveal the identity of the informant. See Open Records Decision No. 515. Consequently, the commission may not withhold copies of the dealer's newspaper advertisements it received from the complainant.

On the other hand, the commission possesses records that it could only have received from particular individuals. If these records were released to the requestor, they would reveal the identity of the individuals who assisted in the investigation. Other records contain some information that, if not deleted, may reveal the identity of the complainant. We have marked the information that you may withhold pursuant to the informer's privilege. All other information must be released.

Mr. Russell Harding  
October 27, 1989  
Page 3

Finally, please note that this decision governs the general public's right of access under the Open Records Act. As a general rule, no individual has a greater right of access than any other. This does not mean, however, that an individual subject to government action does not have any right based on other law. See, e.g., Attorney General Opinion H-626 (1976); see also Attorney General Opinion JM-1048 (1989).

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 OR89-348.

Yours very truly,  
*Open Government Section  
of the Opinion Committee*

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

DAN/RWP/le

Ref: ID# 7642

Enclosure: Marked documents

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