



OFFICE OF

# RAILROAD COMMISSION

## OF TEXAS

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October 18, 1993

# RQ-720

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Gov

The Honorable Dan Morales  
Attorney General of Texas  
Price Daniel Sr. Bldg.  
209 W. 14th, 8th Floor  
Austin, Texas 78701

FILE # NY-22787-93

I.D.# 22787

Request for Open Records Decision

Dear General Morales:

The Railroad Commission of Texas (*Commission*) requests your decision pursuant to the Texas Open Records Act, TEX. GOV'T CODE ch. 552, subchapter G (*the Act*).

Attached are the following:

- (1) the October 8, 1993 Open Records Request from Mr. John Doner. Mr. Doner requests, in part, the *appointment books of Commissioner Nabers and Carol Nasworthy*. (Attachment 1)
- (2) excerpts from the appointment notebooks illustrating the format of each book. (Attachments 2a, b, & c).
- (3) Note from Rex King, Assistant Director, Oil & Gas Division of the Commission to Janice Haddock, Commissioner Nabers' Office relating to telephone call on Nabers' 800-RRC-Mary number. (Attachment 3)

The Commission requests your determination on whether or not *appointment books* are *public information* under the Act and, therefore, subject to inspection by a member of the public. The Commission asks whether personal medical information contained in the appointments books is also excepted from disclosure on the basis of Tex. Gov't Code § 552.101. Lastly whether Attachment 3 is excepted from disclosure, on the basis of Tex. Gov't Code §§ 552.101 and 552.111. (The Commission has made available to Mr. Doner, documents relating to the other items requested by him.)

ACCOMPANIED BY ENCLOSURES -  
FILED

## APPOINTMENT BOOKS

### Commission's Position

The appointment book of a Commissioner or other Commission employee is not *public information* under the Act, in that it is not required by *a law or ordinance or in connection with the transaction of official business, [to be] collected, assembled, or maintained:*

- (1) *by a governmental body; or*
- (2) *for a governmental body and the governmental body owns the information or has a right of access to it. Tex. Gov't Code § 552.021(a).*

Additionally, the Commission submits that personal medical information in the notebooks is excepted from disclosure under Tex. Gov't Code § 552.101.

In support of this position, the following factual information and legal analysis is provided for your consideration:

### Facts

Commissioner Mary Scott Nabers is one member of a three-member state agency, the Railroad Commission of Texas. The Railroad Commission is charged by law to administer several regulatory programs for the state. See for instance Tex. Nat. Res. Code chs. 81, 85-91, 113, 116, 117, 131-133; Tex. Rev. Civ. Stat. art. 911b. The Commission is the governing body of this agency, not any one individual Commissioner. The transaction of Commission business is carried out by the three Commissioners acting together as the governing body or by staff of various regulatory and support divisions of the Commission who have been delegated authority.

Commissioner Nabers has two *appointment books*, a *Daytime* notebook (2a), which shows each month on two pages and then, each day of a month, on a single page, and a *Weekly 1993 Appointment Book* (2b). Entries into each book are made by an employee in her office assigned to do scheduling for the Commissioner. Entries are handwritten. 2b contains essentially the same information in 2a; it is a smaller version of 2a, for Commissioner Nabers' personal use, as a reminder of scheduled events and appointments. These books contain handwritten notes about her weekly schedule, including the identification of persons with appointments, events occurring that month, time, and location. See Attachments 2a & b. Some notations relate to Commission activities, such as dates of Commission weekly Conferences; some do not. Some of these entries relate to medical appointments. Commissioner Nabers already had 2a when she was appointed to this position. She purchased 2b after becoming Commissioner. No

Commission funds were used in their purchase. The scheduler uses accrued comp time whenever she makes entries relating to non-Commission activities.

Carol Nasworthy is a Commission employee working in Commissioner Nabers' office. Ms. Nasworthy has an *appointment book* or *Day Runner* notebook that contains a *Month-In-View Planning Calendar*, for her own personal use as a reminder of scheduled events and appointments. The Commission does not require her to keep such a record. Ms. Nasworthy paid for the book out of her personal funds. It primarily contains personal appointments, including medical appointments, and other events and activities unrelated to the Commission although some events relating to the Commission are noted. See Attachment 2c.

The appointment books of Commissioner Nabers and Carol Nasworthy are not collected, assembled, or maintained by the Railroad Commission. The Commission does not require a Commissioner or his or her staff to keep such record for the Commission, and considers them to be for the personal use of these individuals. No one else at the Commission except Commissioner Nabers or her office staff has control or access to these books. Only Carol Nasworthy has access and control over her appointment book.

### Legal Analysis

These appointment books are not *public information* under the Act, subject to inspection by the public. They do not come under the definition of *public information* provided in the Act and as construed by the Attorney General in various open records decisions including Tex. Att'y Gen. ORD-77 (1975); ORD-116 (1975); ORD-120 (1976); ORD-147 (1976); ORD-450 (1986).

Sec. 552. 021(a) of the Act defines *public information* as follows:

- (a) *Information is public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained:*
- (1) *by a governmental body; or*
  - (2) *for a governmental body and the governmental body owns the information or has a right of access to it.*

(emphasis added.)

Prior Attorney General decisions hold that the Act does not reach personal notes of an individual employee in his or her possession, prepared solely for his or her own use, and not controlled or required by the employer. Tex. Att'y Gen. ORD-77 (1975). *We believe that our*

*conclusion is compelled by the plain words of the Open Records Act, which applies only to information which is collected, assembled or maintained by a governmental body. Id. at 2.* In ORD-77, a UT faculty member requested notes made by members of the University of Texas Academic Freedom Committee. The committee is similar to a grievance committee, and the committee made its decision and final report in writing. The notes sought were personal notes made by committee members for their use as memory reminders, but were not required or controlled by the University. Attorney General John Hill held that the notes were not *public information* within the meaning of the Act and thus, not subject to disclosure.

On the basis of ORD-77, the desk calendar of the Governor's executive assistant was held not subject to disclosure under the Act. Tex. Att'y Gen. ORD-116 (1975). The calendar contained information concerning the activities, both public and private, of the Governor and his executive assistant. The notes were characterized as the assistant's personal notes as well as his personal notations concerning the Governor's schedule and were made solely for his own informational purposes. In this same opinion, the Attorney General held also that notes of the Governor's secretary on various appointments, for use by the Governor were protected for the same reasons. Similarly, in Tex. Att'y Gen. ORD-145 (1976), the personal desk calendar of a university president, also maintained by a secretary, was held not subject to disclosure on the basis of ORD's 77 and 116.

In Tex. Att'y Gen. ORD-120 (1976), Attorney General Hill refused to extend the reasoning in ORD-77 to information relating to a student's Ph.D. qualifying exam. While the information was compiled by individual members of an examination committee, they were not utilized for the sole use of any one member or kept in a member's sole possession. *Id. at 1.* All members of the committee considered the evaluations of the other members in reaching a decision; the information was retained by the chairman of the committee. Tex. Att'y Gen. ORD-450 (1986) further delineated the role of personal notes in governmental action and distinguished the notes in question from those in ORD-77: *Unlike the notes . . . in Open Records Decision No. 77, which were neither 'required' nor 'controlled' by the university, these notes will have been taken during an evaluation process required by school district policy or by state law, if not both. They will have been taken by persons who have independent authority in the evaluation process and whose roles in that process will not end when the evaluation is completed.* ORD-450 at 4.

In Tex. Att'y Gen. No. DM-95 (1992), you held that *an action taken by a quorum of a governmental body on a matter of public policy or concern to that governmental entity is not merely the action of each member of a group of individuals, but is an action of the governmental body.* Opinion at 2. The Opinion concerned a quorum of city council members acting outside the Open Meeting's Act. The Opinion aptly points out who the *governing body* is where a governmental agency head has multiple members. In the case of the Railroad Commission, like a city council, it is the three Commissioners acting together as the Commission--not each

individual Commissioner. It follows then that not all information collected, assembled, or maintained by an individual Commissioner is necessarily information collected, assembled or maintained by the Commission, and thus, subject to public inspection under the Act.

The appointment books of Commissioner Nabers and Carol Nasworthy fall into that category of documents outside the Act. They are for the personal use of the Commissioner, her scheduler and Ms. Nasworthy. They serve no purpose except for providing a written reminder of certain events of interest to these individuals. The Commission, as the governing body of the agency, has never taken any affirmative action to require a Commissioner or a Commissioner's staff to maintain such information on behalf of the Commission. The books are controlled solely by these individuals, and no other Commissioner or employee of the Commission has access or control.

Section 552.101 protects information deemed confidential by law. Besides statutory exemptions, information may be exempt under this provision if it is protected by common law or the U.S. Constitution as private information.

The U.S. Constitution does not explicitly mention a right to privacy; however, a guarantee of a right to privacy has been recognized in certain areas or "zones of privacy". Personal matters relating to marriage, procreation, contraception, family relationships, and child rearing and education have been deemed to be private information and exempt from public disclosure under the Constitution. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977). Medical information is considered private information protected from public disclosure. *United States v. Westinghouse*, 639 F.2d 570 (3d Cir. 1980).

The Texas Supreme Court ruled that information contained in the claims files would be exempt from disclosure, if:

- (1) the information contains **highly intimate or embarrassing facts** the publication of which would be highly objectionable to a reasonable person, and
- (2) the information is not of legitimate concern to the public. (emphasis added.)

*Industrial*, at 685.

Medical information is considered to be highly intimate information relating to any person. Information in the notebooks relating to medical information of either individual should be excepted from disclosure even if the other information contained in them is ruled to be public information.

### STAFF MEMORANDUM-ATTACHMENT 3

#### Commission Position

Attachment 3 contains confidential information that could be highly embarrassing if publicized. It also contain the evaluation and opinion of Mr. King as to the matters relayed in the document. The Commission submits that such information is protected from disclosure by §§ 552.101 and 552.111 of the Act.

#### Facts

Mr. Donor has asked for *notes or logs kept by staff* answering Commissioner Nabers' 800-RRC-Mary telephone line. The telephone number is available for any person to contact Commissioner Nabers regarding a matter under the jurisdiction of the Commission. All such documents responsive to this request have been made available to Mr. Donor, except for Attachment 3. This document relays certain information from a caller. The nature of the information as conveyed by Mr. King could be construed as highly embarrassing and damaging to the reputation of the persons named by the caller. In relaying this information to Commissioner Nabers' staff, Mr. King necessarily has expressed his opinion regarding the information. This information is of the type held to be private and confidential in prior Attorney General opinions.

#### Legal Analysis

Portions of the highlighted information in Attachment 3 (in 1st and 2nd paragraphs) meet the two-prong test of *Industrial*. Portions of the highlighted information in paragraph 1 and all in paragraph 3 reflects Mr. King's opinion and evaluation of the information provided by the caller. Both types of information are exempt from disclosure under the Act. This information is so intertwined with the other information contained in the memorandum that the entire memorandum should be excepted from disclosure.

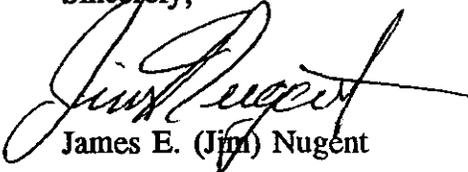
In addition, in Tex. Att'y Gen. ORD-241 (1980), correspondence and memorandums of conversations gathered by the Governor about prospective appointees to the Supreme Court of Texas and the Public Utilities Commission were held not to be subject to disclosure when the information had been developed in conducting informal background checks, and contained derogatory, unverified information -- suggestions of mental illness, questions about an individual's honesty and integrity, and information on financial difficulties. The information was held to satisfy the two-prong test of *Industrial*: it was highly intimate or embarrassing information, the publication of which would be objectionable to a reasonable person, and the information was of no legitimate public interest at that stage of the appointment process. ORD-241, at 4.

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Section 552.111(11) of the Act is designed to protect "advice, opinions, and recommendations" and to allow "open and frank discussion between subordinate and chief concerning administrative action." Tex. Att'y Gen. ORD-538 (1990). This section excepts memoranda and letters, "but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policy-making or deliberative process." Tex. Att'y Gen. ORD-462 (1987). Other information that has been held exempt under Section 3(a)(11) includes: written advice, opinions, and recommendations prepared by a management systems consultant for the Housing Authority of the City of Houston. Tex. Att'y Gen. ORD-298 (1981); opinions and recommendations by the intelligence division of the El Paso Police Department concerning misconduct in the city tax office. Tex. Att'y Gen. ORD-285 (1981); correspondence containing advice and recommendations between administrators at the University of Texas concerning a decision to decline to provide certain courses in the summer session. Tex. Att'y Gen. ORD-128 (1976).

Your assistance on this matter is appreciated. Please advise Brenda Loudermilk, Special Counsel, 463-7155, if you or your staff require further information on this request.

Sincerely,



James E. (Jim) Nugent

**Attachment**

cc: (without attachments)  
Commissioner Mary Scott Nabers  
Commissioner Barry Williamson  
Mr. John Doner  
Brenda Loudermilk