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Office of the Attorney General  
State of Texas

August 19, 1991

Honorable Lena Guerrero  
Chairman  
Texas Railroad Commission  
Capitol Station -- P.O. Box 12967  
Austin, Texas 78711-2967

OR91-379

Dear Commissioner Guerrero:

Your predecessor asked whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. His request was assigned ID# 12111.

The Texas Railroad Commission received a written request for access to or copies of all documents that have been or will be delivered to any of the Railroad Commissioners regarding a specific docket number before the commission, which we gather from his letter relates to a proposed amendment of a current rule and a proposed new statewide rule regarding oil well production factors. The requestor specifically includes in his request all data compilations, summaries of evidence, staff recommendations, and written communication from the public regarding this docket. The request letter correctly observes that the commission is not obliged to comply with a standing request for information to be received or prepared in the future. *See* Attorney General Opinion JM-48 (1983).

The commission has submitted for our inspection three documents it believes are responsive to the request for information. Two of the documents are memoranda prepared by the legal staff of the commission; the third is a draft of the proposed rule. The commission contends that these documents are excepted in whole or in part by sections 3(a)(1), 3(a)(6), and 3(a)(11) of the Open Records Act.

The section 3(a)(1) claim invokes the attorney-client privilege and the work product doctrine. Open Records Decision No. 574 (1990) determined that these doctrines were not incorporated into section 3(a)(1), but were instead encompassed by sections 3(a)(7) and 3(a)(3), respectively. The request letter refers to litigation to which the requested information may relate but does not claim or establish section 3(a)(3) as an exception. Consequently, we will consider whether the requested information is excepted by section 3(a)(7).

Section 3(a)(7) protects from required public disclosure

matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client, pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure.

With regard to the attorney-client privilege, Open Records Decision No. 574 ruled that section 3(a)(7) would protect factual information or requests for legal advice communicated by the client to the attorney and the attorney's legal advice or opinion communicated to the client or to an associated attorney in furtherance of the rendition of legal services to the client. Information that does not reflect these matters, such as an attorney's notations of purely factual information, matters of public record, or information obtained from third parties, is not protected. A copy of Open Records Decision No 574 is enclosed for the commission's reference.

Upon examination of the documents submitted for our inspection, we conclude that much of the information in documents 1 and 2 may be withheld pursuant to section 3(a)(7) as communications within the attorney-client privilege. We have marked the documents accordingly. Because we believe section 3(a)(7) would except more information than section 3(a)(11), we need not consider the commission's section 3(a)(11) claim with respect to documents 1 and 2.

Your predecessor also claimed that document 3 may be withheld in its entirety pursuant to section 3(a)(11), which protects

inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency.

We agree. Open Records Decision No. 559 (1990) ruled that a genuine preliminary draft of a document that has been released or is intended for final release to the public is excepted from disclosure by section 3(a)(11). The exception would also cover editorial markings and changes appearing in the preliminary draft. Severable factual material in a draft must be released, but this requirement is satisfied when the final document contains the same information.

The commission adopted a permanent rule with regard to the matter covered by document 3. See 16 Tex. Reg. 2095 (April 12, 1991). The narrative portion of

document 3 differs only slightly from the commission's final order. The changes, in our opinion, reflect the deliberative process within the agency and therefore may be withheld from public disclosure. Open Records Decision No. 559 (1990) (copy enclosed). The announcement of the final adoption of the rules indicates that there was no change from the proposed text, previously published. *See* 16 Tex. Reg. 817 (1991). Consequently, the draft version of the rules may also be withheld pursuant to section 3(a)(11).

With regard to the commission's section 3(a)(6) claim, we note that while section 3(a)(6) is narrower in scope than section 3(a)(11), Open Records Decision No. 460 (1987), both reflect similar policies and employ similar analyses. *See* Open Records Decision No. 429 (1985). Material that is not excepted by section 3(a)(11) therefore is not excepted by section 3(a)(6). *See* Open Records Decision No. 460 (purely factual material not excepted by section 3(a)(6)). In light of our conclusion regarding section 3(a)(11), it is unnecessary to consider the applicability of section 3(a)(6).

Because case law and prior published open records decisions resolve the commission's 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 OR91-379.

Yours very truly,



Steve Aragon  
Assistant Attorney General  
Opinion Committee

SA/mc

Ref.: ID#s 12111, 12254, 12979

Enclosures: Open Records Decision Nos. 559, 574 (1990)

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