



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

November 27, 1990

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

Open Records Decision No. 575

Re: Applicability of the Open Records Act, article 6252-17a, V.T.C.S., to documents submitted to a governmental body and claimed to be confidential under Rule 26(b)(3) of the Federal Rules of Civil Procedure, and Rule 166b.3 of the Texas Rules of Civil Procedure (RQ-2071)

Dear Mr. Beinke:

The Texas Water Commission [hereinafter the commission] has received a request for information concerning a service station. An underground tank at the service station leaked petroleum products into the water table. Texaco Refining and Marketing, Inc. [Texaco] undertook "remedial work" to recover the subsurface hydrocarbons from the ground water. The information consists of water sample results taken at the service station and a summary report which describes the remedial system used in the cleanup project. Texaco submitted this information to the commission pursuant to the commission's authority. See Water Code § 26.349; 31 T.A.C. § 334.10 (reporting of releases from underground storage tanks). The commission makes this request pursuant to section 7(c) of the Open Records Act, article 6252-17a, V.T.C.S.; Texaco has submitted a brief to this office urging that the information be withheld.

Texaco asserts that this information is excepted from public disclosure based on section 3(a)(1) of the Open Records Act, as "information deemed confidential by law, either Constitutional, statutory, or by judicial decision," by virtue of the investigative and attorney work product privileges contained in Rule 166b.3(a) of the Texas Rules of Civil Procedure. No suit has been instituted at this time, but Texaco informs us of an intention to sue the service station owner for reimbursement of the cost Texaco incurred in its cleanup efforts.

We find that the information must be released. The work product privilege was relied upon to withhold information based on section 3(a)(1) of the Open Records Act in Open Records Decision No. 304 (1982). More recently, however, this office stated that the "work product doctrine . . . merely represents one aspect of section 3(a)(3) information relating to litigation." Open Records Decision No. 429 (1985). In Open Records Decision No. 574 (1990), we explicitly overruled Open Records Decision No. 304 to the extent it dealt with work product doctrine under section 3(a)(1) and held that the section 3(a)(3) requirements must be fulfilled before we will allow exceptions for an attorney's work product. We now explicitly state that we do not consider discovery privileges to be covered under section 3(a)(1) of the act. Such information is "privileged" only to the extent that the court in a particular case deems it to be so. We do not believe that this is the type of information that section 3(a)(1) was intended to protect as information deemed confidential by law. Of course, some discovery privileges will be covered under other sections of the statute. For example, the attorney-client privilege is within the coverage of section 3(a)(7), and, as noted above, an attorney's work product may come within the section 3(a)(3) litigation exception.

The exception most germane to the information at issue is section 3(a)(3). As discussed above, we must first determine whether this material meets the section 3(a)(3) requirements. To warrant protection under section 3(a)(3), the information must be related to pending or reasonably anticipated litigation to which the state or political subdivision is a party. Open Records Decision No. 132 (1976). Any anticipated litigation in this case will involve only private parties. Therefore, section 3(a)(3) is not applicable to this information. For this reason, you must release it. A discovery privilege relevant to litigation between private parties does not shield information held by a governmental body from public disclosure.

You ask several general questions concerning section 7(c) of the Open Records Act and a governmental body's duties and obligations to release information when a third party's interests are at stake. Specifically, you wish to know "how a governmental body should deal with information submitted to it marked 'confidential' but unaccompanied by support for the claim." You advocate a requirement that the body asserting confidentiality substantiate its claim at the time it submits its material to the agency, as well as a confirmation from this office that the Executive Director of

the commission has the authority to determine, based on the claimant's substantiation, the validity of the confidentiality claim.

There is no authority under the act for requiring a third party to substantiate any claims of confidentiality at the time it submits material to a governmental body. Under section 7(a) of the Open Records Act, a governmental body that receives an open records request is given the authority to make the initial determination as to whether to release or withhold the requested information. Of course, information is not confidential under the Open Records Act simply because the party submitting the information marks it as confidential. Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 930 (1977). Nor does the act require the governmental entity to offer a party an opportunity to substantiate its claim. Yet if disclosure of the information submitted might result in an injury to a third party's property or privacy interest, or if any substantiation proffered by the party does not clearly resolve its claim as a matter of law, the better practice is to request a decision from this office on the applicability of the act's exceptions, thereby triggering section 7(c).

Section 7(c) provides that in cases where a third party's property or privacy interests may be implicated,

[t]he governmental body may decline to release the information in order to request an attorney general opinion. . . . In such cases, the governmental body may, but is not required to, submit its reasons why the information should or should not be withheld. (Emphasis added.)

The statute clearly contemplates the governmental body's submitting a claim to this office even when it believes that the confidentiality claim has not been adequately substantiated. In a case coming under section 7(c), this office notifies the third party concerned and offers it an opportunity to explain its reasons for wanting the information withheld. The third party then has the burden of showing this office how specific information is protected by specific exceptions to the act. If the third party does not satisfy this burden, the governmental body must release the information unless it can independently show that the material fits within the act's exceptions. Open Records Decision No. 552 (1990).

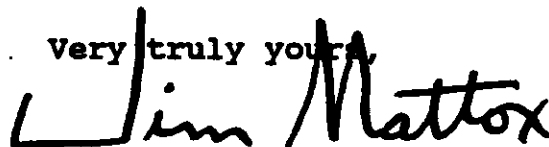
In short, the third party's failure to substantiate any claim of confidentiality when it submits material to your agency does not in itself mandate your release of the information claimed to be confidential. We advise that you take advantage of the procedure provided in section 7(c) of the Open Records Act and send the documents to this office for a determination if a third party's property or privacy interest may be injured by disclosure, unless the resolution of the question is evident as a matter of law. Although the statute does not mandate your request for our determination in these circumstances, we believe that this approach represents the most prudent course of action in doubtful cases.

S U M M A R Y

Section 3(a)(1) of the Open Records Act does not encompass work product, investigative, or other "discovery privileges." Such protection may exist under section 3(a)(3), if the situation meets the section 3(a)(3) requirements. A governmental body cannot withhold information under section 3(a)(3) when the anticipated litigation is between private parties.

The Open Records Act does not require a third party to substantiate its claims of confidentiality when it submits material to a governmental body or when a governmental body requests an open records decision pursuant to section 7(c) of the Open Records Act. Although the governmental body may make the initial determination of whether to request a decision from this office, the most prudent course of action is to submit the request to this office when a third party's property or privacy interests may be implicated, despite the third party's lack of substantiation of its claim, unless there is evidence that the claim is clearly unfounded or clearly justified as a matter of law.

Very truly yours,



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