



THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

June 15, 1977

Honorable George W. McNeil
State Auditor
Sam Houston State Office Bldg.
P. O. Box 12067
Austin, Texas 78711

Open Records Decision No. 164
Re: Whether records of State Auditor giving details of an audit exception are public under the Open Records Act.

Dear Mr. McNeil:

You inquire whether certain records held by the State Auditor constitute public information under the Open Records Act. V.T.C.S. art. 6252-17a. A reporter requested a letter regarding disallowed travel expenses and other audit exceptions sent to a state agency following an audit. He also requested an itemization of expenses comprising the audit exceptions and supporting documents such as vouchers and receipts. You sent him the letter, identifying the two persons who received payment for non-reimbursable travel expenses and giving the total amounts of money received by each. You noted that you did not keep supporting documents, which could be obtained from the audited agency, and you withheld the list of charges, stating that it constituted part of your audit working papers. Pursuant to section 7 of the Act, you have inquired whether the requested record is public information. You believe that it is exempt from disclosure under the section 3(a)(16) exception for "the audit working papers of the State Auditor."

We must therefore determine whether the itemized listing of charges properly falls within the exemption for the "audit working papers of the State Auditor." The term "audit working papers" is not defined in the Open Records Act. Nor have we found a definition in Texas statutory or case law. It has been defined in other jurisdictions, generally in the context of determining whether a private auditor or his client owned particular papers. See Annot., 90 A.L.R.2d 784 (1963). One court defined working papers as computations and rough notes made by an accountant as a record of audit work performed. Ablah v. Eyman, 365 P.2d 181 (Kan. 1961). They constitute proof of the

records examined, the confirmations undertaken, and the inquiries made. "[T]hey are the accountant's proof of the accuracy of his audit and the fairness of the opinion which he expresses in his reports to his clients." Id. at 188. A national association of Certified Public Accountants has defined "working papers" in equally broad terms. AICPA Professional Standards (CCH) § 338.03. It gives the following examples of working papers: "[W]ork programs, analyses, memoranda, letters of confirmation and representation, abstracts of company documents, and schedules or commentaries prepared or obtained by the auditor." Id.

Such expansive definitions of "working papers" include virtually every paper prepared by an auditor aside from the final audit report. These definitions, however, have been developed in connection with the relationship of private auditor to client. They concern the adequacy of evidence supporting an audit report and the ownership of the working papers. The ownership of working papers depends on the contractual relationship of accountant and client. Ablah v. Eyman, supra. Questions of access to the papers are often resolved by determining who owns them. For example, the client is not entitled to use and possess work papers owned by the accountant. Id. When the Internal Revenue Service issues a summons for working papers owned by the accountant, the client may not assert his privilege against self incrimination with respect to them. United States v. Widelski, 452 F.2d 1 (6th Cir. 1971), cert. denied, 406 U.S. 918 (1972). Nor may the taxpayer's attorney withhold them on the basis of attorney-client privilege. Sale v. United States, 228 F.2d 682 (8th Cir. 1956).

Different considerations apply to the definition of "working papers" in the present case, and to the question of access to them. The powers and duties of the State Auditor are defined by statute and are not affected by any contractual relationship with a client. See V.T.C.S. arts. 4413a-13 - 4413a-17. The State Auditor is directed to keep a complete file of audit work papers; thus no dispute as to proper ownership and custody should arise. V.T.C.S. art. 4413a-15.

The policies behind the Open Records Act militate against an expansive reading of the section 3(a)(16) exception for audit working papers. The declaration of policy requires that the Act be liberally construed to the end of providing the public with complete information regarding the affairs of government. V.T.C.S. art. 6252-17a, § 1. Instead of mechanically reading into section

3(a)(16) a definition taken from another context, we must construe "audit working papers" in light of the declared policy of the Open Records Act, and in accordance with the Legislative intent which found expression in its words. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 674 (Tex. 1976), cert. denied, No. 76-840 (U.S. Mar. 21, 1977).

We do not believe the Legislature intended section 3(a)(16) to withhold from the public all documents prepared in the course of an audit. Instead, we believe section 3(a)(16) should be interpreted in light of the purposes of the Open Records Act and the reasons for which this exception was sought. The State Auditor requested the exception at the Senate Jurisprudence Committee hearings on the bill. Transcript of testimony presented on House Bill No. 6 before Jurisprudence Committee, April 10, 1973 at 53. He gave four reasons for requesting the exemption: (1) the working paper files reflect audit strategy which had to be kept from client agencies; (2) they contain expressions of opinion by auditors and clients which are subject to misrepresentation if taken out of context; (3) they contain evidence of assistance given to law enforcement agencies; and (4) they consist primarily of extracts of records held by other agencies which are available from those agencies. His first three reasons relate the requested confidentiality of working papers to the proper performance of his duties as State Auditor. Moreover, they are analogous to the reasons underlying other specific exceptions in the Open Records Act. See V.T.C.S. art. 6252-17a, §§ 3(a)(8), (11). See also Attorney General Opinion H-483 (1974). We believe section 3(a)(16) should be interpreted consistently with these reasons.

We do not believe the fourth reason alone justifies withholding information where his other three reasons do not apply and no other specific exception pertains to the material. See Open Records Decision No. 141 (1976) (applying section 3(a)(3) to records held by State Auditor): We have said that it is anomolous for information made confidential by the Open Records Act to be released by another governmental custodian. Attorney General Opinions H-390 (1974); H-115 (1973). However, the State Auditor's testimony provides no basis for making agency records confidential merely because they are reflected in his audit working papers; he in fact assumes they will be available through the client agency. We have said that it is inconsistent with the purpose and spirit of the Open Records Act for information available from one governmental source to be closed in the possession of another. Open Records Decision No. 138 (1976). We believe we

should not interpret section 3(a)(16) so as to create an inconsistency of this sort. Thus, in our opinion, section 3(a)(16) does not except information in the State Auditor's files merely because it may be available from another agency. Moreover, as a practical matter such information may be difficult to locate in the client agency's files without the State Auditor's compilations thereof. Cf. Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969) (Freedom of Information Act not "contingent upon a showing of exhaustion of one's own ingenuity").

In our opinion, the Legislature did base the "audit working papers" exception on the other reasons given by the State Auditor, since they describe an interest in confidentiality similar to other interests recognized by the Open Records Act. Thus, requests for documents which would reveal the timing, scope, or strategy of an audit may be denied under the audit working papers exception. In Attorney General Opinion H-483 (1974) we determined that an examining board did not have to reveal exam questions under the Open Records Act. A contrary result would render the exam ineffective. The audit working papers exception serves a similar purpose by preserving the secrecy of audit techniques and preventing clients from circumventing the Auditor's work.

The second interest mentioned is the protection of opinions expressed in the process of the audit. A similar interest underlies the inter/intra-agency memorandum exception, which protects from disclosure "advice and opinion on policy matters and [encourages] open and frank discussion [within a governmental body] concerning administrative action." Sec. 3(a)(11); Attorney General Opinion H-436 (1974) at 2. Factual information that can be severed from the portion containing opinion and advice must be disclosed. Environmental Protection Agency v. Mink, 410 U.S. 73, 86-87 (1973); Attorney General Opinion H-436 (1974). Disclosure of purely factual material contained in the audit working papers will not in our opinion harm the second interest discussed by the State Auditor. See Dunlea v. Goldmark, 389 N.Y.S.2d 423 (App. Div. 1976) (budget examiner's worksheets available to the public under New York Freedom of Information Act).

Third, the State Auditor stated that his office gives assistance to law enforcement and investigative agencies. The State Auditor is required to see that laws dealing with the expenditure of public money are observed and to report violations to the Legislature. V.T.C.S. art. 4413a-14; see also V.T.C.S. art. 4413a-16. Section 3(a)(8) of the Open Records Act excepts certain records held by law enforcement agencies for law enforcement purposes. As this exception has been applied, the public

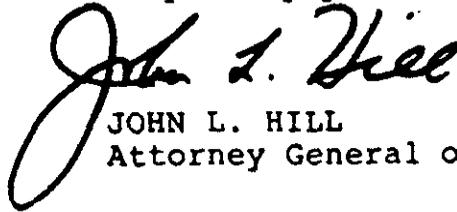
is entitled to certain basic factual information in investigation reports. Open Records Decision Nos. 134, 127 (1976). We believe the same principle is applicable to records relating to law enforcement held by the State Auditor.

We believe section 3(a)(16) must be interpreted consistently with other Open Records Act provisions which maintain the confidentiality of records for reasons similar to those expressed to the Legislature by the State Auditor. Thus, section 3(a)(16), while broad, does not except audit files in their entirety. Information located in audit files may be withheld under 3(a)(16) where one or more of the policies underlying that exception apply to it. The Auditor may withhold records that will reveal audit strategy, discussion and opinion expressed by persons involved in an audit, or certain law enforcement efforts.

The public is entitled to certain factual information from records prepared in connection with an audit. Whether particular records are excepted by 3(a)(16) must be determined on a case-by-case basis by examining them in light of the policies underlying that exception. It is possible that a request might seek a large and cohesive body of factual information which could be analyzed to reveal audit strategy, or factual information which is impossible to separate from the auditor's evaluation of it. See Environmental Protection Agency v. Mink, supra at 86-87.

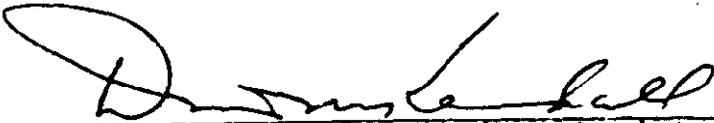
Such circumstances might justify the withholding of factual information, but they do not exist in the present case. We have not been shown, and we do not perceive how the itemized list of charges will reveal audit strategy or the expression of opinion. Nor have we been informed that it relates to any law enforcement effort. The information will merely provide the requestor with further details about the disallowed travel expenses and enable him to locate the supporting documents in the agency's files. Since none of the policies underlying section 3(a)(16) apply to the records in question, they are open to the public under the Open Records Act. Our decision is necessarily limited to the instant request. We express no opinion as to the probable disposition of future requests for information in the audit working papers of the State Auditor, since each request must be the subject of an individual determination.

Very truly yours,

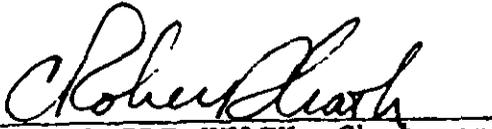


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APPROVED:



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