



**THE ATTORNEY GENERAL
OF TEXAS**

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December 21, 1990

Mr. Lawrence F. Alwin, CPA
State Auditor
Office of the State Auditor
P.O. Box 12067
Austin, Texas 78711-2067

Open Records Decision No. 580

Re: Whether information relating to an investigation of a state agency by the state auditor is excepted from disclosure by section 3(a)(16) of the Open Records Act (RQ-2047)

Dear Mr. Alwin:

You have received a request under the Open Records Act, article 6252-17a, V.T.C.S., for records of your investigation of allegations of impropriety in the administration of the Employees Retirement System. You believe that the requested information is within section 3(a)(16) of the Open Records Act, which excepts the audit working papers of the state auditor from the description of "public information" set out in section 3(a) of that statute.

In discussing the scope of section 3(a)(16), you argue that the prior decisions of this office, in particular Open Records Decision No. 164 (1977), have incorrectly construed this section. You state as follows:

To the extent that Open Records Decision No. 164 requires any inquiry beyond whether a particular document can legitimately be characterized as an audit working paper of the State Auditor, we regard the decision as inconsistent with State law, and believe it should be overruled.

We have reexamined Open Records Decision No. 164 and agree that it incorrectly construes the exception for audit working papers. It relies in part on open records decisions that have since been overruled. More important, it does not recognize that "audit working papers" are words of art connected with a particular trade, which should be given the significance attached to them by experts in the trade. See

Gov't Code § 312.002 (formerly codified as V.T.C.S. art. 10, § 1 (1925)).

Open Records Decision No. 164 arose out of a request to the state auditor for information about disallowed expenses and other audit exceptions noted following the audit of a state agency. The auditor provided the letter sent to the agency pointing out the audit exceptions, but refused to make available a supporting document consisting of the itemized list of expenses comprising the audit exceptions. He claimed that the supporting document was within the exception for the audit working papers of the state auditor. Thus, the task of this office was to determine the meaning of "audit working papers" in section 3(a)(16).

Open Records Decision No. 164 cited judicial decisions that defined or referred to "audit working papers" as well as the Professional Standards of the American Institute of Certified Public Accountants. However, instead of relying on these authorities, it turned to the legislative history of section 3(a)(16). This provision was added to the Open Records Act after the state auditor requested it in his testimony at the Senate Jurisprudence Committee hearing on the bill. Texas Open Records Act: Hearings on H.B. 6 Before the Senate Jurisprudence Comm., 63rd Leg. (April 10, 1973) (statement of George McNeil, state auditor) (transcript available from Senate Staff Services Office). He stated that it was his function to examine the activities of state agencies and express an opinion on them, and that he would like to request an exemption "for the working paper files which we create during these examinations." Id. He cited four reasons for this request, which are summarized as follows in Open Records Decision No. 164:

- (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;
- (4) they consist primarily of extracts of records held by other agencies which are available from those agencies.

Open Records Decision No. 164 at 3.

This office examined the four policies he mentioned and stated that the audit working papers exception applied only to documents, the release of which would impair the first three policies. It dismissed the fourth policy as irrelevant, based on opinions saying that it was "anomalous 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) (birth and death records of county registrar).

The opinion relied on for the need to avoid an anomalous result has since been overruled. Open Records Decision No. 307 (1982) (overruling Attorney General Opinion H-115 (1973)); see also Open Records Decision No. 486 (1987). It is not unusual for records to be available from one entity under the Open Records Act, while copies are unavailable from another entity. See Open Records Decision Nos. 553 (1990); 144, 138 (1976). The fourth policy referred to by the auditor is actually more significant as a description of audit working papers than as a reason for their confidentiality.

Because the state auditor said that audit working papers contained expressions of opinion, Open Records Decision No. 164 analogized them to the interagency memorandum of section 3(a)(11) and concluded that statements of opinion could be withheld, while facts could not be. This analogy almost nullifies section 3(a)(16), since many of the documents prepared by the auditor's office will consist of numerical data extracted from the agency's financial records. Such data is ordinarily factual information not excepted by section 3(a)(11). See Open Records Decision No. 197 (1978). It would be more reasonable to interpret section 3(a)(16) as applying to information not excepted by section 3(a)(11), rather than to the same kind of information. Perkins v. State, 367 S.W.2d 140, 146 (Tex. 1963) (each clause of a statute is to be given effect if possible).

In his testimony before the Senate Jurisprudence Committee, the state auditor did not define "audit working papers," but used that term as one well known in the field of accounting. He asked the legislature to exempt audit working papers as a category, for the reasons already set out. The legislature adopted the exception that he requested. The attempt in Open Records Decision No. 164 to limit the meaning of "audit working papers of the State Auditor"

to a formula that would incorporate only the policies stated by the auditor was inconsistent with the legislative history and the language of the provision as adopted.

Moreover, this formula was never articulated clearly enough to determine as a general rule whether documents typically prepared or gathered in an audit were excepted by section 3(a)(16). Open Records Decision No. 164 required an examination of documents on a case-by-case basis to determine whether release of the records would impair any of the policies cited by the state auditor. It has proved difficult to make distinctions based on this test in subsequent decisions. See, e.g., Open Records Decision No. 424 (1984) (all audit memos excepted by section 3(a)(16)); OR88-135 (1988) (no explanation as to how the criteria of Open Record Decision No. 164 apply).

We have determined that Open Records Decision No. 164 incorrectly defines the term "audit working papers" in section 3(a)(16) of the Open Records Act and we overrule that decision. As a term of art connected with the practice of accounting, this term should be given the significance attached to it by experts in that field. See Gov't Code § 312.002.

The provisions establishing and governing the Office of State Auditor suggest an appropriate source of the definition of working papers. Gov't Code ch. 321. Section 321.013 of the Government Code, which requires the state auditor to conduct audits of all departments of state government, provides as follows:

The State Auditor shall conduct the audits in accordance with generally accepted auditing standards as prescribed by the American Institute of Certified Public Accountants, the Governmental Accounting Standards Board, the United States General Accounting Office, or other professionally recognized entities that prescribe auditing standards.

Gov't Code § 321.013(b).

For each audit he conducts, the state auditor is required to prepare a written report in accordance with the following provision:

The written report must include a management letter with comments about internal

controls, compliance with state or federal laws, and recommendations for improving operations or program effectiveness, as applicable. The report must also include an opinion on fair presentation of financial statements if the State Auditor considers an opinion to be necessary.

Gov't Code § 321.014(b). The auditor is required to maintain a complete file containing:

- (1) copies of each audit report; and
- (2) audit working papers and other evidence relating to the work of the State Auditor.

Id. § 321.014(d) (emphasis added).

Thus, the statute itself recognizes the distinction between the audit working papers and the audit report. Since audits are to be conducted according to standards prescribed by the entities identified in section 321.013(b), we can look to standards issued by the United States General Accounting Office and the American Institute of Certified Public Accountants for a definition of "audit working papers" in chapter 321 of the Government Code and the comparable term in section 3(a)(16).

Standards issued by the United States General Accounting Office for auditing governmental organizations, programs, activities, and functions provide that a record of the auditor's work in performing a financial audit should be retained in the form of working papers. U.S. General Accounting Office, Government Auditing Standards 4-6 (1988). The Glossary appended to Government Auditing Standards defines working papers as follows:

Documents containing the evidence to support the auditor's findings, opinions, conclusions, and judgments. They include the collection of evidence, prepared or obtained by the auditor during the audit.

Id. G-12.

The standards for performance audits¹ provide as follows:

Sufficient, competent, and relevant evidence is to be obtained to afford a reasonable basis for the auditors' judgments and conclusions regarding the organization, program, activity, or function under audit. A record of the auditors' work is to be retained in the form of working papers. Working papers may include tapes, films, and discs.

Id. 6-16. The types of evidence are categorized and described as follows:

a. Physical evidence: . . . obtained by direct inspection or observation of (1) activities of people, (2) property, or (3) events. Such evidence may be documented in the form of memoranda summarizing the matters inspected or observed, photographs, charts, maps, or actual samples.

b. Documentary evidence: . . . [consisting] of created information such as letters, contracts, accounting records, invoices, and management information on performance.

c. Testimonial evidence: . . . obtained from others through statements received in response to inquiries or through interviews. . . .

d. Analytical evidence: . . . includes computations, comparisons, reasoning, and separation of information into components.

1. Performance audits include economy and efficiency audits, which look into whether the entity is using its resources economically and efficiently, and program audits, which consider the extent to which the results established by the legislature are being achieved. Both types of audit determine whether the entity has complied with applicable laws and regulations. United States General Accounting Office, Government Auditing Standards 2-1.

Id. 6-16 through 6-17.

The standards issued by the American Institute of Certified Public Accountants include the following guidelines on the nature of working papers:

.03 Working papers are the records kept by the independent auditor of the procedures he followed, the tests he performed, the information he obtained, and the conclusions he reached pertinent to his examination. Working papers, accordingly, may include work programs, analyses, memoranda, letters of confirmation and representation, abstracts of company documents, and schedules or commentaries prepared or obtained by the auditor.

.04 Working papers should fit the circumstances and the auditor's needs on the engagement to which they apply. The factors affecting the independent auditor's judgment as to the quantity, type, and content of the working papers desirable for a particular engagement include (a) the nature of the auditor's report, (b) the nature of the financial statements, schedules, or other information upon which the auditor is reporting, (c) the nature and condition of the client's records and internal controls, and (d) the needs in the particular circumstances for supervision and review of the work performed by any assistants.

AICPA Professional Standards § 338 (CCH 1977) (emphasis added). The list of charges at issue in Open Records Decision No. 164 would be working papers within the above standard, since they were "abstracts of . . . [state agency] documents, and schedules . . . prepared or obtained by the auditor."

The AICPA standard also sets out detailed guidelines for the type and content of working papers that generally would be maintained. Id. § 338.05. One such guideline describes working papers that demonstrate the procedures followed in obtaining the evidence on which the auditor's opinion is based. This record could include memoranda, check lists, work programs, and schedules. Id. § 338.05 d. In addition, the audit working papers might include information on how exceptions and unusual matters were

resolved and the auditor's recommendations indicating his conclusions concerning significant aspects of the engagement. Id. § 338.05 e, f.

We believe that the term "working papers of the State Auditor" in section 3(a)(16) of the Open Records Act should be read to incorporate the concept of working papers set out in the Government Auditing Standards and the AICPA standards. Moreover, any data expressly made public information by statute or excluded from the category of "working papers" by chapter 321 of the Government Code will not be within section 3(a)(16). Thus, the audit report, which is distinguished by statute from working papers, is not within the section 3(a)(16) exception.²

Having defined "audit working papers" as used in the practice of accounting, we must next determine its relevance to the records in this case: the state auditor's investigation of allegations regarding the Employees Retirement System.

The auditor is required to conduct audits of all departments of state government as specified in the audit plan. Gov't Code § 321.013. The plan is prepared by the auditor and reviewed and approved by the Legislative Audit Committee, the body that appoints and supervises him. Id. §§ 321.002, 321.005, 321.013. At the direction of the committee, the auditor is to conduct an audit or investigation of any entity receiving funds from the state. Id. § 321.013(a). He "may conduct financial audits, compliance audits, economy and efficiency audits, effectiveness audits, special audits, and investigations as defined by . . . [chapter 321] and specified in the audit plan." Gov't Code § 321.013(f) (emphasis added).

2. A transfer of audit working papers to the Legislative Audit Committee is not a release of records to the public pursuant to the Open Records Act. Open Records Decision No. 424 (1984) (Legislative Audit Committee may raise section 3(a)(16) with respect to state auditor's records).

Separate provisions describe each kind of audit and an investigation. Gov't Code §§ 321.0131 - 321.0136.³ For example, a financial audit is an audit to determine, among other things, whether the entity's books accurately reflect its financial and fiscal operations. Id. § 321.0131. An effectiveness audit is directed at determining whether the objectives and intended benefits of a program are being achieved "efficiently and effectively." Id. § 321.0134. The following provision defines "investigation":

An investigation is an inquiry into specified acts or allegations of impropriety, malfeasance, or nonfeasance in the obligation, expenditure, receipt, or use of state funds, or into specified financial transactions or practices that may involve such impropriety, malfeasance, or nonfeasance.

Id. § 321.0136.

The individual who has requested a copy of the state auditor's investigation argues that section 3(a)(16) does not apply to an investigation, because the statute distinguishes between audits and investigations. However, the distinction between "audit" and "investigation" is not so clearly drawn that we can find as a matter of law that section 3(a)(16) is inapplicable to investigations. Article 6252-5d, V.T.C.S., the Texas Internal Auditing Act, defines "audit" by incorporating definitions from provisions applicable to the State Auditor's Office:

"Audit" means a financial audit, a compliance audit, an economy efficiency audit, an effectiveness audit, or an investigation as defined by Sections 321.0131 - 321.0136, Government Code.

3. These provisions were among those added by House Bill 699 of the 70th Legislature. Acts 1987, 70th Leg., ch. 862, at 2929. The legislation was designed to "make the State Auditor's duties more feasible to accomplish and remove unnecessary restrictions that inhibit carrying out these duties." House Comm. on State Affairs, Bill Analysis, H.B. 699, 70th Leg. (1987). See generally Attorney General Opinion JM-872 (1988).

V.T.C.S. art. 6252-5d, § 3(3) (emphasis added). In this provision, the legislature described an investigation performed under section 321.0136 of the Government Code as another kind of audit. Since an investigation by the state auditor may inquire into allegations of misconduct in "the obligation, expenditure, receipt, or use of state funds, or into specified financial transactions," it could take the form of an audit of those funds or transactions. Some or all of the evidence developed during an investigation could consist of audit working papers.

The auditor had similar authority to perform investigations at the time the Open Records Act was adopted. The predecessor of section 321.013(a), in effect in 1973, stated in part:

The Committee shall direct the Auditor to make any special audit or investigation that in its judgment is proper or necessary to carry out the purpose of this Act, or to assist the Legislature in the proper discharge of its duties.

Acts 1943, 48th Leg., ch. 293, § 8, at 432 (formerly codified as V.T.C.S. art. 4413a-14 (1925)); see also id. § 9 (formerly codified as V.T.C.S. art. 4413a-15 (1925)).

The state auditor's testimony at the Senate committee hearing on the Open Records Act describing "working papers" includes documents that might be prepared during an investigation as well as an audit. He stated that the files they create

contain opinions expressed by the personnel of our clients that we are examining and we make a note of . . . comments made by employees to us in the course of our work. They contain expressions of opinions . . . transmitted to us by third parties who have dealt with the state. And we think that all of these are capable of sensational misinterpretation if they are taken out of the context of the audit engagement. . . . [T]o wit, furnished to anybody upon request.

Texas Open Records Act: Hearings on H.B. 6 Before the Senate Jurisprudence Comm., 63rd Leg. (April 10, 1973) (statement of George McNeil, state auditor) supra. The auditor went on to say that the files contained evidence of

assistance given by his office to law enforcement agencies, the attorney general, and other investigative agencies. Although he expressed the opinion that this information might fall within the law enforcement section of the bill, now section 3(a)(8) of the Open Records Act, he thought it would be preferable for his files to be expressly exempted. Id. We conclude that section 3(a)(16) applies to audit working papers assembled in connection with a state auditor's investigation as described by section 321.0136 of the Government Code.

The letter from the requestor to the state auditor refers to "your February 13, 1990 'no finding' letter to Lieutenant Governor William P. Hobby" concerning the investigation. This letter apparently is the state auditor's report on the allegations.

You have submitted a folder of documents about the investigation, claiming that they are excepted from disclosure by section 3(a)(16). Included among the documents are memoranda summarizing the allegations, the steps taken to investigate them, such as conducting interviews or examining financial information, and the individual auditor's conclusions. The file also contains copies of relevant legislation,⁴ other legislative materials, correspondence of other state agencies, and memoranda analyzing relevant financial information. A cover memo briefly summarizes the investigation and its results.

All of the documents are audit working papers as defined and described in the authorities cited in this opinion. Accordingly, the file of documents in its entirety

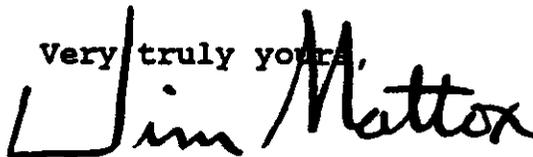
4. Open Records Decision No. 551 (1990) stated that a city could not withhold one of its ordinances pursuant to an exception to the Open Records Act. The law is freely available to all, because the concept of due process required that the people have notice of the law. Open Records Decision No. 551 dealt with an attempt by the legislative body to withhold one of its enactments from the public. In contrast, the auditor's file contains copies of statutes that are freely available from the session laws and codifications. Withholding copies of statutes will not diminish the availability of those laws to the public, but releasing them may reveal information about the focus of the auditor's investigation.

is within the section 3(a)(16) exception, and the Open Records Act does not require you to make it available on request to members of the public.

S U M M A R Y

The term "audit working papers" in the Texas Open Records Act, V.T.C.S. art. 6252-17a, § 3(a)(16), is a term of art connected with the practice of accounting and should be given the significance attached to it by experts in that field. Open Records Decision No. 164 (1977) is overruled.

Very truly yours,



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