



THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

December 19, 1990

Mr. Kevin O'Hanlon
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR90-582

Dear Mr. O'Hanlon:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 9553.

You have received a request for all records concerning pending TEAMS violation cases, including those in the investigative stage. You have submitted to us eight questions regarding the applicability of Open Records Act exceptions to various types of information that may be responsive to the request, specifically, sections 3(a)(1), 3(a)(3), 3(a)(7), 3(a)(11), and 3(a)(14). The questions concern a variety of categories of documents, and you have submitted examples of documents within some of these categories. At the outset, we must inform you that this office can only make determinations about the applicability of the Open Records Act exceptions in reference to specific documents. If you wish us to make determinations about other documents to which you refer, we will be glad to do so after you have submitted them and set out your arguments for their non-disclosure.

Your main concern appears to be the application of section 3(a)(3), the litigation exception. You also refer to sections 3(a)(1) and 3(a)(7) in claiming attorney work product protection for some of these documents. Section 3(a)(7) protects attorney-client confidences, not attorney work product; protection of litigation work product is only afforded under section 3(a)(3), if 3(a)(3) requirements have been met. See Open Records Decision Nos. 574, 575 (1990). To sustain a 3(a)(3) exception, the governmental body must show that the material sought to be withheld reasonably relates to pending or reasonably anticipated litigation to which the state or a governmental body is a party. Open

Records Decision No. 551 (1990). Furthermore, there must be a determination by the government attorney responsible for the litigation that the material should not be disclosed. Id. This office has ruled that section 3(a)(3) protection extends to quasi-judicial proceedings before an administrative agency as well as to litigation before a court. Open Records Decision Nos. 368 (1983), 301 (1982).

We cannot make determinations about the application of the section 3(a)(3) exception in the abstract. In each case, the governmental agency must make an affirmative showing to this office that all the 3(a)(3) requirements are met. See Open Records Decision No. 350 (1982). The sample documents submitted to us all relate to proceedings that have already terminated, and the 3(a)(3) exception is therefore inapplicable to them. For your future guidance, we are enclosing Open Records Decision Nos. 452 (1986), 351, 346, 331, and 322 (1982), which discuss what constitutes a sufficient showing that litigation is pending or reasonably anticipated. Likewise, we can only make determinations about the applicability of the other sections you cite on a case-by-case examination of specific documents.

You have also asked general questions that we can answer. Question 6 asks whether witness statements that are not discoverable under the Texas Rules of Civil Procedure are thereby exempt from disclosure under the Open Records Act by virtue of section 3(a)(1) protection of material deemed confidential by law. Recently, in Open Records Decision No. 575, this office ruled that "discovery privileges" are not within the ambit of section 3(a)(1) protection. However, witness statements might be protected by other exceptions to the act, such as section 3(a)(3), in appropriate situations. Again, such protection can only be extended upon sufficient showing to this office that a particular case comes within the exception.

In question 8 you ask

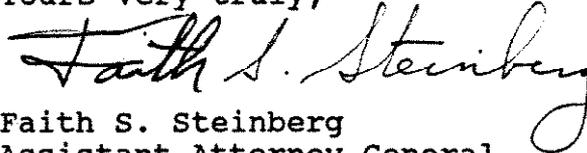
[w]here the agency does not maintain a running count of the number of allegations received concerning TEAMS violations, or of the number of cases settled by agreement, or of the number of formal contested proceedings instituted, is the agency required to provide such a tally?

The Open Records Act does not require a governmental body to prepare new information, or to prepare information in the form desired by the requestor. See Attorney General Opinion

JM-672 (1987); Open Records Decision No. 452 (1986). However, you may be required to allow the requestor to conduct his own search through the records to derive this information, if it would be possible to do so without compromising protected information. See Attorney General Opinion JM-672. Without more information, this office cannot determine if such a requestor-conducted search would be feasible in your case.

Because prior published open records decisions resolve your 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 OR90-582.

Yours very truly,



Faith S. Steinberg
Assistant Attorney General
Opinion Committee

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Ref.: ID# 9553

Enclosure: Attorney General Opinion JM-672;
ORD Nos. 575, 574, 452, 331, 350, 322, 368, 301

cc: Joan Howard Allen
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