



Office of the Attorney General
State of Texas

February 24, 1993

DAN MORALES
ATTORNEY GENERAL

Mr. Douglas C. Brown
General Counsel
Office of the State Auditor
P.O. Box 12067
Austin, Texas 78711-2067

OR93-076

Dear Mr. Brown:

The Office of the State Auditor has received a request for certain information pursuant to the Texas Open Records Act, article 6252-17a, V.T.C.S. Your letter referring this matter to us was assigned ID# 17811.

The letter requesting information from your office refers to meetings between Governor Richards and the State Auditor and/or the auditor's staff that took place during the first quarter of 1991. According to the letter, these meetings concerned poorly-run state agencies. The requestor asks for the following:

- (1) A list of the names of the worst run Texas agencies which was given orally or in writing to Governor Richards or her staff.
- (2) All letters and memorandums concerning these meetings, either from your office to the Governor's office or vice versa.
- (3) Please produce the methodology which you used to determine which were the poorest run agencies.
- (4) If no written documentation exists to support #1, #2, and #3 above, please indicate what if anything was communicated verbally from your office to the Governor's Office.
- (5) Please also produce any documents calling for the reorganization of these agencies.

The Open Records Act allows members of the public to inspect and copy records, but it does not require a governmental body to answer questions. Open Records Decisions Nos. 555 (1990); 379 (1983); 347 (1982). Nor does the act require a

governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed w.o.j.); Open Records Decision No. 452 (1986). Accordingly, the Open Records Act does not require you to reduce oral communications to writing in response to a request under the Open Records Act. A governmental body must, however, make a good faith effort to relate a request to information that it holds. Open Records Decision No. 87 (1975).

Your letter states that you have enclosed "copies of all documents maintained by the State Auditor's Office which were developed or discussed in association with the State Auditor's meeting with Governor-elect Richards and her transition team" on November 26, 1990. The following three documents were submitted: a six-page document concerning the November 26, 1990 meeting; a copy of the STATE AUDITOR'S OFFICE BIENNIAL REPORT (1990); and a copy of the STATE AUDITOR'S OFFICE AUDIT PLAN (1991).

You state that this information may relate to litigation to which the state is a party, specifically, *Aurispa v. Texas Dep't of Commerce*, No. A-92-CA-168 (W.D. Tex.), and you ask us to determine whether the documents are excepted from disclosure by section 3(a)(3) of the Texas Open Records Act. This provision excepts the following information from disclosure to the public:

information relating to litigation of a criminal or civil nature and settlement negotiations, to which the state or political subdivision is, or may be, a party, or to which an officer or employee of the state or political subdivision, as a consequence of his office or employment, is or may be a party, that the attorney general or the respective attorneys of the various political subdivisions has determined should be withheld from public inspection.

V.T.C.S. art. 6252-17a, § 3(a)(3).

The lawsuit has been brought against the Texas Department of Commerce, not against the State Auditor, the Office of the State Auditor, or an employee of that office. This office has not determined whether section 3(a)(3) applies to information held by a state agency when the litigation involves a state agency other than the custodian. *But see* Open Records Decision No. 132 (1976) (a school district may not raise section 3(a)(3) as to information related to litigation involving another school district). However, we can resolve this request in part without answering this threshold question.

The STATE AUDITOR'S OFFICE BIENNIAL REPORT (1990) and the STATE AUDITOR'S OFFICE AUDIT PLAN are available to the general public in the Legislative

Reference Library.¹ The Legislative Reference Library is maintained for the use of legislators, heads of state departments, and citizens of this state. Gov't Code § 324.007. It is a depository library designated by statute to receive copies of state publications. *Id.* §§ 324.008, 441.101 - 105 (distribution of state publications to Legislative Reference Library and other depository libraries); *see also id.* § 321.014(c)(5) (State Auditor must file certain reports with Legislative Reference Library). A state publication is defined as follows:

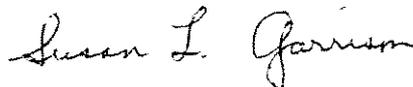
printed matter that is produced in multiple copies by the authority of or at the total or partial expense of a state agency, including a publication sponsored by or purchased for distribution by a state agency or released by a research firm, consulting firm, or other similar private institution under contract with a state agency. The term does not include correspondence, an interoffice memorandum or a routine form.

Id. § 441.101(4).

Section 3(a)(3) does not apply to records that have been made available to all parties to the litigation, through discovery or otherwise. Open Records Decision No. 349 (1982). The two reports prepared by the Office of the State Auditor are available at the Legislative Reference Library to be read and copied by members of the public, including the parties to the litigation. We need not decide whether section 3(a)(3) applies to the records of the State Auditor's Office under the circumstances set out in this ruling, because the two reports could not in any case be withheld pursuant to that section. Accordingly, you must make the two reports available to the public. We will deal with the remaining document, the six-page memo, in a supplementary ruling.

Because case law and prior published open records decisions resolve this matter, we are communicating our decision by this informal letter ruling rather than by published open records decision. If you have questions about this ruling, please refer to OR93-076.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Opinion Committee

¹The STATE AUDITOR'S OFFICE BIENNIAL REPORT (1990) has the catalogue number A2700.3 B477 1988/9 - 9/90. The document titled STATE AUDITOR'S OFFICE AUDIT PLAN, which you submitted with this request, is found in the Legislative Reference Library under the title PROPOSED AUDIT PLAN FISCAL YEAR 1991. Its catalogue number is A2700.1 Au27p 1990/1.

SLG/lmm

Ref.: ID# 17811

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