



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 15, 1998

Mr. David Anderson
Chief Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR98-3134

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120541.

The Texas Education Agency (the "agency") received a request for "[r]eports, letters, correspondence or memos regarding allegations of cheating, manipulation or exemptions for too many students on the TAAS [Texas Assessment of Academic Skills] for 1997 and 1998." You advise that the agency will release information pertaining to closed investigations which is responsive to the request. However, you seek to withhold responsive information relating to ongoing investigations under sections 552.103(a) and 552.116 of the Government Code. You submitted representative samples of this information.¹

Section 552.116 excepts from disclosure

an audit working paper or draft audit report of the state auditor or of another state agency or institution of higher education as defined by Section 61.003, Education Code.

¹In reaching our conclusion, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision No. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

The legislation enacting section 552.116 also defines the term “audit working paper” as

all documentary and other information prepared or maintained in conducting an audit or investigation, including all intra-agency and interagency communications relating to an audit or investigation and all draft reports or portions thereof.

Act of May 29, 1997, 75th Leg., R.S., ch. 1122, § 2, 1997 Tex. Gen. Laws 4266, 4267 (amending Gov’t Code 321.001). An “audit” is defined as “1 a: a formal examination of an organization’s or individual’s accounts or financial situation, b: the final report of an audit 2: a methodical examination and review,” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY (9th ed. 1989), and “to make an official systematic examination of (accounts), so as to ascertain accuracy,” THE OXFORD ENGLISH DICTIONARY (2nd ed. 1989). Section 321.0136 of the Government Code defines “investigation” for purposes of chapter 321 as

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.

Gov’t Code § 321.0136.

We have reviewed the submitted information. We do not believe that the information constitutes “audit working paper[s]” as contemplated in Government Code section 552.116 or section 321.001. *See* Gov’t Code §§ 321.0131-.016 (defining state audits and investigations). Accordingly, the agency may not withhold the requested information based on section 552.116 of the Government Code.

Section 552.103(a) excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588

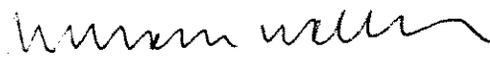
(1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You advise that the “the agency is currently investigating complaints regarding allegations of improprieties in the administration of the TAAS exams” and that “ the State Board for Educator Certification (“SBEC”) could institute a licensing action based upon potential findings of the ongoing investigation.” In our opinion, you have failed to sufficiently demonstrate that the agency reasonably anticipates litigation to which the agency will be a party. Therefore you may not withhold the requested information under section 552.103(a).

We do note that the material you submitted appears to contain student-identifying information which may be confidential under the Family Educational Rights and Privacy Act of 1974 (“FERPA”), Title 20, United States Code, section 1232g. Whether this information is confidential in the hands of the agency may involve questions of fact which this office cannot resolve. *See also* Open Records Decision No. 634 (1995) (withholding of FERPA information without the necessity of requesting an attorney general decision). We advise you to contact the federal agency which administers FERPA² in order to determine whether student-identifying information in the information responsive to the request must be withheld. Otherwise, you must release the requested information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



William Walker
Assistant Attorney General
Open Records Division

²Family Policy Compliance Office
Department of Education
400 Maryland Ave. S.W.
Washington, D.C. 20202-4605
(202) 260-3887

WMW/rho

Ref: ID# 120541

Enclosures: Submitted documents

cc: Ms. Alberta Brooks
Austin American-Statesman
P.O. Box 670
Austin, Texas 78767
(w/o enclosures)