ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 12, 2007

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2007-16409

Dear Mr. Meitler:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 297091.

The Texas Education Agency (the "agency") received a request for fourteen categories of information pertaining to the Rio Brazos Educational Cooperative, the Bruceville-Eddy Independent School District, and the West Independent School District. You state that the agency has no information responsive to four categories of the request.[1] You claim that the submitted information is excepted from disclosure under section 552.116 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that some of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date of this request. The

[1]The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W. 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Division Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

agency need not release nonresponsive information in response to this request and this ruling will not address that information.

Next, you claim that the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2007-04704 (2007). With the exception of the responsive information that was created after the date of the February 9, 2007 request corresponding to Open Records Letter No. 2007-04704, which we will discuss below, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the agency may continue to rely on Open Records Letter No. 2007-04704 as a previous determination and withhold the information that is responsive to both the instant request and the February 9, 2007 request. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

As for the information that is not subject to Open Records Letter No. 2007-04704, we must address the requestor's assertion that the agency is in violation of the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). In addition, not later than the tenth business day after receiving the requestor's written request for information, the governmental body must provide the requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general and (2) a copy of the governmental body's written communication to the attorney general. *Id.* § 552.301(d).

The requestor asserts that he was not provided notice of the agency's request for a decision from this office within the ten business day time period mandated under section 552.301(d). The agency informs us that it received the request on September 24, 2007. The agency requested a ruling from our office on October 8, 2007. Accordingly, we find that the agency's request for a ruling was timely submitted. Additionally, we note that the agency's request for a decision to this office indicates that the requestor was sent a copy of the request for a decision. The requestor asserts that he never received this correspondence. Whether the agency provided a copy of the comments to this requestor is a question of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *Id.* Therefore, based on the agency's representations and our review, we conclude that the agency complied with the procedural requirements of section 552.301 in requesting this ruling, and we will address the agency's arguments against disclosure.

We next note that the information at issue contains a completed audit report which is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). The information at issues consists of a document titled "Final Letter of Findings." The agency does not claim an exception under section 552.108. We note that section 552.116 of the Government Code is a discretionary exception to disclosure that a governmental body may waive. *See* Gov't Code § 552.007; Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.116 is not other law that makes information expressly confidential for purposes of section 552.022. Therefore, the agency may not withhold the "Final Letter of Findings" under section 552.116 of the Government Code.

We now address your argument under section 552.116 of the Government Code for the remaining information. Section 552.116 provides as follows:

> (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.
>
> (b) In this section:
>
> > (1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.
> >
> > (2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:
> >
> > > (A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state that the information at issue consists of audit working papers prepared or maintained by the agency's Division of Financial Audits in conjunction with the financial audits at issue. You inform us that the agency has the authority to conduct the financial audits at issue pursuant to section 39.075 of the Education Code. *See* Educ. Code §§ 39.075(a)(4) (listing circumstances in which commission shall authorize investigations). Based on your representations and our review, we agree that the remaining information constitutes audit working papers. Accordingly, the agency may withhold the remaining responsive information pursuant to section 552.116 of the Government Code.

In summary, the agency may rely on our decision in Open Records Letter No. 2007-04704 with respect to the information that is responsive to both the instant request and the February 9, 2007 request. The agency must release the "Final Letter of Findings" we have marked pursuant to section 552.022(a)(1) of the Government Code. The agency may withhold the remaining information pursuant to section 552.116 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

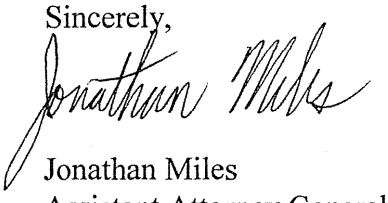
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 297091

Enc. Submitted documents

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(w/o enclosures)