



September 2, 1999

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

OR99-2471

Dear Mr. Anderson:

You have asked 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# 127034.

The Texas Education Agency (the “agency”) received a request for “[a]ny documents, memorandum and/or reports dealing with alleged TAAS irregularities at Kaffie Middle School in Corpus Christi.” In response to the request, you submit to this office for review a representative sample of the information which you assert is responsive.¹ You contend that the submitted records are excepted from required public disclosure under sections 552.103(a) and 552.116 of the Government Code. We have considered the exceptions and arguments you have raised and reviewed the submitted information.

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.

¹We 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 Nos. 499 (1988), 497 (1988). 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.

The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation.² *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The agency must meet both prongs of this test for information to be excepted under 552.103(a). 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. Open Records Decision No. 452 (1986). The mere chance of litigation will not trigger section 552.103(a). *Id.*

You advise our office that "the TEA is currently investigating complaints regarding allegations of improprieties in the administration of the Texas Assessment of Academic Skills (TAAS) test," 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 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.³ 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 FERPA⁴ in order to

²To 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).

³The Office of the Attorney General will raise an exception on behalf of a governmental body when necessary to protect third-party interests. *See generally* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)

⁴The Family Compliance Office of the Department of Education may be contacted by mail at 400 Maryland Ave. S.W., Washington, D.C. 20202-4605 or by telephone at (202)260-3887.

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.

Sincerely,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 127034

Encl. Submitted documents

cc: Mr. Jonathan Osborne
Corpus Christi Caller-Times
920 N. Lower Broadway Street
Corpus Christi, Texas 78401
(w/o enclosures)