



Office of the Attorney General
State of Texas

October 24, 1994

DAN MORALES
ATTORNEY GENERAL

Mr. Stephen L. Braun
Bracewell & Patterson, L.L.P.
South Tower Pennzoil Place
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR94-674

Dear Mr. Braun:

On behalf of the Houston Independent School District (the "district"), you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request an identification number, ID# 25728.

The district has received two requests for information relating to students enrolled in the free or reduced-price lunch program at various schools in the district. The first request, dated March 28, 1994, seeks the following:

1. Copies of the [National School Lunch Program (the "NSLP")] application for [named students] at Bruce Elementary . . . for the . . . school years 1990-1993.
2. Copies of the NSLP Free Lunch Application for [a named student] when in attendance at Pleasant Elementary.
3. Copies of the NSLP Free Lunch Application for students[] in attendance at B.T. Washington Senior High, 1992-1994.
4. Bruce Elementary List of Eligible Students computer Printout for the 1991-93 school year as required by TEA as well as any updates to this document.
5. Bruce Elementary Documents that would substantiate Evidence of prepaid lunch for students in attendance at Bruce Elementary 1990-1993 as maintained by Ms. Flora Colley[,] NSLP Contact Personnel.

6. Investigative Report File as maintained by Mr. Curtis Cooper "Principal's Inquiry Form", for the school district for 1988-1994.

7. A copy of the files on Floppy Disk from paradox prior to the implementation of the SNAP program presently in use for Bruce Elementary.

The second request, dated March 30, 1994, seeks the following:

1. Computer Printout El[i]gibility Rosters for Washington Senior High School.
2. District Eligibility Rosters for B.T. Washington, Bruce, Pleasant[] and Rucker Elementary.
3. Verification packet.
4. Verification files for the past five (5) years.

You believe all of the requested information is confidential under section 552.101 of the Government Code, in conjunction with 42 U.S.C. § 1758(b)(4), (5), as well as sections 552.026, .114 of the Government Code and the Federal Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. Section 552.101 of the Government Code requires a governmental body to withhold from required public disclosure information "that is confidential by law, either constitutional, statutory, or by judicial decision." You believe that 42 U.S.C. § 1758(b)(4), (5) is incorporated into section 552.101 of the Government Code and requires the district to withhold the requested information from the requestors.

Chapter 13 of 42 U.S.C., of which section 1758 is a part, provides for school lunch programs:

It is hereby declared to be the policy of Congress, as a measure of national security, to safeguard the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities and other food, by assisting the States, through grants-in-aid and other means, in providing an adequate supply of foods and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs.

42 U.S.C. § 1751. Section 1758 establishes requirements for schools participating in the school lunch program under chapter 13. Among other requirements, section 1758(b)(4) prohibits a school participating in the school lunch program from physically segregating

or otherwise discriminating against any child¹ eligible for a free lunch or a reduced-price lunch under section 1758(b). Furthermore, the school is forbidden overtly to identify any such eligible child "by special tokens or tickets, announced or published lists of names, or by other means." *Id.* § 1758(b)(4). Subsection (b)(5), which pertains specifically to children whose primary caretakers are unemployed, likewise prohibits a school from discriminating against or overtly identifying such a child. *Accord* 7 C.F.R. § 245.8(a) (prohibiting schools that participate in National School Lunch Program, School Breakfast Program, or Special Milk Program from publishing, posting, or announcing in any manner names of children eligible to receive free and reduced-price meals or free milk).

We agree that section 1758(b)(4), (5) explicitly bars the district from releasing to the requestor any information that would identify specific children participating in the school lunch program established pursuant to chapter 13, 42 U.S.C. In our opinion, however, section 1758(b)(4), (5) requires the district to withhold the requested information only to the extent that it identifies a particular child. *Cf.* Open Records Decision Nos. 332 (1982) at 3 (discussing confidentiality requirements of FERPA); 206 (1978) at 2 (same). In some cases, we believe that the district must withhold the entire document, particularly where the release of a deidentified document in response to a request for a particular child's application is tantamount to identifying the child as eligible to participate in the school lunch program.

We turn next to consider the specific items the requestors seek. You first state that the district is unable to locate information responsive to items #2 and #4 listed in the March 28, 1994, letter. The Open Records Act does not require a governmental body to make available nonexistent information. Open Records Decision No. 362 (1983) at 2; *see also* Open Records Decision No. 605 (1992) at 2.

You have submitted for our review copies of some of the requested items; you have sent representative samples of some of the requested items; and you have sent blank forms indicating the kinds of information sought in the remaining items. *See* Gov't Code § 552.303 (requiring governmental body that requests attorney general decision on open records request to supply to attorney general specific information requested). Item #1 listed in the March 28, 1994, letter seeks a copy of the application of named children. The district must withhold the applications in their entirety, if they exist. Items #3, #5, #6, and #7 listed in the March 28, 1994, letter all contain information that overtly

¹Section 1757, 42 U.S.C., defines the terms "child" and "children" for purposes of chapter 13, to include "individuals regardless of age who are determined by the State educational agency, in accordance with regulations prescribed by the Secretary [of Agriculture], to have 1 or more mental or physical handicaps and who are attending any child care institution as defined in section 17 of this Act [42 U.S.C.S. § 1766] or any nonresidential public or nonprofit private school of high school grade or under for the purpose of participating in a school program established for individuals with mental or physical handicaps."

identifies children eligible for the school lunch program. These documents must be deidentified; once deidentified, the district must release the documents.²

Likewise, items #1 and #2 listed in the March 30, 1994, letter must be deidentified prior to release. Item #3 listed in the March 30, 1994, letter requests a verification packet. We do not understand the requestors to seek a completed verification packet. You have sent a representative sample of a verification packet containing a memorandum with no named recipient and blank forms that certain school lunch program applicants are asked to complete. Blank forms do not overtly identify a child eligible to participate in the school lunch program and are not confidential. Accordingly, the district must release to the requestors a copy of an uncompleted verification packet.

Finally, the requestors seek, in item #4 listed in the March 30, 1994, letter, verification files for the past five years. You state that you are uncertain as to the specific information the requestors seek, although you have submitted for our review a representative copy of a district verification report. The verification report is statistical in nature; it summarizes the number of applications that have been approved and the percentage of students whose eligibility has changed, among other things. Nothing in the verification report overtly identifies particular children. We therefore conclude that the district may not withhold the document from the requestors.

Our resolution of the issues you raise under section 552.101 of the Government Code, together with 42 U.S.C. § 1758(b)(4), (5), eliminates the need to consider at this time the other statutes and exceptions you have raised. For your convenience, we have marked the documents you submitted for our review, indicating the information the district may withhold. Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Kimberly K. Oltrogge
Assistant Attorney General
Open Government Section

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²We note that many of the documents, once the district deidentifies them, will contain little or no information other than the name of the school.

Ref.: ID# 25728

Enclosures: Marked documents

cc: Mr. C. Andre Jackson
Ms. Evelyn Mayberry
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(w/o enclosures)