



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 28, 1995

Mr. Richard S. Rafes
Vice President for Legal Affairs and General Counsel
University of North Texas
P.O. Box 13426
Denton, Texas 76203-6426

OR95-863

Dear Mr. Rafes:

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# 32257.

The University of North Texas (the "university") received a request for information from a student at the university. Among other things, the requestor seeks copies of her examinations.¹ You believe section 552.122 of the Government Code and the Federal Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, authorize the university to allow the requestor to examine the examination questions and her answers. You contend, however, that the university need not provide the requestor with a copy of the questions and her answers.

You have submitted for our review copies of the examinations and the requestor's answers to the examination questions. 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). You also have submitted the evaluator's comments on the requestor's answers.

¹Because you do not contest the release of any other information the requestor seeks, we assume the university has released or will release the information to the requestor.

Section 552.122(a) of the Government Code authorizes, but does not require, a governmental body to withhold from required public disclosure a "test item developed by an educational institution that is funded wholly or in part by state revenue." This office has defined the term "test item" as "any standard means by which an individual's . . . knowledge or ability in a particular area is evaluated." Open Records Decision No. 626 (1994) at 6.

The legislature's purpose for enacting the statutory predecessor to section 552.122 was to codify existing open records decisions concluding that a governmental body authorized to conduct examinations was entitled to keep the examination questions confidential, particularly where the governmental body would use the questions on subsequent examinations. Open Records Decision Nos. 626 (1994) at 5, 543 (1990) at 3. In Open Records Decision No. 537 this office concluded that the statutory predecessor to section 552.122 of the Government Code authorized a governmental body to withhold from a student examination questions and an answer key. Open Records Decision No. 537 (1990) at 2. Because the governmental body addressed in that open records decision already had released the student's answers to the student, this office did not address "whether students generally have a special right of access to their examinations." *Id.*

Although you have not indicated that the university will reuse the examination questions at issue here, we do not believe that fact precludes the university from withholding these examination questions from the requestor. Indeed, we believe section 552.122 authorizes the university to withhold the examination questions, and perhaps the remaining requested information as well, from the requestor. Your letter indicates, however, that the university will allow "the student to view a copy of the questions and her answers to the test." The university therefore has waived section 552.122.

Moreover, section 552.221(a) of the Open Records Act declares that a the officer for public records of a governmental body, upon request, must produce public information "for inspection, duplication, or both." See Open Records Decision No. 512 (1988) at 1 (stating that, generally, Open Records Act gives to a requestor the option to take notes from original documents, to pay for copies of public records, or both). The university must provide the requestor with copies of the information if the requestor desires them.

You contend, however, that FERPA requires the university only to allow the student to inspect these education records; it does not require the university to provide copies. You conclude, therefore, that the Open Records Act cannot require what FERPA does not require. You cite no specific provision of FERPA on which you premise your argument.

FERPA provides that no federal funds will be made available under an applicable program to an educational agency or institution that releases to anyone but certain enumerated federal, state, and local officials and institutions personally identifiable information (other than directory information²) contained in a student's education records unless the student has authorized otherwise. See 20 U.S.C. § 1232g(d). "Education records" consist of those records that contain information directly related to a student and that an educational agency or institution or a person acting for such agency or institution maintains. *Id.* § 1232g(a)(4)(A).

The examination questions do not comprise information directly related to a student; therefore, they are not education records subject to FERPA. The availability of the examination questions accordingly is governed solely by the Open Records Act. With regard to the student's answers and the evaluator's comments on her answers, we note that FERPA neither requires nor prohibits the providing of copies of education records to a person who lawfully may inspect those records. See Open Records Decision No. 152 (1977) at 2. Thus, the requirement in the Open Records Act that a governmental body provide a requestor with copies of public records if the requestor opts to receive copies is consistent with FERPA.

In sum, the university must release to the requestor copies of the information she seeks. 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 may not be relied upon as a previous determination under section 552.301 of the Government Code regarding any other records. If you have questions about this ruling, please contact this office.

Yours very truly,



Kymerly K. Oltrogge
Assistant Attorney General
Open Government Section

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²For the purposes of FERPA the term "directory information" relating to a student includes: the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height if the student is a member of an athletic team, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution the student attended. 20 U.S.C. § 1232g(a)(5)(A). An educational agency or institution that makes public directory information must comply with the notice provisions in § 1232g(a)(5)(B).

Ref.: ID# 32257

Enclosures: Submitted documents

cc: Ms. Lori Lover
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(w/o enclosures)