



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 4, 1998

Mr. James R. Raup
McGinnis, Lochridge & Kilgore, L.L.P.
1300 Capitol Center
919 Congress Avenue
Austin, Texas 78701

OR98-0328

Dear Mr. Raup:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 111391.

The Round Rock Independent School District (the "district") received a request for several categories of information concerning a district student. The requestor is the parent of the student who is the subject of this request. You ask whether you must release one category which asks for the text and answers of any standardized tests which were administered to the requestor's child. You ask whether the district may withhold the requested tests under section 552.101 and 552.122 of the Government Code. You also point to several other statutory provisions which may require release of the information to the student's parent. You explain that two types of standardized tests are implicated by this request for information: the mandatory statewide assessment test ("TAAS") and diagnostic assessment instruments.

You first ask whether you must withhold the TAAS testing materials based on either section 552.101 or section 552.122 of the Government Code. Although you ask for a decision from this office under the Open Records Act, access to the TAAS testing materials is governed by provisions outside the Open Records Act. *See, e.g.*, Open Records Decision No. 598 (1991) (provisions more specific to particular information requested prevail over general access statute, based upon well-established rule that specific statutes prevail over general ones), 451 (1986). The Texas Education Code specifically addresses access to the testing materials. Statutes which govern access to specific information prevail over the generally applicable Open Records Act. Attorney General Opinion DM-146 (1992); *see also* Open Records Decision Nos. 623 (1994), 525 (1989). Thus, we must determine pursuant to the Education Code's statutory provisions whether the testing information at issue must be released.

We recognize at the outset that the Texas Education Code pronounces that

Parents are partners with educators, administrators, and school district boards of trustees in their children's education. Parents shall be encouraged to actively participate in creating and implementing educational programs for their children.

Educ. Code § 26.001(a). We also point out that governmental bodies may not enter into agreements to keep information confidential except where specifically authorized to do so by statute. Open Records Decision Nos. 444 (1986), 437 (1986), 425 (1985), 414 (1984). And, governmental bodies are prohibited from entering into contracts to keep information confidential. Open Records Decision Nos. 514 (1988), 484 (1987), 479 (1987), 283 (1981), 207 (1978), 133 (1976). With this framework in mind, we will examine the Education Code's specific provisions.

Section 26.005 of the Education Code provides that "[e]xcept as provided by Section 39.023(e), a parent is entitled to access to a copy of each state assessment instrument administered under Section 39.023 to the parent's child." Section 39 of the Education Code provides for the administration of the statewide assessment instrument. It provides in section 39.023(e) that

Under rules adopted by the State Board of Education, the agency shall release the questions and answer keys to each assessment instrument administered under Subsection (a), (b), (c), or (d) after the last time the instrument is administered for a school year. To ensure a valid bank of questions for use each year, the agency is not required to release a question that is being field-tested and was not used to compute the student's score on the instrument. The agency shall also release, under board rule, each question that is no longer being field-tested and that was not used to compute a student's score.

Educ. Code § 39.023(e). The TAAS test is administered under section 39.023. We believe, therefore, that release of the TAAS questions and answer keys are governed by section 39.023(e). If the requestor wishes to obtain the TAAS test, she should direct her request to the State Board of Education which must release the instrument as provided by the statute.

We note, however, that section 39.023 provides only for the questions and answer keys of the testing instrument and not the individual student's answer sheets or scores. It appears that the two may be separated. We believe that the district must release the student's answers and scores. Section 26.004 of the Education Code specifically articulates that "[a] parent is entitled to access to all written records of a school district concerning the parent's child, including: (1) attendance records; (2) test scores; (3) grades; (4) disciplinary records; (5) counseling records; (6) psychological records; (7) applications for admission; (8) health

and immunization information; (9) teacher and counselor evaluations; and (10) reports of behavioral patterns.” Section 26.008(a) in relevant part goes on to add that “[a] parent is entitled to full information regarding the school activities of a parent’s child.” Furthermore, a parent or adult student has an affirmative right of access to that student’s records under the federal Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. § 1232g(a)(1)(A), (d); Open Records Decision No. 634 (1995). *See also* Educ. Code § 26.008 (a); Gov’t Code § 552.114(b)(2). The answer sheets and TAAS scores must be released to the parent.

We now turn to the remaining diagnostic assessment instruments. Again, release of this material in this instance is governed by provisions outside the Open Records Act. The statutory provisions at issue will prevail over the generally applicable Open Records Act. Attorney General Opinion DM-146 (1992). Thus, the arguments made under sections 552.110 and 552.122 are not applicable in this particular instance.

As outlined above, section 26.004 of the Education provides that a parent is entitled to access to all written records of a school district concerning the parent’s child. Section 26.006 of the Education Code expands upon this provision by furnishing additional access. Section 26.006 provides the following:

(a) a parent is entitled to:

(1) review all teaching materials, textbooks, and other teaching aids used in the classroom of the parent’s child; and

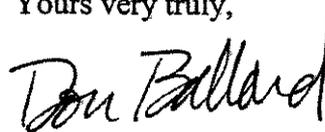
(2) review each test administered to the parent’s child after the test is administered.

Educ. Code §26.006; *see also* Educ. Code § 26.008(a). Given these broad statutory rights of access, we find that the district must provide the requested diagnostic assessment instruments to the parent here. This includes the assessment questions, answer grids, and the student’s answers or responses. *See* Educ. Code § 26.008(a) (parent entitled to full information regarding school activities of the parent’s child).

You have noted that some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Consequently, the district may only provide access to any copyrighted material in the diagnostic testing instruments.

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,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 111391

Enclosures: Submitted documents

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