



May 24, 2002

Mr. David Anderson  
General Counsel  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494

OR2002-2824

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162873.

The Texas Education Agency (the “agency”) received a written request for two categories of information regarding student performance on GED, TAAS, ACT, SAT, and AP College Board examinations. You state that the agency does not object to the release of the information sought in items a, b, c, and d or the “bulleted” items in the request.<sup>1</sup> You contend, however, that the remaining requested information either requires the creation of new information not held by the agency or is excepted from required public disclosure pursuant to the Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. § 1232g, in conjunction with section 552.026 of the Government Code. You have also requested a decision from this office pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information should be withheld from the public. This office also received comments from the requestor’s attorney as to why the requested information should be released. *See Gov’t Code § 552.304.*

We will first address whether the information sought in items e, f, and g of the records request is excepted from required public disclosure. Specifically, the requestor seeks

- e. The score (1, 2, 3, 4 or 5) recorded by each student on each AP College Board tests [sic] as enumerated in the request and shown in Exhibit A.

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<sup>1</sup> You state that the agency has sent the requestor a “cost and time estimate” for providing this information. *See Gov’t Code § 552.231(a).*

- f. The SAT verbal and math scores for each student.
- g. The ACT English, Reading, Science Reasoning, Math and Composite score for each student.

You sought a decision from this office pursuant to section 552.305 regarding this information because you believe that the release of this information “would impact the property interests of private third parties. In accordance with section 552.305(d), the agency was required to notify the interested third parties of the records request and of their right to submit arguments to this office as to why the requested information should not be released to the public. *See* Gov’t Code § 552.305(d); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). An interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov’t Code § 552.305(d)(2)(B).

This office received responses from representatives of ACT, Inc. and The College Board, both of which contend only that the requested information consists of “education records” made confidential under FERPA.<sup>2</sup> Because you also contend that FERPA makes confidential the information requested in items e, f, and g, we will consider these arguments together.

Section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with [FERPA].

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

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<sup>2</sup>You acknowledge that although the agency has executed confidentiality agreements with the third parties regarding the release of this information, the agency cannot, through a contract, overrule or repeal provisions of the Public Information Act. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977); Attorney General Opinion JM-672 (1987).

However, information must be withheld under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student.” Open Records Decision Nos. 332 (1982), 206 (1978). *See also* Ed. Code § 39.030(b) (aggregated student performance data available to public in de-identified form). In this instance, the requestor specifically seeks the test score information in a manner that will not reveal the identities of individual students. Although you express concern over releasing test score information regarding groups of students numbering less than five, the requestor’s attorney has informed this office that the requestor will “waive” his request for any such group’s test scores. Accordingly, we conclude that the agency must release the test score information requested in items e, f, and g with the redaction of the students’ identities, except for those groups of test scores involving less than five students, which the requestor no longer seeks. *See Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 682 (Tex.App.—Eastland 2000, pet. denied) (manipulating computer data to substitute confidential student information with unique, confidential number required under Gov’t Code section 552.231).

We now address the second aspect of the records request, which you characterize as a request for “the agency [to] coordinate with other entities, on [the requestor’s] behalf, to receive information from those entities in order to merge it with data that the agency already maintains.” You explain that this plan “would require the agency to receive new data, upload and merge that data with some of the information [the requestor] is seeking from the agency in the first part of his request, and provide the merged data in a de-identified format.” You contend that the agency is not required to comply with this aspect of the request because it would require the creation of new information not held by the agency.

We agree with your contention that the agency is not required to “coordinate with other entities” to obtain information not held by the agency in response to the current records request. The Public Information Act does not require a governmental body to obtain information not in its possession. Open Records Decision Nos. 558 (1990), 518 (1989), 499 (1988); *cf.* Open Records Decision No. 561 at 8 (1990) (deciding that a governmental body must make a good faith effort to relate a request to information that it holds). Furthermore, a governmental body is not required to obtain information from another entity, so long as the entity does not hold the information on behalf of the governmental body. Open Records Decision No. 534 (1989). Moreover, a governmental body is not required to obtain new information in order to comply with a request, Open Records Decision No. 561, or to take affirmative steps to create or obtain information that is not in its possession. Open Records Decision No. 534.

On the other hand, the Public Information Act requires governmental bodies to manipulate computer information that they hold in response to a records request. *See* Gov’t Code § 552.231. The manipulation of computer data does not constitute the creation of new information. *Fish*, 31 S.W.3d at 682. Accordingly, we conclude that if the agency maintains computer information that it has received from another entity, and compliance with the

current records request would require that the agency merge that information with other computer information held by the agency, the agency must comply with that request if it is capable of merging and manipulating the requested data. If the agency is not capable of merging the computer data, it must provide the data separately, in de-identified form, to the requestor.

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 appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, 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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public 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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KH/RWP/sdk

Ref: ID# 162873

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