



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 14, 2007

Mr. Douglas L. Hibbard
Bracewell & Giuliani
711 Louisiana Street, Suite 2300
Houston, Texas 77002-2770

OR2007-12042

Dear Mr. Hibbard:

You ask 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# 288079.

The Spring Independent School District (the "district"), which you represent, received a request for testing protocols used by the district to evaluate the requestor's son. You claim that the submitted information is excepted from disclosure under section 552.122 of the Government Code. You also believe that the submitted materials may contain proprietary information subject to exception under the Act. You state, and provide documentation showing, that you notified the interested third parties of the district's receipt of the request for information and of each entity's right to submit arguments to this office as to why the requested information should not be released to the requestor.¹ *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received correspondence from Harcourt and Riverside. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

¹The interested third parties are American Guidance Service, Inc., LinguiSystems, Inc., Harcourt Assessment, Inc. ("Harcourt"), The Riverside Publishing Company ("Riverside"), McCarron-Dial Systems, AGS Publishing, Pro-ED, Louisiana Department of Education, and Pearson AGS Globe.

²We 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.

Initially, we note that the requested information includes education records. Recently, the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.³ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). However, if the district obtains parental consent to submit unredacted education records, and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly. Because our office is prohibited from reviewing education records to determine the applicability of FERPA, we will not address FERPA with respect to the submitted information, other than to note that parents have a right of access to their own child's education records. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. We further note that the DOE has also informed this office that if a state law prohibits a school district from providing a parent with access to the education records of his or her child and an opportunity to inspect and review the record, then the state statute conflicts with FERPA, and an educational agency or institution must comply with FERPA if it wishes to continue to receive federal education funds. Letter advisement from Ellen Campbell, Family Compliance Office, U.S. Department of Education to Robert Patterson, Open Records Division, Office of the Texas Attorney General (April 9, 2001). *See Equal Employment Opportunity Comm'n v. City of Orange*, 905 F. Supp 381, 382 (E.D. Tex. 1995); Open Records Decision No. 431 (1985) (FERPA prevails when in conflict with state law). Because the educational authority in possession of the education records is now responsible for determining the applicability of FERPA, we will only address the claimed exceptions for the requested information.

We next note that access to the submitted materials is governed by law outside the Act. Provisions of the Texas Education Code specifically address a parent's right of access to the school records of the parent's child. Statutes which govern access to specific information prevail over the Act's generally applicable exceptions. Attorney General Opinion DM-146 (1992); *see also* Open Records Decision Nos. 623 (1994), 525 (1989). Therefore, we must determine whether the submitted information must be released pursuant to the relevant provisions of the Education Code.

Section 26.004 of the Education Code provides that:

³A copy of this letter may be found on the attorney general's website, available at http://www.oag.state.tx.us/opinopen/og_resources.shtml.

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 admissions;
- (8) health and immunization information;
- (9) teacher and counselor evaluations; and
- (10) reports of behavioral patterns.

Educ. Code § 26.004; *see generally id.* § 26.001. You state that the requestor is the parent of a special education child and that the submitted testing protocols were "used by the [d]istrict to evaluate his son for special education services." Based on your representations, we determine that the submitted information consists of written records of the district concerning the requestor's child, and are therefore subject to disclosure under section 26.004. *See also* 34 C.F.R. § 300.501(a) (parent of child with disability must be afforded opportunity to inspect and review all education records with respect to identification, evaluation, and education and placement of child).

Section 26.006 of the Education Code expands upon section 26.004 by granting additional parental access to records relating to the parent's child. Section 26.006 provides in relevant part:

(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.

Id. § 26.006. You state that the submitted “protocols are clearly test items.” You further state that the submitted “protocols are used to evaluate special education students’ abilities in various areas” and that “the results of these evaluations assist the [d]istrict in determining the proper education placement for those students.” Finally, as noted above, you inform us that these protocols were administered by the district to the requestor’s son. Accordingly, based on your representations and our review of the submitted information, and given the broad statutory rights of access granted by sections 26.004 and 26.006 of the Education Code, we find that the requestor has a special right of access to the submitted information. *See also id.* § 26.008(a) (parent is entitled to full information regarding the school activities of a parent’s child). Because the requestor has a statutory right of access to the information, it may not be withheld under sections 552.122 and 552.110 of the Government Code. *See* Attorney General Opinion DM-146, ORD 623, 525.⁴ Therefore, the submitted information must be released to the requestor in its entirety.

We note that some of the submitted information 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 protected by copyright. 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 materials protected by copyright, 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).

To conclude, the district must release the submitted information to the requestor pursuant to sections 26.004 and 26.006 of the Education Code. Any copyrighted information may only be released in accordance with copyright law.

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

⁴Accordingly, we do not address either the district’s arguments against disclosure or those that we have received from Harcourt and Riverside.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. 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 Office of the Attorney General 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. 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,



Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/jb

Ref: ID# 288079

Enc. Submitted documents