



The Attorney General of Texas

December 31, 1982

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Mr. Raymon L. Bynum
Commissioner of Education
Texas Education Agency
201 East Eleventh Street
Austin, Texas 78701

Open Records Decision No. 352

Re: Test results for school
districts on Texas Assessment
of Basic Skills

Dear Mr. Bynum:

You recently received the following request under the Open
Records Act, article 6252-17a, V.T.C.S.:

I write to request a copy of the most recent results for district level data on the Texas Assessment of Basic Skills. To be perfectly clear, I wish to receive a copy of the data for all grades for each district in the Texas public school system. I am not, at this time, requesting any analyses or interpretations of the raw data. The data should be available in categories reflecting many demographic variables, including race, sex, ethnicity, Title I participation, Special Education, free or reduced lunch programs, Migrant, Limited English Proficient, bilingual program participation, English-as-a-Second Language program, English Language Development, and Gifted and Talented. I would appreciate it if the above data were also produced. I have access to computer services, so please do not incur any additional expenses by producing a print-out.

You have asked us to decide whether section 3(a)(1) or section 3(a)(14) of the act authorizes you to deny this request.

At the outset, we must clarify what is at issue here. In a brief, the requestor advised us that:

the request is two-tiered. First, [I seek] the TABS results for each district broken down by grade. Then, since the data should be available in demographic classifications, [I ask] that this data also be produced.

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The general counsel for the Texas Education Agency has informed us that this information is contained on a computer data tape which was sent to the agency by Westinghouse, the independent contractor which prepares the Texas Assessment of Basic Skills tests and compiles the results thereof. He also informed us that this computer tape does not contain the names and addresses of individual students. In a telephone conversation, the requestor advised us that she would be content to obtain a duplicate of this computer tape. She stated that she does not desire that the agency produce a computer printout containing the information that she seeks.

Because this request actually centers upon a computer tape, the threshold question before us is whether such a tape is subject to required public disclosure under the Open Records Act. We answer in the affirmative. In Open Records Decision No. 32 (1974), this office held that a tape recording of an open meeting of a particular governmental agency was subject to required disclosure under the act. In that decision we reasoned that a tape recording produced during a meeting to aid in the preparation of accurate minutes of the meeting constitutes "information assembled in connection with the transaction of official business" within the meaning of section 3(a) of the act, which makes such information "public" unless it falls within one of the section 3(a) exceptions. Implicit in this decision is the acknowledgment that the form in which information is stored should have nothing to do with the issue of its availability under the Open Records Act. See also Open Records Decision Nos. 182 (1977); 65 (1975).

We agree with the reasoning of Open Records Decision No. 32 because we perceive no difference between a tape recording and a computer tape, at least insofar as the Open Records Act is concerned, we conclude that a computer tape is also within the ambit of section 3(a) of the act. In addition, we believe that a computer tape constitutes "developed materials" within the meaning of section 2(2) of the act, which includes such materials within the definition of "public records." Computer tapes are, therefore, not per se excepted from required disclosure under the act.

We turn next to your claim that the requested information is within section 3(a)(1) of the act, which excepts from required disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." You urge that the statute which makes this information confidential is section 16.176(e) of the Texas Education Code, which provides that:

The results of individual student performance on assessment instruments administered pursuant to this section are confidential and may be made available only to the student, the student's

parent or guardian, and to the school personnel directly involved with the student's educational program. However, overall student performance data shall be aggregated by campus and district and made available to the public, with appropriate interpretations, at regularly scheduled meetings of the governing board of each school district. The information may not contain the names of individual students or teachers. The commissioner of education shall compile all of the data and report it to the legislature, lieutenant governor, and governor no later than January 1 of each odd-numbered year.

The only information which is expressly made confidential by this section is "the results of individual student performance on assessment instruments" and "the names of individual students or teachers." You in effect argue, however, that this section impliedly excepts from disclosure even the "overall student performance data" contained on the agency's computer tape, which does not identify individual students. Essentially, your position is that section 16.176(e) creates the only two means by which information concerning student performance on the TABS tests may be released. In other words, you contend that under the rule of expressio unius est exclusio alterius, only that information which is released by local school boards at regular board meetings and by you in your required report to the legislature, lieutenant governor, and governor is available to the public. Overall student performance data which is in your possession, but which is not released in either of these two ways, need not, under your line of reasoning, be disclosed. We note that your 1982 report discusses overall student performance on the TABS test on a statewide and regional, but not district or campus, basis.

We disagree with your construction of section 16.176(e). In our opinion, it requires far too restrictive a reading of this section, it places too much emphasis upon a rule of statutory construction which, as the court observed in Blankenship v. Highlands Insurance Company, 594 S.W.2d 147, 150 (Tex. Civ. App. - Dallas 1980, writ ref'd n.r.e.), "requires great caution in its application," and it overlooks some important language in the section.

In the first place, as we read section 16.176(e), the intent of the second and fourth sentences was not to create the only means by which overall student performance data can be released to the public. As we have observed, the section expressly makes confidential only certain information; we do not believe that the legislature intended to make any additional information confidential by implication. In our opinion, the second and fourth sentences were put in the statute, not to limit the availability of overall student performance data, but

to make it clear to the named parties that they have specific duties with respect to this data. The second sentence, in other words, emphasizes to local school boards that, although they must protect the identities of individual students, they cannot keep from the public the overall student performance data. The fourth sentence informs the commissioner of education that he has a duty to compile the performance data and report it to the designated parties.

Moreover, even if we were to assume that these two sentences do specify the only two ways in which overall student performance data can be released, we would still conclude that the information sought by this particular requestor is not protected from disclosure under this section. The fourth sentence of section 16.176(e) directs the commissioner of education to "compile all of the data" and report it to the named parties. (Emphasis added). In our opinion, the phrase "all of the data" embraces the "overall student performance data... aggregated by campus and district" to which the second sentence refers. Thus, the commissioner's 1982 report should have included this data. The fact that it did not is irrelevant for purposes of this decision; the point is that because the legislature has stated that this data is to be included in the commissioner's report, it can hardly be argued that, at least after the date on which the report was submitted, which in this instance was October 9, 1982, this data can be concealed from the public. Because the commissioner's report is available to the public, the data which it is supposed to contain must be available to the public as well, at least after the date on which the report was submitted.

We therefore conclude that the information at issue here is not protected from required disclosure by section 16.176(e) of the Texas Education Code.

We next consider section 3(a)(14) of the act. This section excepts from required disclosure:

student records at educational institutions funded wholly, or in part, by state revenue; but such records shall be made available upon request of educational institution personnel, the student involved, or that student's parent, legal guardian, or spouse.

As we have noted, it is our understanding that the names and addresses of individual students are not contained on the agency's computer tape. This being so, the release of overall student performance data aggregated by district and campus, and even classified according to various demographic variables, will not, in most instances, cause any problem under section 3(a)(14). The student population of most districts is such that it will be difficult, if not

impossible, to use this data to ascertain the identities of particular students. The likelihood that such information can be ascertained does become somewhat greater, however, as the population of the school district or campus in question decreases.

In Open Records Decision No. 206 (1978), this office addressed the question of whether anonymous student evaluations of teachers are available to the public. In that decision we acknowledged the problems which are inherent in releasing information which does not, on its face, identify particular students, but which may, in some instances, be used to obtain that information. It resolved this dilemma in the following manner:

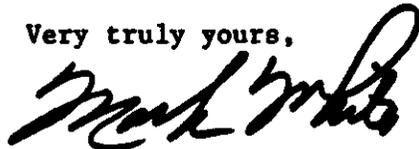
You contend that disclosure of the information would contravene the Family Educational Rights and Privacy Act of 1974 (the Buckley Amendment), 20 U.S.C. §1232g, and section 14(e) of the Texas Open Records Act, since the questionnaire includes personally identifiable information as to ethnic background. We agree that in some instances it is possible that disclosure of the answer to item number 39 concerning ethnic background could make a particular student's identity easily traceable. See Open Records Decision No. 165 (1977). No such specific information has been submitted on which we can make a factual determination. We believe that the district may delete the responses of certain class members to item number 39 only to the extent that it is reasonable and necessary to avoid personally identifying a particular student in the class. If the requestor objects to the extent of such deletions in a particular instance, we will accept a request to determine the issue of whether the specific information deleted is excepted from public disclosure. (Emphasis added).

We believe that this approach should be utilized in this instance. If you conclude that your computer tape can provide the information which the requestor wants without jeopardizing the identities of particular students, you should provide her with a duplicate of the tape. If, however, you reasonably conclude that some of the requested information must be withheld because nondisclosure is "necessary to avoid personally identifying a particular student," you may decline to release it. For example, nondisclosure may be necessary where the student population of a particular district or campus is so small that the release of the data in the form sought by the requestor "could make a particular student's identity easily traceable." If you decide to withhold certain data and the requestor

objects, "we will accept a request to determine the issue of whether the specific information deleted is excepted from public disclosure." Open Records Decision No. 206 (1978).

In closing, we note that the agency may incur various costs in making the requested information available to the requestor in a form, such as an edited computer printout, which protects the identities of individual students. Charges for these costs should be determined pursuant to section 9 of the Open Records Act.

Very truly yours,



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