



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

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Richard Rafes, J.D., Ph.D.
Vice President for Legal Affairs and
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University of North Texas
P.O. Box 13426
Denton, Texas 76203-6426

OR95-755

Dear Dr. Rafes:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32251.

The University of North Texas (the "university") received a request for:

1. A copy of comprehensive exam questions;
2. A copy of the requestor's responses/answers to the exam questions;
3. A copy of each grader's response/grade to the requestor's answers to the exam questions; and
4. A response to what constitutes a "fail."

You state that the university allowed the requesting student to review the material pursuant to the university's obligations under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. However, you claim that FERPA does not obligate the university to provide the requestor with a copy of the requested information. You also claim that the requested information is excepted from disclosure under section 552.122. We have considered the exception you claimed and have reviewed the documents at issue.

You state that no documents responsive to category (4) exist. The Open Records Act does not require a governmental body to disclose information that did not exist at the time the request was received. Open Records Decision No. 452 (1986) at 3. Therefore, the university need not produce any documents in response to category (4).

Section 552.026 of the Government Code incorporates the requirements of FERPA into the Open Records Act. Open Records Decision No. 431 (1985). Section 552.026 provides:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Therefore, FERPA controls the release of "education records" under the Open Records Act.

FERPA provides:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children.

20 U.S.C. § 1232g(a)(1)(A).

Additionally, FERPA states:

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

Id. at 1232g(d). "Education records" are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A); *see also* Open Records Decision Nos. 462 (1987) at 14-15, 447 (1986). Therefore, under FERPA, a student over the age of eighteen has a special right of access to his or her education records.

With the exception of the test questions, the documents submitted to us for review are clearly education records as defined by FERPA. We conclude that the test questions are not education records because they do not directly relate to a student. We assume that the student requestor is over the age of eighteen and accordingly has a special right of access to those documents that are education records. The university has allowed the student to review the requested documents. However, you claim that FERPA does not require the university to provide the student requestor with copies of these records. This office has addressed this issue before. In Open Records Decision No. 152 (1977), we concluded that, as FERPA “neither requires nor prohibits the providing of copies of education records to persons who may lawfully inspect those records,” the provisions of the Open Records Act applied. Open Records Decision No. 152 (1977) at 2, 3. The Open Records Act requires that the requesting party be afforded an opportunity to take notes of the contents of the documents in question, or to pay for their duplication, or both. *Id.* at 2 (quoting Open Records Decision No. 38 (1974)). Therefore, the university must make available to the requestor copies of the requestor’s responses to the exam questions and the graders’ evaluations of the requestor’s answers to the questions upon payment of a reasonable fee. *See id.* at 3.

We next address whether section 552.122 of the Government Code excepts the exam questions from disclosure. Section 552.122 excepts from disclosure:

(a) A curriculum objective or test item developed by an educational institution that is funded wholly or in part by state revenue

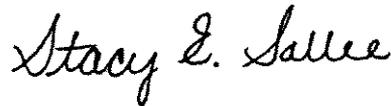
(b) A test item developed by a licensing agency or governmental body.

In Open Records Decision No. 537 (1990), this office determined that section 552.122 excepts the answer keys of a school district's exam questions. In Open Records Decision No. 626 (1994), this office determined that the term “test item” in section 552.122 includes any standard means by which an individual’s or group’s knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee’s overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 (1994) at 6. Section 552.122 may apply where release of “test items” might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976).

We have held that where it is a governmental body's policy to reuse examination questions and knowledge of a past examination's questions would compromise the effectiveness of future examinations, the governmental body may maintain the confidentiality of past examination questions. Attorney General Opinion H-483 (1974); Open Records Decision Nos. 353 (1982) at 1, 118 (1976) at 1; *see* Open Records Decision No. 626 (1994) at 5. The submitted questions appear to comprise a comprehensive exit examination for a masters of public affairs candidate. We believe that these types of examinations are tailored for the particular student based on his or her field of study. However, if it is the university's policy to reuse these test questions, the university may withhold the questions.

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 under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Government Section

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Ref.: ID# 32251

Enclosures: Submitted documents