

Recent Developments Affecting the Disclosure of Test Data and Materials: Comments Regarding the 1996 Statement on the Disclosure of Test Data¹

Committee on Psychological Tests and Assessment, American Psychological Association

INTRODUCTION

In response to concerns by psychologists regarding the disclosure of test data and materials, the Committee on Psychological Tests and Assessment (CPTA) of the American Psychological Association (APA) produced a document entitled "Statement on the Disclosure of Test Data" (CPTA, APA, 1996), hereinafter referred to as the *Statement*. Since the publication of that document, several events have occurred that could bear upon the decisions psychologists may need to make in connection with the disclosure of test data and materials. These include (a) the third revision of the *Standards for Educational and Psychological Testing* (American Educational Research Association [AERA], APA, National Council on Measurement in Education [NCME], 1999; hereinafter referred to as the *Testing Standards*); (b) revision of the *APA Ethical Principles of Psychologists and Code of Conduct* (APA, 2002; hereinafter referred to as the *Ethics Code*); and (c) passage of the Health Insurance Portability and Accountability Act (HIPAA), which was enacted in 1996 but did not begin to take effect until April 2001. In addition, it has been noted that the 1996 *Statement* did not mention the Federal Educational Rights and Privacy Act (FERPA), which can also affect the disclosure of test data by psychologists, particularly those who engage in psychological testing in an educational setting.

Because the new language included in the *Ethics Code*, the *Testing Standards*, HIPAA, and FERPA that relates to test data and test materials can be confusing and even contradictory relative to each other and the *Statement*, the CPTA believes a discussion of these issues may be valuable to psychologists. The purpose of this document is to illustrate some of the potential legal and ethical conflicts that may be encountered by psychologists as well as the nature of the decisions psychologists may face in light of these recent developments.

It should be noted that this document does not provide and is not intended to provide guidelines, set standards or policy, represent legal advice, or in any other way promote a par-

ticular course of action or decision by psychologists. This document discusses some of the relevant, current issues for psychologists regarding hypothetical situations that may arise in practice and involve the need to make a decision about disclosure of test data and materials. Psychologists with a need to make a decision, or those contemplating any action relative to disclosure of test data and materials, are advised to refer to the *Statement* and other official guidelines and standards (e.g., *Ethics Code*, *Testing Standards*) and seek counsel from an attorney. Given the changes outlined above, such a statement is timely and essential.

The first section summarizes some general issues surrounding the release of test information including a discussion of the distinction between test data and test materials. The definitions of test data and test materials as articulated in the 2002 *Ethics Code* provide the basic structure underlying the test disclosure process. The second section of this document focuses on a brief description of HIPAA and its possible relevance to disclosure of test data and materials. Similarly, the third section offers a brief description of FERPA and its potential applicability to decisions regarding disclosure of test data and materials. The fourth and final section highlights various aspects of test data and materials

* The original 1996 Statement on the Disclosure of Test Data was ratified by the APA Council of Representatives in 1997 and as such, became official APA policy on the matter and remains so. This document is not intended to replace or supersede the previous Statement or any other existing guidelines or policies specific to the disclosure of test data and materials, whether official or unofficial, published or unpublished, that may have been authored by APA or any of its constituent boards, divisions, committees, or other governance bodies.

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disclosure addressed under the *Ethics Code* and that correspond to the *Testing Standards*. The information is listed in tabular format for easy reference.

DISCLOSURE OF TEST DATA AND MATERIALS

General Issues

The Distinction Between Test Materials and Test Data

In the original *Statement* (CPTA, APA, 1996), test materials were subsumed under test data. Test data included “an individual’s test results, raw test data, records, written/computer generated reports, global scores or individual scale scores, and test materials such as test protocols, manuals, test items, scoring keys or algorithms, and any other materials considered secure by the test developer or publisher” (p. 75). No distinction between test data and test materials was made in the original *Statement*. However, a distinction between test data and test materials is promulgated by the new *Ethics Code* (APA, 2002) in Standard 9.04(a), Release of Test Data, and Standard 9.11, Maintaining Test Security.

The definition of test data from Standard 9.04(a) follows: “The term *test data* refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists’ notes and recordings concerning client/patient statements and behavior during examination. Those portions of test materials that include client/patient responses are included in the definition of *test data*.” Test data “includes any information the psychologist collects that is unique to a particular client.” (Behnke, S., *Monitor on Psychology*, 2003, p. 70). Test data are answer sheets, record forms, or protocols that are identified by the client/patient’s ID number, including record forms where the client/patient has marked the bubbles or filled in the blanks or the examiner has recorded the client/patient’s responses. Test data also include profile, summary, or interpretive reports and psychologists’ notes and recordings that are identified by the client/patient’s ID number.

In contrast, *test materials* are defined by the *Ethics Code* in Standard 9.11, Maintaining Test Security: “The term *test materials* refers to manuals, instruments, protocols, and test questions or stimuli and does not include *test data* as defined in Standard 9.04, Release of Test Data.” Test materials are those that “do not include anything unique to this particular client” (Behnke, *Monitor on Psychology*, 2003, p. 70). Thus, test materials would include kit materials that are reused

without alteration, such as blocks and other manipulatives, stimulus booklets, and cards, etc.

Test data and test materials are mutually exclusive; test data contain information unique to a client/patient, and test materials contain no such information. The distinction between test data and test materials is an important development that has relevance to the disclosure of information by psychologists.

Request for the Release of Test Data

Because of the potential conflicts among the *Ethics Code*, the *Testing Standards*, HIPAA, FERPA, state laws and regulations, case law, and other standards and regulations, a request received by a psychologist for the release of test data or materials is likely to necessitate careful consideration. For straightforward written release requests, such as those initiated by an individual client who also was the examinee, psychologists may refer to the *Ethics Code* and the *Testing Standards* for specific guidance regarding whether release of test data and materials is or is not appropriate. For example, the *Ethics Code* Standard 9.04(a) states: “Pursuant to a client/patient release, psychologists provide test data to the client/patient or other persons identified in the release.” Other requests, however, may be more complicated. For example, in cases where the mental state, functional capacity, or motivation of the client is questionable, the actions or decisions that constitute compliance with applicable ethical and legal standards may not be clear. *Ethics Code* Standard 9.04(a) provides some guidance for those circumstances: “Psychologists may refrain from releasing test data to protect a client/patient or others from substantial harm or misuse or misrepresentation of the data or the test, recognizing that in many instances release of confidential information under these circumstances is regulated by law.”

One of the major issues that psychologists may face at the outset of a request for release of test data and materials, and which might also affect subsequent decisions and actions, is determining who the client is. In some cases it can be difficult to clearly identify the client at the initiation of the assessment process. This may occur when the request for assessment emanates from someone other than the examinee, such as a custodial or noncustodial parent, an employer or potential employer, a school, a court, or an attorney. These circumstances can complicate compliance with a written release from an examinee who is not the client.

In such cases, release of test data pursuant to the written consent of the examinee, but without the written consent of the client, may conflict with the *Ethics Code*, *Testing Standards*, and other statutes and guidelines. Thus, establishing clearly who is authorized to petition for a release of test data and materials is not always straightforward and may be critical in ensuring that subsequent decisions and actions are appropriate and comply with applicable standards.

Clarifying who has the right to consent to disclose test data may be viewed as a process that begins with the *referral* for the assessment, not with the *request* for release of test data or materials. There may well be cases where psychologists know in advance that a request for release of test data or materials will follow completion of an evaluation, and this could represent a point of discussion prior to the provision of any services. In addition to clearly identifying the client (even when the client and the examinee are the same), other topics for such a discussion might include clarification regarding who does and does not have access to the test data and materials, clarification regarding who has the right to consent to disclose test data and who has the authority to view test data, ensuring that informed written consent regarding the nature and purpose of the assessment has been obtained, and determining the agenda and motivation of the client and the examinee when the examinee is not the client. Such information could prove invaluable in cases where psychologists encounter complex requests for test data disclosure.

Psychologists who are confronted with a subpoena or court order are encouraged to review Standard 9.04(b) of the *Ethics Code* and the *Strategies for Private Practitioners Coping With Subpoenas or Compelled Testimony for Client Records or Test Data* (APA, Committee on Legal Issues, 2006).

If there is conflict between ethics, testing standards, law, and regulations, then understanding when to release data can be unclear. Standard 1.02 of the *Ethics Code* speaks to resolving the conflicts between ethics, law, and regulations: “If psychologists’ ethical responsibilities conflict with law, regulations, or other governing legal authority, psychologists clarify the nature of the conflict, make known their commitment to the Ethics Code, and take reasonable steps to resolve the conflict consistent with the General Principles and Ethical Standards of the Ethics Code. Under no circumstances may this standard be used to justify or

defend violating human rights.” (*The APA Ethical Principles of Psychologists and Code of Conduct*, 2002, Amended June 1, 2010, p. 4). Psychologists may want to reflect on the related ethical codes and consult with their attorneys.

The following sections offer information about the newer standards, regulations, and codes that may affect decisions and actions related to disclosure of test data and materials.

Health Insurance Portability and Accountability Act (HIPAA)

HIPAA was enacted in 1996 to create a national standard for protecting the privacy of patients’ personal health information particularly in light of the dramatic increase in the use of electronic methods to communicate patient health information. Overall, HIPAA is consistent with trends in state law over the last decade or so that emphasize protection of health records but also specifies greater increase and access to such records, which may include test data. HIPAA provides the patient/client with the right, under certain conditions, to inspect and copy records that contain his or her Protected Health Information (PHI). PHI is the set of designated records with the patient’s individually identifiable health information that are maintained by health plans, doctors, hospitals, clinics, nursing homes, and other entities covered by HIPAA. The provisions of HIPAA relevant to psychologists involve granting individuals and other authorized entities relatively unlimited rights to inspect and copy health records that may include test data. The regulation also requires new safeguards to protect the security and confidentiality of an individual’s protected health information.

The *Ethics Code* appears to deal with many of the standards adopted by HIPAA. However, this does not mean that the applicability of HIPAA standards will conform in all cases with the *Ethics Code*, *Testing Standards*, state statutes, or case law. Because HIPAA has been enacted relatively recently, the breadth and depth of its impact on psychological practice, including assessment, is not yet clearly defined or well known. Given the complex, dynamic, and evolving legal landscape that may characterize, for any particular case, compliance with HIPAA, this document is not able to inform psychologists about all the elements of HIPAA that apply specifically to the release of test data and materials or how consistent these elements are with the *Ethics Code* and the *Testing Standards*. Instead, because interpretations of

HIPAA requirements may vary, psychologists who have any questions or concerns about what constitutes an appropriate decision or action may wish to seek guidance from a HIPAA compliance officer or an attorney. Other pertinent and useful information may be drawn from the Web sites of state psychological associations and other professional associations, universities, and health organizations within their states that include HIPAA guidance. Psychologists are also referred to articles regarding the complexities encountered at the nexus of HIPAA and other requirements by Behnke (2003, 2004), Erard (2004a, 2004b), Fisher (2003, 2004), Rogers (2004), and Smith and Evans (2004).

Family Educational Rights and Privacy Act (FERPA)

The Family Educational Rights and Privacy Act (FERPA), enacted in 1974, is a federal law that protects the privacy of student educational records. Test data and materials are examples of the type of information that may be included in a student's educational records. The law applies to all schools that receive funds under an applicable program of the U.S. Department of Education.

In general, FERPA gives parents certain rights with respect to their children's educational records, which may include test data. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred (e.g., students in college) are referred to as "eligible students."

Wording in FERPA gives parents or eligible students the right to inspect and review their children's or their own educational records maintained by the school. Schools are not required to provide copies of records unless it is impossible for parents or eligible students to review the records (e.g., due to geographical distance, financial hardship involved with travel, etc.). Schools may also charge a fee for copies.

Parents or eligible students have the right to request that a school correct records that they believe to be inaccurate or misleading. If the school decides not to amend the record, the parent or eligible student then has the right to a formal hearing. After the hearing, if the school still decides not to amend the record, the parent or eligible student has the right to place a statement within the record setting forth his or her view about the contested information.

Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's educational record. However, FERPA allows schools to disclose those records without consent to the following parties or under the following conditions:

- School officials with legitimate educational interest,
- Other schools to which a student is transferring,
- Specified officials for audit or evaluation purposes,
- Appropriate parties in connection with financial aid to a student,
- Organizations conducting certain studies for or on behalf of the school,
- Accrediting organizations,
- Appropriate officials in cases of health and safety emergencies,
- State and local authorities within a juvenile justice system pursuant to specific state law, or
- To comply with a judicial order or lawfully issued subpoena

Much as with HIPAA, the provision that allows parents and students themselves the right to have access to their educational records (which may contain test data) could create situations in which psychologists are uncertain about whether compliance with disclosure requests might conflict with professional ethics and standards. Because this document cannot guide such determinations, psychologists may find it helpful to review the *Ethics Code* and consult an attorney. Again, the information provided here is not intended to guide decisions or actions relative to disclosure of test data or materials but rather to indicate that there exists the potential for conflicts between FERPA and professional psychology ethics and standards.

The *Ethics Code* and the *Testing Standards*

Tables 1 and 2 contain key features of the revised *Ethics Code* and the *Testing Standards* that provide additional reference for information regarding issues surrounding requests for disclosure of test data and materials. Table 1 summarizes the sections of the *Ethics Code* that relate to test data and test material, and Table 2 summarizes points in the *Testing Standards* that also relate to disclosure of test data and materials. Note, however, that not all of the issues listed in each table have been discussed in this document (e.g., maintaining copyright interests, flagging accommodations). The issues listed in these tables represent some of the possible

situations that may necessitate consideration of the relevant standards in making a determination about how to proceed following a request for disclosure of test data and materials. The scenarios listed herein are not exhaustive of the full range of instances where psychologists might be confronted with a need to make a decision or take action in this regard. Rather, the issues listed are simply some of the more common ones likely to be encountered in psychological practice, and the reference to the appropriate standards is provided solely to assist psychologists in securing additional information that may be helpful in formulating decisions and actions.

CONCLUSION

It is important to note that even when the *Ethics Code*, *Testing Standards*, HIPAA, and FERPA are consistent and in agreement with each other, they may not prevail over state law and regulations, case law, or other professional or institutional guidelines or standards, such as the *Principles for the Validation and Use of Personnel Selection Procedures* (Society for Industrial and Organizational Psychology, 2004). Psychologists may be subject to relevant state statutes and case law and other appropriate guidelines and standards in addressing legal and ethical conflicts associated with requests for the release of test data or materials.

The recent revision of the *Ethics Code* and the *Testing Standards*, the passage of HIPAA, and the need to consider FERPA appear to call for commentary that explores the potential conflicts or misalignments among these documents and regulations. In this regard, the content of this document sought to briefly describe some of the more salient developments that present new challenges or create apparent conflicts in the process of determining appropriate action when a psychologist receives a request for disclosure of test data and materials. These issues are primarily the result of advancements in professional standards in psychology related to ethics and testing and their relationship to changes in the legal rights and regulations governing psychological data and information. As noted throughout, this document does not provide and is not intended to provide any guidance on matters related to disclosure of test data and materials. Moreover, the issues covered in this document cannot be considered comprehensive enough to cover every conceivable scenario that may arise relative to disclosure of test data and materials in psychological practice. In cases where psychologists have questions or concerns regarding appropriate action surrounding requests for disclosure of test data and materials, there is no substitute for reviewing the relevant *Ethics Code* and *Testing Standards* and seeking legal counsel.

Table 1. Language Relevant to the Release of Test Data and Materials in the 2002 *Ethics Code*

Issue	Ethical Standard
Distinction between test data and test materials	9.04, 9.11
Release of test data (with or without consent)	9.04, 4.05
Release of test materials	9.11, 9.04
Informed consent	3.10, 9.03
Interpreting assessment results	9.06
Bases for assessments	9.01
Use of assessment	9.02
Obsolete tests and outdated test results	9.08
Explaining assessment results	9.10
When explanations of results are not required	9.10
Maintaining copyright interests	9.11
Conflicts between ethics and professional demands	1.03
Conflicts between ethics, laws, regulations, and governing authority	1.02
Assessment in organizations	1.02, 1.03, 3.07, 3.11, 4.05, 9.03, 9.10
Forensic assessments	4.02, 4.05, 9.01, 9.03

Table 2: Language Relevant to the Release of Test Data and Materials in the 1999 *Testing Standards*

Issue	Relevant Standards
Keeping test records and results secure from unauthorized release in light of changing technologies (e.g., facsimile transmission, computer networks, databases)	5.13, 5.16, 8.6,
Obligations to help the public or policymakers understand and interpret test data, usually for groups (e.g., educational test results), particularly when test scores are disaggregated by groups	5.10, 7.8, 11.17, 11.18, 13.15, 13.19, 15.11, 15.12
Flagging accommodations when releasing test results for clients with disabilities	9.5, 10.11
Informing examinees of policies regarding release of test data when they retake a test	11.11
Correcting material errors after release of score reports	5.14
Avoiding stigmatizing the examinee when test results assign examinees to a category	8.8
Developing clear policies regarding retention and release of test data and informing examinees and test data recipients (e.g., employers, policymakers) of these policies	5.15, 5.6, 8.2, 11.17
Reporting test scores in educational settings including obligations regarding error, date of testing, and norms information	13.15, 13.16

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