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GEORGE DEUKMEJIAN  
Attorney General

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OPINION	:	No. 80-1106
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of	:	<u>MARCH 3, 1981</u>
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GEORGE DEUKMEJIAN	:	
Attorney General	:	
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Paul H. Dobson	:	
Deputy Attorney General	:	
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The Honorable Norman S. Waters, Member of the Assembly, Seventh District, has requested an opinion on the following question:

May a person obtain from an elementary or high school district a copy of the textbook and other written instructional material used in a district school pursuant to the provisions of the California Public Records Act?

CONCLUSION

An elementary or high school district must provide a copy of a textbook or other written instructional material used in the district pursuant to a request, accompanied by the requisite fee, made pursuant to the California Public Records Act unless: (a) it is test material exempt from disclosure by the Act; (b) providing the copy would infringe a copyright; or (c) providing the copy would constitute an unreasonable burden on the operation of the district.

## ANALYSIS

The California Public Records Act (ch. 3.5 (commencing with § 6250), div. 7, tit. 1 of the Gov. Code) generally provides that public records, which are maintained by a state or local agency, are open to public inspection at all times during office hours of the agency. (Gov. Code, § 6253.)

Government Code section 6256 provides:

“Any person may receive a copy of any identifiable public record or copy thereof. Upon request an exact copy shall be provided unless impractical to do so. Computer data shall be provided in a form determined by the agency.”

Government Code section 6257 provides:

“A request for copy of an identifiable public record or information produced therefrom, or a certified copy of such record, shall be accompanied by payment of a fee or deposit to the state or local agency, provided such fee shall not exceed the actual cost of providing the copy, or the prescribed statutory fee, if any, whichever is less.”

Government Code section 6258 provides that a person may institute judicial proceedings for injunctive or declaratory relief to enforce the right to inspect or to receive a copy of any public record.

Subsection (d) of Government Code section 6252 defines “public records” for purposes of the act to include “any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.” Subsection (e) of section 6252 provides:

“‘Writing’ means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punch cards, discs, drums, or other documents.”

Local school districts are agencies subject to the provisions of the California Public Records Act. (§ 6252, subsections (a) and (b).)

By the reference to “textbooks and other written instructional materials” in the question, we understand the requester to mean instructional material within the meaning of title 2, division 3, part 33 (§ 6000 *et seq.*) of the Education Code. Education Code section 60011 provides:

“‘Instructional material’ means all materials designed for use by pupils and their teachers as a learning resource and which help pupils to acquire facts, skills, or opinions or to develop cognitive processes. Instructional materials may be printed or nonprinted and may include textbooks, educational materials and tests.”

Section 60016 provides:

“‘Textbook’ means a book designed for use by pupils as a source of instructional material, or a teacher’s edition to the same book.”

The Education Code set forth certain requirements with respect to the content of instructional materials. (See Ed. Code, §§ 60040–60047, 60110, 60650.) It also sets forth various provisions with respect to the selection, adoption, and procurement of textbooks and other instructional materials for elementary schools (Ed. Code, §§ 60200–60315) and secondary schools (Ed. Code, §§ 60400–60420).<sup>1</sup>

Our first task is to determine whether instructional materials are “public records” within the meaning of the California Public Records Act. The legislative intent behind the California Public Records Act is to provide public access to *information* concerning the conduct of the people’s business. (*Northern California Police Practices Project v. Craig* (1979) 90 Cal. App. 3d 116, 123.) It is not limited to particular documents recording official action, but also includes information which is supplied to the government which may not in itself reveal official action, but may have sharp relevance to inquiries into official conduct. (See *Black Panther Party v. Kehoe* (1974) 42 Cal. App. 3d 645, 652.)

In 58 Ops. Cal. Atty. Gen. 65,67 (1975) we had occasion to construe the phrase “. . . any writing containing information relating to the conduct of the public’s business . . .” in subsection (d) of Government Code section 6252 with respect to a pupil’s mental examination report on file in a school district and found it to be a “public record” within the meaning of that provision. There (at p. 67) we stated:

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<sup>1</sup> We note that with respect to materials used in elementary schools the statutory scheme expressly provides for public participation in the selection of instructional materials. (Ed. Code, §§ 60202, 60203, 60262.)

“The ‘business’ of a school district is the education of students and the report in question was obtained in order to promote such education.”

Instructional materials are also obtained and used to promote education—the “business” of a school district. The content of textbooks and other instructional materials may not itself reveal government action, but the fact that such material has been considered or selected for use, or is being used for instruction in the public schools, clearly relates “to the conduct of the public’s business.” (*Cf. Northern California Police Practices Project v. Craig, supra*, 90 Cal. App. 3d 116 (training materials used by the California Highway Patrol held covered by the act).)

We note in this respect that Government Code section 6254 exempts from disclosure certain records which would otherwise be public records open to inspection pursuant to Government Code section 6253. (*Cook v. Craig* (1976) 55 Cal. App. 3d 773, 781.) Accordingly, in some cases, the exceptions set forth in section 6254 may by reference demonstrate the breadth of the term “public records” in section 6252. (See *Cook v. Craig, supra*, at p. 782.)

With respect to instructional material, subsection (g) of section 6254 exempts “[t]est questions, scoring keys, and other examination data used to administer [an] . . . academic examination, except as provided for in chapter 3 (commencing with section 99150) of part 65 of the Education Code.” As we have seen a “test,” like textbooks and other educational materials, is included in the definition of “instructional material” in Education Code section 60011. Thus, the Legislature in exempting certain types of instructional material from the disclosure requirements of the California Public Records Act, has revealed its intent that the act does apply to other instructional material.<sup>2</sup> We conclude that textbooks and other written instructional material used in a public school constitute public records subject to the provisions of the California Public Records Act.

We are asked whether a person may obtain a copy of such record pursuant to the Act. Government Code section 6256 states the rule that unless an identifiable public record is exempt from disclosure, a person may not only inspect it but also “receive” a copy of the record.

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<sup>2</sup> The disclosure and copying of any ‘pupil record,’ i.e.; an item of information directly related to an identifiable student, is governed by Education Code sections 49060–49078 which prevail over the provisions of the California Public Records Act. (Ed. Code, § 49060.) Thus, if any “instructional material” as defined in Education Code section 60011 also contains “pupil record” information, that information would not be subject to general disclosure although there may be a duty to excise the confidential information from the nonconfidential information. (See *Northern California Police Practices Project v. Craig, supra*, 90 Cal. App. 3d 116.)

In *Rosenthal v. Hansen* (1973)34 Cal. App. 3d 754, the Court of Appeal had occasion to consider the issue of “. . . whether the [California] Public Records Act mandates any public official or department to prepare and provide copies of all public records regardless of their nature and regardless of their bulk.” In *Rosenthal*, the plaintiff sought to have California Department of Human Resources Development provide him with copies of (a) the department’s Benefit Determination Guide, (b) all other circulated papers, memos, manuals and documents used to determine eligibility for unemployment insurance benefits, and (c) the amendments, deletions, additions, supplements, updates and all other changes in these materials. Plaintiff offered to pay any reasonable fee incurred in furnishing the copies. None of these records were exempt from disclosure and they were all available to the public for inspection in the offices of the defendant at all reasonable times.

The original request for copies involved, according to defendant’s estimate, 80,000 to 85,000 pages of material. Defendant declined to provide plaintiff with such copies. The trial court denied plaintiff’s petition, finding: (1) that the California Public Records Act did not require defendants to provide plaintiff with copies of public records not yet in existence, (2) that it was not the intent of the California Public Records Act to permit persons to make general requests for public records from state agencies, (3) that where a general request for copies of public records is made the Act requires that the person making the request be provided with the public records so that he may reproduce the public records himself at his own cost, and (4) that public agencies are required to provide at a reasonable cost copies of public records in response to a request for specific records related to a specific subject matter.

On appeal plaintiff abandoned his contention that he was entitled to receive automatically copies of records which would be prepared in the future. The Court of Appeal affirmed the trial court’s decision. It concluded that while the California Public Records Act would appear literally to make the right to inspect and the right to receive copies coextensive, the literal language of section 6256 must give way to the settled principle of statutory interpretation that language of a statute should not be given a literal meaning if to do so would result in absurd consequences which the Legislature did not intend. (*Rosenthal v. Hansen*, *supra*, 34 Cal. App. 3d at p. 760.)

The Court of Appeal cited *Bruce v. Gregory* (1967)65 Cal. 2d 666, a case which predated the California Public Records Act, but which construed a former provision in the Code of Civil Procedure which authorized a citizen to inspect and obtain a copy of any public writing of the state. The Supreme Court in *Bruce* concluded that the right to inspect and have a copy made of a public document was not absolute but was subject to the implied rule of reason. The Court in *Bruce* held that a custodian of public records could formulate reasonable rules and regulations necessary to protect the safety of the records against loss, to prevent inspection from interfering with the orderly function of the public

agency, and to generally avoid chaos in record archives.

The Court of Appeal in *Rosenthal* applied the rule of reasonableness set forth in *Bruce* and held that while the plaintiff had the right to secure specific documents, public agencies could impose reasonable restrictions on general requests for voluminous classes of documents restricting copies to specific requests. As we have seen, with the exception of test questions, scoring keys and other examination data (Gov. Code, § 6254, subsection g), instructional material is subject to disclosure pursuant to the California Public Records Act. The *Rosenthal* case states the rule that upon request and upon the payment of a statutory fee or reasonable charge, a public agency has the duty to provide a person with a copy of any identifiable public record unless under the circumstances it would be unreasonable to do so. The reasonableness of any particular request for a copy of a public document presents a factual issue.

We have no particular facts before us and we cannot in this opinion set forth a definitive rule which would apply to all possible requests for copies of instructional materials. As already indicated, the Education Code sets forth a specific procedure for the adoption and procurement of instructional materials. In some cases it may be a simple matter to provide a copy of a particular instructional material to a person.<sup>3</sup> On the other hand, a particular request for copies of instructional materials may place an unreasonable burden on school officials. In such cases under the rule of *Rosenthal v. Hansen, supra*, 34 Cal. App. 3d 754, a school district would not be obligated to furnish such copies.

In this respect, we note the problem of copyrighted instructional materials. (See generally, 17 U.S.C. § 101 *et seq.*) Textbooks are often copyrighted and textbook publishers may resist uncompensated copying of portions of their copyrighted materials. (See Treece “Library Photocopying,” (1977) 24 U.C. L.A. L. Rev. 1020, 1052.) In addition to textbooks, other educational materials may be the subject of a copyright. (See, e.g. *Gelles-Widmer Company v. Milton Bradley Company* (7th Cir. 1963) 313 F. 2d 143 (copyright on educational flashcards).)

States and state officials are subject to federal copyright laws. (*Mills Music, Inc. v. The State of Arizona* (9th Cir. 1979) 591 F. 2d 1278; see also *Association of American Medical Colleges v. Carey* (N.D.N.Y. 1980) 482 F. Supp. 1358, 1361–1363; but see *Wihtol v. Crow* (8th Cir. 1962) 309 F. 2d 777.) We believe it is clear that the Legislature

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<sup>3</sup> For example, Education Code section 52327 authorized the governing board of a school district which maintains a regional occupational center to establish a bookstore on district property for the purpose of selling instructional materials. See also Education Code section 60310 which permits individuals to purchase instructional materials from lists adopted by the State Board of Education ‘for use only in California.

in enacting the California Public Records Act did not intend it to be used in a manner which would constitute a copyright infringement. We note that the Act itself expressly exempts from disclosure records the disclosure of which would be prohibited by federal law. (Gov. Code, § 6254, subsection k.) The Act does not address the issue of reproducing records, the reproduction of which is prohibited by federal law. However, to construe the Act as intending to authorize such activity would clearly result in an absurdity not intended by the Legislature.<sup>4</sup> (*Cf. Rosenthal v. Hansen, supra*, 34 Cal. App. 3d at p. 760–761.) Thus, we conclude that school authorities may refuse to honor a request pursuant to the California Public Records Act for a copy of copyrighted material, where the reproduction of such material would constitute a copyright infringement or where it would place an unreasonable burden on the school authorities to provide such a copy in compliance with copyright restrictions.

We emphasize that, even though instructional materials may be copyrighted, in many cases, it may be possible to comply with the California Public Records Act without infringing upon a copyright. For example, it would not be an infringement of a copyright to provide a person with a particular copy of copyrighted material if the copy has been purchased by the public agency. (17 U.S.C. § 109, subsection (a).) Additionally, reproduction of copyrighted material under certain limited circumstances may fall within the “fair use” exception to copyright restrictions. (17 U.S.C. § 107; *Key Maps, Inc. v. Pruitt* (S.D. Tex. 1978) 470 F. Supp. 33 (county fire marshal’s reproduction and distribution of copyrighted fire zone maps held to constitute “fair use” in view of public interest in dissemination of maps for fire prevention purposes).)

It is our conclusion, therefore, that an elementary or high school district must provide a copy of a textbook or other written instructional material used in the district pursuant to a request, accompanied by the requisite fee, made pursuant to the California Public Records Act unless: (a) it is test material exempt from disclosure by the Act; (b) providing the copy would infringe a copyright; or (c) providing the copy would constitute an unreasonable burden on the operation of the district.

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<sup>4</sup> The Education Code provides for the payment of royalties to publishers of instructional materials. (See Ed. Code, §§ 60222, subsection (d), 60281, subsection (e), 60283, 60289.)