



Texas State Board of Examiners of Psychologists

August 2020 Newsletter

Clearing Up the Confusion of When to Release Records as it Relates to Test Data and Test Materials: TSBEP Board Rule 465.22(c) Explained

There is a lot of discussion in the psychological community about what licensees need to do when testing materials and data are requested. Despite this being covered in TSBEP Board Rules, clarification will help all licensees do what is expected. This article is the Board's attempt to assist all licensees to better understand TSBEP Board Rule 465.22(c) for proper compliance in the best interest of the public. The Board cannot provide legal advice to licensees or the general public, therefore this article is not an exhaustive analysis of all applicable law and fact for every possible scenario regarding the below described authorities. A review of all Board rules and applicable law is still required and expected; and licensees are advised to seek out their own legal counsel if necessary or needed.

To review, TSBEP Board Rule 465.22(c)(3)-(5) states:

- (c) Access to Records.
 - (3) A licensee shall release information about a patient or client only upon written authorization from the patient or client, or as otherwise permitted or required under state or federal law.
 - (4) Test materials are not part of a patient's or client's record and may not be copied or distributed unless otherwise permitted or required under state or federal law.
 - (5) Test data are part of a patient's records and must be released to the patient as part of the patient's records. In the event test data are commingled with test materials, licensees may inquire whether the patient will accept a summary or narrative of the test data in lieu of having to either redact the test materials or extract the test data from test materials in order to comply with the request for records.

TSBEP Board Rule 465.1(19) and (20) define "test data" and "test materials":

- (19) "Test data" refers to a patient's specific answers to test materials, whether spoken or written, generated in drawings, or recorded by computers or other lab devices.
- (20) "Test materials" refers to test booklets, forms, manuals, instruments, protocols, software, as well as test questions, and stimuli protected by federal copyright law and used in psychological testing to generate test results and test reports.

There are four types of records to consider when making sure licensees do the right thing.

1. Records due to the work of an LSSP in a school setting.
2. The records due to the services performed by a licensee in a community setting, i.e. working at an agency or other organization such as a hospital.

3. The records due to the services performed by a licensee in a private practice setting.
4. The records due to the services performed by a licensee in a forensic setting.

School Setting: As it relates to records produced by an LSSP, those record requests would be the responsibility of the school district or private school where the work was performed rather than the LSSP releasing them independently. See Board rule 465.22(a)(6) which states as follows:

- (a) General Requirements.
 - (6) Licensees working in public school settings shall comply with all federal and state laws relative to the content, maintenance, control, access, retention and destruction of psychological and educational records, test data and test protocols.

Community Setting: The same is true for licensees working in community settings. In a community setting, it is the responsibility of the organization to utilize the policies and procedures of the organization while also following the TSBEP rules for those licensed by this board. Typically, the community organization owns the records. See Board rule 465.22(b)(6) which states as follows:

- (b) Maintenance and Control of Records.
 - (6) The possession, access, retention, control, maintenance, and destruction of records of psychological services rendered by a licensee as an employee of or contractor for an agency or organization remain the responsibility of that agency or organization upon termination of the licensee's employment or contract unless otherwise required by state or federal law or legal agreement.

It is important to note that licensees are still responsible for complying with all Board rules and if a licensee has knowledge that a community setting is violating record retention, maintenance, or access requirements it is incumbent upon the licensee to inform the community setting as it may also be in violation of other state and federal law.

Where record requests can get confusing is when a licensee is in private practice or in a forensic setting. For licensees in private practice and for those performing services for a court for forensic purposes, here is what to consider:

Private Practice Setting: When a client/patient asks for records, it is expected that the licensee will give the full file. If there is psychological testing, any test data gathered regarding the patient must also be released. If the test data is comingled with test materials the licensee may offer to provide a summary of the data but if a summary is not acceptable to the client/patient then the licensee will have to either redact the test materials or extract the test data from the materials. The client/patient does not get the test materials (i.e. test booklet) but the client/patient gets everything else in the licensee's file, including the licensee's notes. Please refer back to Board rule 465.22(c)(4)-(5) which is stated above.

The general purpose behind releasing the test data is so the patient may take the file to another qualified mental health professional who can fully review the work previously done to get a clear and accurate picture of all services previously performed. If a licensee is having trouble

differentiating between test data and test materials they should refer back to the definitions cited above and also consider the following questions. Was this information provided by the patient/client and was it used in any way in the evaluation of the client/patient? Or conversely, is the information in question directly and only authored by the test publisher (e.g. test questions)? The general purpose behind the exclusion from providing test materials is due to copyright law and maintaining the validity of the testing instrument. Often test publishers will require licensees to sign contracts which prohibits the release of the test materials created by a test publisher and informing the licensee that such materials are the intellectual property of the publisher. Therefore test materials maintain some level of protection from release but, with the test data being released, other qualified mental health professionals can purchase or contract with the test publisher and obtain a copy of the test materials previously used so they may not only review and check the work previously done but also ensure the continuity of care of the patient by having all the documentation to understand all the services previously provided to the patient.

If a licensee believes, in his or her professional judgement, that the requested records are reasonably likely to endanger the life or physical safety of the patient or another person, then the licensee may withhold some or all of the requested patient information but in order to do so the licensee must comply with the requirements of Board rule 465.22(c)(9)(C); provide the patient with a written statement that is signed and dated reflecting the licensee's determination regarding the records and specifying the portion of the records being withheld, the reason for the denial, and the duration of the denial.

Forensic Settings: When records are requested in a forensic setting the first question should be what is the nature of the forensic engagement and who is the client? For example, a licensee may be hired by a police department to conduct a fitness for duty evaluation for employees or the Social Security Administration may employ a licensee to conduct a disability evaluation of an individual. In both examples the client is the employing or contracting entity and not the evaluatee. Therefore any request for records by a former evaluatee should be directed to the employing or contracting entity. It is important that licensees document and inform the clients and evaluatees of the true nature of this arrangement. See Board rule 465.18(c)(1)-(9) which states as follows:

- (c) Describing the Nature of Services. A licensee must document in writing that subject(s) of forensic evaluations or their parents or legal representative have been informed of the following:
 - (1) The nature of the anticipated services (procedures);
 - (2) The specific purpose and scope of the evaluation;
 - (3) The identity of the party who requested the psychologist's services;
 - (4) The identity of the party who will pay the psychologist's fees and if any portion of the fees is to be paid by the subject, the estimated amount of the fees;
 - (5) The type of information sought and the uses for information gathered;
 - (6) The people or entities to whom psychological records will be distributed;
 - (7) The approximate length of time required to produce any reports or written results;
 - (8) Applicable limits on confidentiality and access to psychological records;
 - (9) Whether the psychologist has been or may be engaged to provide testimony based on the report or written results of forensic psychological services in a legal proceeding;

When a psychologist is court appointed to conduct a forensic child custody evaluation the client will be the court. But when a psychologist's records are requested by attorneys after a custody evaluation report or a psychological evaluation report has been submitted, a psychologist should give all of his or her records, test materials, and test data to the attorney for them to give to the psychologist who is reviewing their work. For example, this could include the questions and answers on the Behavior Assessment System for Children – 3rd Edition, where the questions and answers are on the same sheet. This could also include the critical items that are listed for results with an MMPI-2. See Texas Family Code Section 107.112(c) which states the following:

- (c) Except for records obtained from the department in accordance with Section 107.111, a private child custody evaluator shall, after completion of an evaluation and the preparation and filing of a child custody evaluation report under Section 107.113, make available in a reasonable time the evaluator's records relating to the evaluation on the written request of an attorney for a party, a party who does not have an attorney, and any person appointed under this chapter in the suit in which the evaluator conducted the evaluation, unless a court has issued an order restricting disclosure of the records.

This more often occurs during a child custody evaluation when an evaluator is being reviewed after doing a custody or psychological evaluation. Because the files for a court related evaluation are “court documents,” psychologists are expected to give everything in the file that was relied upon for their opinions, conclusions, and recommendations, including test materials and data, to the attorney and to the identified reviewer with the exception of the records discussed in Sections 107.111 and 107.1111. To put it simply, both the attorneys and the reviewers get everything in the file in response to a request with those two exceptions. When a file is requested in a forensic matter, there is no reason to withhold or redact protocol sheets (that have the questions on it) from the attorneys since they are forensic records being requested. There is also no reason to wait and give the testing only to the reviewer once the licensed psychologist who will be reviewing a forensic file is identified. It is important to note that the issue of copyright protection regarding test materials considered above are still relevant to this scenario but need to be addressed differently. The best practice of a licensee may be to inform and obtain written consent from the party they are releasing records to that certain identified records are covered by copyright protection and the party receiving such records should not misuse such records, such as disclosing their contents publicly or using the materials for their own personal or commercial gain, or they may run afoul of the copyright protection the author has in the test material.

It is important to note that Texas Family Code Section 107.112 was created by House Bill 1449 from the 84th Regular Legislative Session. While the bill became law on September 1, 2015, Section 5.03 of the bill states that the “changes in law made by this Act apply to a suit affecting the parent-child relationship that is filed on or after March 1, 2016.” Since Section 107.112 was created by this bill then this statute does not retroactively apply to all lawsuits, it only applies to suits filed on or after March 1, 2016. For suits filed prior to this date, licensees should apply the previous standard. First look to the court's order, it may limit access to records by specifically addressing who is granted access to them and what should be provided. If the court's order is silent on this issue then the psychologist should reach out to the client, the court. The discretion

as to what records to provide, to whom, and when falls under the purview of the court in prior suits affecting parent-child relationships.

When records are requested by an attorney, it is best practice to inform opposing counsel they are being requested. Each attorney can then receive a copy of the file at the same time. If a litigant that requests their records is pro se (representing himself or herself as their own attorney in a legal proceeding), it is best to confirm that and then let opposing counsel know they have been requested for transparency.

Some additional issues that come up when psychologists are faced with a release of records are whether or not to obtain a release of information and psychotherapy notes.

Release of Information: It is always important to have a release of information prior to releasing records. It is also best practice to secure the expected releases early in the process whether it is in a private practice setting, community setting, school setting or for services that are the result of litigation. In particular, it is important to have the litigant sign releases of information for themselves and their children for all attorneys involved and for the court so it is clear that the information will be provided when it is requested at the appropriate time in the process.

Psychotherapy Notes: Finally, there appears to also be confusion about “Psychotherapy Notes.” Board rule 465.22(c)(10) states the following:

(c) Access to Records.

(10) A licensee may, but is not required to provide a patient with access to psychotherapy notes, as that term is specifically defined in 45 C.F.R. §164.501, maintained by the licensee concerning the patient.

The definition of psychotherapy notes listed in 45 C.F.R. §164.501 is:

- a. “Psychotherapy notes means notes recorded (in any medium) by a health care provider who is a mental health professional documenting or analyzing the contents of conversation during a private counseling session or a group, joint, or family counseling session and that are separated from the rest of the individual’s medical record.”
- b. “Psychotherapy notes excludes medication prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.”

Whether it is the proper release of records, the difference between test materials and test data, the rules for forensic practice, the definition of psychotherapy notes, or other information as it relates to the practice of psychology in Texas, look to the TSBEP rules for information as you continue to practice in the best interest of the public. If the licensee receives a request for information in the form of a subpoena, please review the previous TSBEP newsletter from winter of 2012 (Volume 26, No. 1) for more information. A copy of this prior newsletter can be viewed by [clicking here](#).

**TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS DISCIPLINARY SANCTIONS RATIFIED AT THE
MAY 14, 2020 BOARD MEETING**

NAME	CITY	NATURE/INFRACTION	DISCIPLINARY ACTION
Douglas W. Sanders, Psy.D.	San Antonio	The licensee failed to timely report a deferred adjudication for a criminal charge.	Administrative penalty and professional development.
John H. Herman, Ph.D.	Dallas	The licensee failed to obtain informed consent and failed to reach an agreement specifying compensation and billing prior to initiating services.	Reprimand, administrative penalty, refund, and professional development.
Thomas James McCaffrey, Psy.D.	Santa Fe, NM	The licensee conducted the unlicensed practice of psychology and provided false, inaccurate, or misleading information to the Board.	Probated suspension and administrative penalty.
Laura Lunn Greenlee, Ph.D.	Georgetown	The North Carolina Board of Licensed Professional Counselors entered an order prohibiting the licensee from conducting child custody evaluations.	Practice restriction - the licensee may not conduct child custody evaluations in Texas.
Karen A. Sitterle, Ph.D.	Dallas	The licensee received payment and agreed to provide a report to a client but failed to ever provide the report, respond to the client's requests, or cooperate with a Board investigation.	Revoke.
Chanika Nicole Martin, Psy.D.	Lubbock	The licensee conducted the practice of psychology with a delinquent license.	Reprimand.

**TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS DISCIPLINARY SANCTIONS RATIFIED AT THE
AUGUST 13, 2020 BOARD MEETING**

NAME	CITY	NATURE/INFRACTION	DISCIPLINARY ACTION
Edward Scott Hamilton, Ph.D.	Nocona	The licensee failed to define a professional relationship, failed to create a treatment plan, failed to use scientifically and professionally derived knowledge when making professional judgments, used outdated data in rendering in assessment, failed to refer the client to a competent provider, failed to withdraw to avoid a dual relationship, and entered into a dual relationship	Probated Suspension, administrative penalty, professional development, practice monitor.
Dr. Michael James Leach, Ph.D.	Richardson	The licensee failed to create, document, and explain a treatment plan, failed to create, maintain accurate, current, and pertinent records, failed to make arrangements for continuity of care.	Probated Suspension, administrative penalty, professional development.