



**STATE OF ARIZONA**

**OFFICE OF THE ATTORNEY GENERAL**

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| <p>ATTORNEY GENERAL OPINION</p> <p>By</p> <p>MARK BRNOVICH<br/>ATTORNEY GENERAL</p> <p>August 3, 2020</p> | <p>No. I20-010<br/>(R20-010)</p> <p>Re: Information Collected under A.R.S., Title<br/>15, Chapter 19 and Public Records Requests</p> |
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To: Arizona Department of Education  
State Board of Education

**I. Introduction**

Senate Bill 1224 requires that the Arizona Attorney General provide written guidance to the Arizona Department of Education (“ADE”) and the State Board of Education (“SBE”) “regarding what types of information [...] collected under title 15, chapter 19, Arizona Revised Statutes, as amended by this act, are subject to public records requests under state and federal law, including the [F]amily [E]ducational [R]ights [A]nd [P]rivacy [A]ct of 1974.” 2020 Ariz. Legis. Serv. Ch. 12, § 6 (S.B. 1224). The Arizona Attorney General therefore provides the following guidance. *See* A.R.S. § 41–193(A)(7).

**II. Summary**

ADE’s and SBE’s response to public records requests is governed by Arizona’s public records law and related precedent, as well as pertinent federal and state privacy laws. Title 15, chapter 19, relates to Arizona Empowerment Scholarship Accounts, commonly known as ESA.

The ESA program is not an educational institution; instead, it serves as a funding source for children to attend private schools or participate in other alternative educational options under A.R.S., Title 15, Chapter 19. As a general matter, ESA records are subject to public records requests received by ADE or SBE. Some records collected or created through the ESA program are public records and can be produced without redaction in response to a public records request. To the extent ESA records contain personally identifiable information (“PII”), however, ADE and SBE must redact protected PII prior to disclosure or withhold the record because of privacy and/or confidentiality interests as set forth in pertinent state and federal law.

### **III. Background**

#### **A. S.B. 1224 And Types of Records Collected Under Title 15, Chapter 19**

Title 15, Chapter 19 of the Arizona Revised Statutes governs the operation of the ESA program. The ESA program provides parents with funds from State sources “to provide options for the education of students in this state.” A.R.S. § 15–2402(A). Children do not attend the ESA program; rather, the program serves as a funding source for children to attend private schools or participate in other alternative educational options. *See Niehaus v. Huppenthal*, 233 Ariz. 195, 196, 199, ¶¶ 2, 15 (App. 2013) (providing overview of ESA program and explaining that “[p]arents can use the funds deposited in the empowerment account to customize an education that meets their children’s unique educational needs[,]” which “may or may not include paying tuition at a private school.”).

ADE administers the ESA program. *See* A.R.S. §§ 15–2402(D) (“The department shall administer the fund”); –2401(3) (“‘Department’ means the department of education” for purposes of Title 15, Chapter 19, unless the context otherwise requires); *see also* Ariz. Senate

Fact Sheet (S.B. 1224).<sup>1</sup> SBE is responsible for processing appeals of an ESA administrative decision. Ariz. Senate Fact Sheet (S.B. 1224). ADE will receive various records in administering the ESA program, and SBE will likely receive similar records through its role in the appeal process. To receive ESA funds, parents generally submit information to ADE in the course of: (1) submitting an application and related documentation to demonstrate a student's eligibility to participate in the ESA program; (2) providing documentation to satisfy their obligations under the ESA contract and A.R.S. § 15–2402; and (3) corresponding with ADE. See ADE, Empowerment Scholarship Account Program, Eligibility Requirements & Application, available at <https://www.azed.gov/esa/eligibility-requirements/> (last visited July 28, 2020).

#### **B. Arizona's Public Records Law**

Arizona law requires that “[a]ll officers and public bodies shall maintain all records, including records as defined in § 41-151.18, reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from this state or any political subdivision of this state.” A.R.S. § 39–121.01(B). Those records are presumptively disclosable to the public. See A.R.S. § 39–121 (“Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours.”). Nevertheless, “only those documents having a ‘substantial nexus’ with a government agency’s activities qualify as public records.” *Griffis v. Pinal County*, 215 Ariz. 1, 4, ¶ 10 (2007) (citation omitted). Indeed, “the purpose of the law is to open *government* activity to public scrutiny, not to disclose information about private citizens.” *Id.* at 4, ¶ 11; see also *ACLU v. Arizona Dep’t of Child Safety*, 240 Ariz. 142, 147, ¶ 10 (App. 2016) (“Arizona’s broad definitions of a public record are not, however, unlimited—they do not

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<sup>1</sup> See [https://www.azleg.gov/legtext/54leg/2R/summary/S.1224ED\\_ASPASSED\\_COW.pdf](https://www.azleg.gov/legtext/54leg/2R/summary/S.1224ED_ASPASSED_COW.pdf).

encompass documents of a purely private or personal nature.”); Ariz. Att’y Gen. Op. No. I17-004 (R15-026) (text messages sent or received using a government device or social media account would not be a public record if messages are of a “purely private or personal nature.”).

“While access and disclosure is the strong policy of the law, the law also recognizes that an unlimited right of inspection might lead to substantial and irreparable private or public harm; thus, where the countervailing interests of confidentiality, privacy, or the best interests of the state should be appropriately invoked to prevent inspection,” a custodian “may refuse inspection” of such records, “subject to judicial scrutiny.” *Carlson v. Pima County*, 141 Ariz. 487, 491 (1984). Of course, “a practical alternative to the complete denial of access” is to redact confidential PII information. *See id.*

Additionally, agencies are neither required to create new records to respond to a records request nor search and provide individualized information contained within records, such as a database. *See Lunney v. State*, 244 Ariz. 170, 177, ¶ 20 (App. 2017) (noting that “[a]gencies are not required to ‘tally and compile previously untallied and un-compiled information or data available’ in an electronic database.”) (citation omitted).

### **C. Federal Privacy Protections For Education Records Under FERPA**

The Family Educational Rights And Privacy Act of 1974 (“FERPA”) and related regulations protect the privacy of student “education records” by affording parents and eligible students the right to: (1) access their own education records; (2) seek to have the education records amended; and (3) have some control over the disclosure of PII contained in education records. 20 U.S.C. § 1232g; 34 C.F.R. §§ 99.10–99.12; 99.20–99.22; 99.30.

FERPA defines a “student” as an individual “who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains

education records.” 34 C.F.R. § 99.3. “[E]ducational agencies or institutions” generally means “public schools, school districts (or ‘local educational agencies’ (LEAs)), and postsecondary institutions, such as colleges and universities.”<sup>2</sup> “Education records” are those records that are (1) “[d]irectly related to a student;” and (2) “[m]aintained by an educational agency or institution or by a party acting for the agency or institution.” 34 C.F.R. § 99.3. PII “includes, but is not limited to[,]” names, addresses, “personal identifier[s]” (e.g., social security number or student number), and “[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty[.]” *Id.* PII also includes information requested by a third party “who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.” *Id.*

FERPA prohibits an educational agency or institution from disclosing PII from student education records without a parent’s or eligible student’s prior written consent unless the disclosure meets an exception to FERPA’s general consent requirement. 34 C.F.R. §§ 99.30–99.31. Information may be released without consent if all PII is removed through de-identification, and as long as the educational agency “has made a reasonable determination that a student’s identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.” 34 C.F.R. § 99.31(b)(1). While certain records collected or maintained by ADE or SBE through the ESA program may not fall within FERPA’s definition of “education records,” it is likely that other records that come into

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<sup>2</sup> See U.S. Department of Education FAQ, available at: <https://studentprivacy.ed.gov/faq/which-educational-agencies-or-institutions-does-ferpa-apply> (last visited July 31, 2020).

possession of ADE or SBE through the ESA program are “education records” for FERPA purposes.

#### **D. State Privacy Protections For Educational Records**

Arizona law incorporates FERPA. *See* A.R.S. § 15–141(A) (“The right to inspect and review educational records and the release of or access to these records, other information or instructional materials is governed by federal law in the family educational and privacy rights act of 1974 ... and federal regulations issued pursuant to such act”); *Catrone v. Miles*, 215 Ariz. 446, 454, ¶ 24 (App. 2007) (“§ 15–141(A) incorporates the provisions in FERPA relating to the release of and access to education records”); Ariz. Att’y Gen. Op. No. 78–115 (R77–387) (“the state standard which sets forth the persons to whom education records may be released, as well as the circumstances under which they may be released, is by reference contained in [FERPA]”).

Arizona law also expressly states that “[a]ny collection, maintenance or disclosure of pupil educational records compiled by [ADE] in an education database of pupil records shall comply with [FERPA].” A.R.S. § 15–1045(A). Accordingly, Arizona education privacy law protects educational records at least to the same extent as FERPA. *See supra*, Section III(C).

And, of particular relevance here, Arizona law expressly states that PII maintained in ADE’s “education database of pupil records” is “confidential and is *not* public record.” A.R.S. § 15–1045(A), (B)(2) (emphasis added); *see also* A.R.S. § 15–1042(I) (providing that “[a]ll student level data” is “confidential and is not a public record”).

#### **IV. Analysis**

As state agencies, ADE and SBE are subject to Arizona’s public records law. *See* A.R.S. § 39–121.01(B). Each public records request is unique and must be reviewed on a case-by-case basis in light of the circumstances surrounding the request. Because complying with public

records requests is necessarily a fact-intensive process, no portion of this guidance should be relied on exclusively when responding to record requests. Additionally, the Office reserves its right to amend any portion of this guidance.

To the extent ADE and SBE collect and maintain records relating to the ESA program, such records are generally presumed to be public records. For example, either agency may receive general records requests (e.g., external correspondence) and general aggregate data requests (e.g., number of children currently in ESA program, how many have applied in a given time period, or number of appeals for different appealable agency action categories).

These types of records are generally disclosable with proper redaction and de-identification measures. In particular, in responding to public records requests, ADE and SBE must redact any PII in education records that are received or maintained through the ESA program because, under FERPA and corresponding provisions of state law, PII “is confidential and is not public record.” A.R.S. § 15–1045(B)(2); *see also Catrone*, 215 Ariz. at 453–54, ¶ 19 (“the federal and state statutes make educational records ‘confidential,’ although FERPA does not use this term”). ADE and SBE must also redact any PII in non-education records that are received or maintained through the ESA program because of privacy and/or confidentiality interests. *See Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cty. v. KPNX Broad. Co.*, 191 Ariz. 297, 300, ¶ 9 (1998) (recognizing that if the interests of “‘confidentiality, privacy, or the best interests of the state’” “outweigh the public’s right of inspection, the State can properly refuse inspection.”) (citation omitted). For redaction to be proper, it must be resilient and fully accomplish the goal of preventing the disclosure to the public of the personal information that is to not be disclosed; whatever the method of redaction, it must be done so as to prevent the redaction from being undone or circumvented once the document is made public as part of a

public records request. *See, e.g.*, A.R.S. § 18–522 (providing that “[a] governmental agency shall develop and establish commercially reasonable procedures to ensure that entity identifying information or personal identifying information that is collected or obtained by the governmental agency is secure and cannot be accessed, viewed or acquired unless authorized by law.”); *see also* A.R.S. § 18–521 (“‘Personal identifying information’ has the same meaning prescribed in [A.R.S.] § 13–2001.”).

ADE or SBE may also withhold some records relating to the ESA program in connection with public records requests. In particular, personal documents such as birth certificates may be withheld when disclosure of such documents would invade privacy and that invasion outweighs the public’s right to inspection. *See, e.g., Scottsdale Unified Sch. Dist.*, 191 Ariz. at 303, ¶ 25 (“the minimal public interest” in obtaining birth dates of teachers “does not override the privacy interest of the teachers”; on facts of case, teachers’ birth dates were properly withheld in response to public records request). Chapter 6 of the AG’s Arizona Agency Handbook thoroughly discusses Arizona public records law and provides examples of situations in which public inspection may be properly denied when records are deemed confidential by statute or involve privacy interests.<sup>3</sup>

In sum, many records received, maintained, or created by the ESA program are public records under A.R.S. § 39–121.01; however, some of those records might be withheld for privacy reasons and some (perhaps many) would be subject to redaction prior to disclosure to ensure that individuals’ identities and PII are adequately protected.

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<sup>3</sup> *See* Arizona Agency Handbook (2018), Ch. 6, Public Records, *available at*: [https://www.azag.gov/sites/default/files/docs/agency-handbook/2018/agency\\_handbook\\_chapter\\_6\\_corrected.pdf](https://www.azag.gov/sites/default/files/docs/agency-handbook/2018/agency_handbook_chapter_6_corrected.pdf) (last visited July 31, 2020).



## **V. Conclusion**

Records held by ADE or SBE in connection with the ESA program are subject to public records requests under Arizona law. ADE and SBE may be required to disclose ESA program documents to the extent that they are de-identified and have a substantial nexus to the government's activities (i.e., the state allocating, and members of the public spending, public monies on educational resources). However, certain information related to ESA accounts may need to be redacted or withheld based on privacy considerations under state and federal law. As noted above, ADE and SBE will have to review each unique public records request to determine whether any part of the records or information requested can be disclosed. And, critically, any redaction of personal information in connection with a disclosure of documents or other information must be accomplished in a way to ensure that the redaction is effective and cannot be undone or circumvented by the recipient of the production or others in the public.

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