ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 23, 2008

Mr. David P. Backus
Underwood Attorneys and Counselors
P.O. Box 16197
Lubbock, Texas 79490

OR2008-09979

Dear Mr. Backus:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 316896.

The Ralls Independent School District (the "district"), which you represent, received a request from an investigator with the Texas Education Agency ("TEA") for several categories of information pertaining to TEA's investigation of an allegation against a named teacher. You state that the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).[1] You state that some of the information will be released to the requestor. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." This office has interpreted

[1]We note that the United States Department of Education Family Policy Compliance Office (the "DOE") has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that a "teacher" for purposes of section 21.355 means a person who (1) is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. You indicate that the teacher at issue did hold the appropriate certificate and was a teacher at the time of the evaluations. Upon review, we find that several of the submitted documents do not evaluate the teacher as contemplated by section 21.355. Accordingly, the district may not withhold these documents, which we have marked, under section 552.101. We agree, however, that a portion of the information, which we have marked, consists of evaluations of the teacher at issue. Accordingly, we find that the marked evaluations are subject to section 21.355 of the Education Code.

We next note that the requestor is a staff investigator with the TEA. TEA's request states that it is seeking this information under the authority provided to the State Board for Educator Certification ("SBEC") by section 249.14 of title19 of the Texas Administrative Code.[2] Chapter 249 of title 19 of the Texas Administrative Code governs disciplinary proceedings, sanctions, and contested cases involving the SBEC. *See* 19 T.A.C. § 249.1. Section 249.14 provides in relevant part:

> (a) [TEA] staff may obtain and investigate information concerning alleged improper conduct by an educator, applicant, examinee, or other person subject to this chapter that would warrant the [board] denying relief to or taking disciplinary action against the person or certificate.
>
> . . .
>
> (c) The TEA staff may also obtain and act on other information providing grounds for investigation and possible action under this chapter.

Id. § 249.14. In this instance, the requestor states that she is investigating alleged improper conduct by the named teacher and that she needs to review the requested records "to determine whether enforcement actions are warranted against [the named teacher]." Thus,

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[2]Chapter 21 of the Education Code authorizes SBEC to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators. *See* Educ. Code § 21.031(a). Section 21.041 of the Education Code states that SBEC may "provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code." *Id.* § 21.041(b)(7). Section 21.041 also authorizes SBEC to "adopt rules as necessary for its own procedures." *Id.* § 21.041(a). Effective September 1, 2005, SBEC's administrative functions and services transferred to TEA. *Id.* § 21.035.

we find that the information at issue is subject to the general right of access afforded to the TEA under 19 T.A.C. § 249.1. However, because several of the submitted documents are protected from public disclosure by section 21.355 of the Education Code, we find that there is a conflict between the statutory confidentiality provision and the right of access afforded to TEA investigators under 19 T.A.C. § 249.1. Where general and specific statutes are in irreconcilable conflict, the specific provision typically prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence that the legislature intended the general provision to prevail. *See* Gov't Code § 311.026(b); *City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex.App.—Fort Worth 1977, *writ ref'd n.r.e.*).

In this instance, although section 249.14 generally allows TEA access to information relating to suspected misconduct on the part of an educator, section 21.355 of the Education Code specifically protects educator evaluations. Section 21.355 also specifically permits release to certain parties and in certain circumstances that do not include TEA's present request. Because the specific confidentiality provision prevails over the general TEA right of access, we conclude that, notwithstanding the provisions of section 249.14, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355.

In summary, the district must withhold the evaluations we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The remaining documents must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

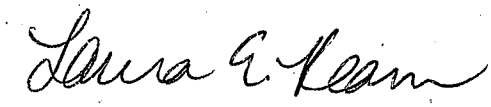
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath* , 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 316896

Enc. Submitted documents

c: Ms. Tracy Thomas
Investigator
Texas Education Agency
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(w/o enclosures)