



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 31, 2008

Ms. Mari M. McGowan
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2008-10374

Dear Ms. McGowan:

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# 317436.

The Plano 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 a named teacher, including information regarding an assault investigation that involved this teacher. You state that some of the information will be released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.137 and 552.147 of the Government Code. You state that you notified the employee who is the subject of the requested information of her right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the date of this request. The district need not release non-responsive information in response to this request and this ruling will not address that 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. Section 552.101 encompasses information protected by other statutes, such

as section 21.355 of the Education Code. Section 21.355 provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. In addition, the court has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because “it reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, we concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* You contend the submitted documents contain evaluative and assessment information regarding the teacher’s performance and should therefore be withheld from disclosure under section 21.355. You state that the teacher was required and did hold a teaching certificate and was teaching at the time of the evaluations. Based on your representations and our review, we conclude that some of the submitted information is subject to section 21.355. Accordingly, the district must withhold the information we have marked under section 552.101 in conjunction with section 21.355 of the Education Code. However, you have failed to show how the remaining information evaluates the performance of a teacher for the purposes of section 21.355. Thus, the district may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.101 also encompasses section 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(c-1) provides the following:

The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

- (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
- (2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). We note a portion of the submitted information contains results from an examination administered under section 21.048 of the Education Code. You do not inform us that subsection 21.048(c-1)(1) or (2) is applicable; therefore, the district must withhold the information we have marked under section 552.101 in conjunction with section 21.048 of the Education Code.

Next, section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102. In *Hubert v. Harte-Hanks Texas*

Newspapers, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ *ref'd n.r.e.*), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Accordingly, we will address your privacy claim under sections 552.101 and 552.102 together.

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. However, there is a legitimate public interest in the qualifications of a public employee and how that employee performs job functions and satisfies employment conditions. *See generally* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). The submitted information is not highly intimate or embarrassing, and it is of legitimate public interest because it involves a public employee's qualifications and performance. Accordingly, the district may not withhold any of the submitted information under section 552.101 or 552.102(a) of the Government Code in conjunction with common-law privacy.

Further, although you claim the submitted information is excepted from disclosure under section 552.101 in conjunction with common law privacy and the ruling in *Morales v. Ellen*, the submitted investigation does not concern sexual harassment. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information). Therefore, we find that *Ellen* is not applicable in this instance.

Section 552.102(b) excepts from disclosure all information from transcripts of a professional public school employee other than the employee's name, the courses taken, and the degree obtained. Gov't Code § 552.102; Open Records Decision No. 526 (1989). Thus, except for the information that reveals the employee's name, the courses taken, and the degree obtained, the transcripts are confidential pursuant to section 552.102(b).

Section 552.117 excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You inform us and provide documentation showing the employee at issue made a timely election for confidentiality under section 552.024. Therefore, we conclude the employee's personal information is confidential under section 552.117(a)(1).

Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). Therefore, unless the individual at issue consented to release of her e-mail address, the e-mail address is confidential under section 552.137 of the Government Code.

Finally, we note that TEA's request states that it seeks this information under the authority provided to the State Board for Educator Certification ("SBEC") by section 249.14 of title 19 of the Texas Administrative Code.¹ Chapter 249 of title 19 of the Texas Administrative Code governs disciplinary proceedings, sanctions, and contested cases involving SBEC. *See* 19 T.A.C. ch. 249. 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.

¹Chapter 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.

19 T.A.C. § 249.14. Because TEA is investigating the educator to determine whether it must take any action against the teacher, we find section 249.14 is applicable. Thus, we must determine if section 249.14 provides TEA access to information discussed above that we concluded is otherwise confidential. First, we note that section 249.14 does not specifically grant access to information that is confidential under sections 21.048 and 21.355 of the Education Code. 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. Civ. 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, sections 21.048 and 21.355 of the Education Code specifically protect results of teacher certification examinations and educator evaluations, respectively, and specifically permit release to certain parties and in certain circumstances that do not include TEA's request in this instance. *See* Attorney General Opinions GA-0055 (2003) at 3-4 (SBEC not entitled to access teacher appraisals made confidential by section 21.355 of the Education Code where section 21.352 of the Education Code expressly authorizes limited release of appraisals), DM-353 (1995) at 4-5 n.6. Generally, if confidentiality provisions or another statute specifically authorize release of information under certain circumstances or to particular entities, then the information may only be released or transferred in accordance therewith. *See* Attorney General Opinion JM-590 (1986) at 5 ("express mention or enumeration of one person, thing, consequence, or class is tantamount to an express exclusion of all others"). We therefore conclude that, notwithstanding the provisions of section 249.14, the district must withhold the information that is excepted from disclosure based on sections 21.048 and 21.355. *See also* Open Records Decision No. 629 (1994) (provision of Bingo Enabling Act that specifically provided for non-disclosure of information obtained in connection with examination of books and records of applicant or licensee prevailed over provision that generally provided for public access to applications, returns, reports, statements and audits submitted to or conducted by Texas Alcoholic Beverage Commission).

Next, we will consider whether section 249.14 permits TEA to obtain information that is otherwise protected by sections 552.102, 552.117, and 552.137 of the Act discussed above. This office has concluded that a statute's specific access provision prevails over generally applicable exceptions to public disclosure under the Act. *See* Open Records Decision No. 451 at 4 (1986). Therefore, based on TEA's representation that it is obtaining the information pursuant to section 249.14, TEA has a right of access to the remaining information.

In summary, the district must withhold the test results and teacher evaluations we have marked under sections 21.048 and 21.355 of the Education Code, respectively. The district

must release the remaining information to TEA pursuant to section 249.14 of title 19 of the Texas Administrative Code.²

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).

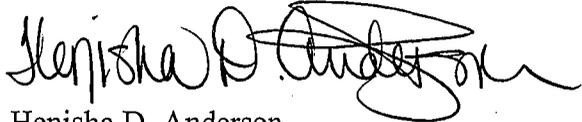
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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.

²Because TEA has a right of access to certain information in the submitted documents that otherwise would be excepted from release under the Act, the district must again seek a decision from this office if it receives a request for this information from a different requestor without such a right of access.

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,

A handwritten signature in black ink, appearing to read "Henisha D. Anderson". The signature is fluid and cursive, with a large initial "H" and "A".

Henisha D. Anderson
Assistant Attorney General
Open Records Division

HDA/mcf

Ref: ID# 317436

Enc. Submitted documents

c: Mr. Noe Martinez
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(w/o enclosures)