



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 4, 2008

Mr. Joe R. Tanguma
Walsh, Anderson, Brown, Schulze, & Aldridge, P.C.
P.O. Box 168046
Irving, Texas 75016

OR2008-12182

Dear Mr. Tanguma:

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# 320705.

The Terrell Independent School District (the "district"), which you represent, received a request for several categories of information pertaining to a named district employee. You state that the district is releasing most of the responsive information to the requestor. You state further 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 claim that the submitted documents are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.²

¹We 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/open/20060725usdoe.pdf>. As the district is making these determinations, we need not address your arguments under sections 552.026 and 552.114 of the Government Code.

²We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this

We first note that "Exhibit III" includes an ETA 9035E form, titled "Labor Condition Application for H-1B Nonimmigrants." Section 655.760 of title 20 of the Code of Federal Regulations makes this document expressly public. *See* 20 C.F.R. § 655.760(a)(1). Therefore, the submitted ETA 9035E form, which we have marked, must be released to the requestor.

We now address your claimed exceptions under the Act. 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. You generally state that Exhibit III contains alien registration information subject to section 1202(f) of title 8 of the United States Code, which is encompassed by section 552.101. Section 1202(f) provides that:

The records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential[.]

8 U.S.C. § 1202(f). We note that this section applies to the records of the Department of State and of diplomatic and consular offices of the United States. You indicate, however, that the information in question is maintained by the district. You have not explained how or why information held by the district would qualify as a record of the Department of State or of a diplomatic or consular office of the United States for the purposes of section 1202(f). *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Therefore, as you have not demonstrated that the information in question falls within the scope of the federal statute, the district may not withhold any of Exhibit III under section 552.101 of the Government Code in conjunction with section 1202 of title 8 of the United States Code. *See also Medina-Hincapie v. Dep't of State*, 700 F.2d 737, 741 (D.C. Cir. 1983) ("Under section[1202(f)] the Secretary of State has no authority to disclose material to the public."); *Perry-Torres v. U.S. Dep't of State*, 404 F.Supp.2d 140, 143-44 (D. D.C. 2005) (Department of State properly withheld information relating to denial of visa application under 8 U.S.C. § 1202(f)); *Church of Scientology of California v. Dep't of State*, 493 F.Supp. 418, 423 (D. D.C. 1980) (8 U.S.C. § 1202(f) applicable to document described as "permanent record of State Department").

You also argue that Exhibit III contains information subject to section 1304(b) of title 8 of the United States Code, which addresses the confidentiality of the registration of aliens under section 1301 of the United States Code and provides:

All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only

office.

(1) pursuant to section 1357(f)(2) of this title, and

(2) to such persons or agencies as may be designated by the Attorney General.

8 U.S.C. § 1304(b). You state that Exhibit III contains confidential alien registration records. Upon review, we have marked the alien registration information that is subject to section 1304(b). However, we find that none of the remaining information constitutes registration records subject to section 1304. See 8 C.F.R. § 264.1(a) (providing detailed list of prescribed registration forms). As you raise no other exceptions regarding the remaining information within Exhibit III, this information must be released to the requestor.

Section 552.101 also encompasses 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. 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 a 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 the information labeled “Exhibit II” is subject to section 21.355.

We now turn to your argument regarding the information labeled “Exhibit I.” Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Upon review, we agree that the letters contained within Exhibit I contain embarrassing information. 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). Furthermore, 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. Because we find that there is a legitimate public interest in the letters contained within Exhibit I, we find that this information is not subject to common-law privacy. As no other exceptions are raised, Exhibit I must be released to the requestor.

We note that the requestor is an investigator with the Texas Education Agency ("TEA") who is seeking 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.³ Accordingly, we will consider whether section 249.14 of title 19 of the Texas Administrative Code permits TEA to obtain information that is otherwise confidential under section 21.355 of the Education Code and section 1304 of title 8 of the United States Code. *See* Open Records Decision No. 451 at 4 (1986) (specific access provision prevails over generally applicable exception to public disclosure).

Chapter 249 of title 19 of the Texas Administrative Code governs disciplinary proceedings, sanctions, and contested cases involving SBEC. *See* 19 T.A.C. § 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) [TEA] staff may also obtain and act on other information providing grounds for investigation and possible action under this chapter.

19 T.A.C. § 249.14. In this case, the requestor states that he is investigating alleged improper conduct by the named district employee and that he needs to review the requested records "to determine whether enforcement actions are warranted against [the named employee]." Thus, 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 some of the requested information is specifically protected from public disclosure by the exceptions discussed above, we find that there is a conflict between these exceptions and the right of

³Chapter 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).

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.).

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 and section 1304 of title 8 of the United States Code specifically protect educator evaluations and alien registration information. These sections also specifically permit release to certain parties and in certain circumstances that do not include TEA's present request. Because the specific statutes raised by the district prevail over the general TEA right of access, we conclude that, notwithstanding the provisions of section 249.14, the district must withhold the information that is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, as well as the information we marked under section 1304 of title 8 of the United States Code. The remaining information 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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 320705

Enc. Submitted documents

c: Ms. Deborah T. Owens
Texas Education Agency
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Austin, Texas 78701
(w/o enclosures)