ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 14, 2008

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

OR2008-15661

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# 328541.

The Plano Independent School District (the "district"), which you represent, received three requests from an investigator with the Texas Education Agency ("TEA") for several categories of information pertaining to a named teacher, including information regarding an investigation that involved this teacher. You state that you will release a portion of the requested information. You also indicate that you will withhold social security numbers under section 552.147 of the Government Code.[1] You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.116, 552.117, 552.135, and 552.137 of the Government Code. You state that you notified the individual who is the subject of the requested information of his 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, you inform us that the district inadvertently released some of the submitted information to the requestor, who returned the information without reviewing it. You assert

[1]Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

that this release does not act to waive the district's claim that this information is excepted from disclosure. Prior decisions from our office have concluded that the involuntary disclosure of information on a limited basis, through no official action and against the wishes and policy of the governmental body, does not waive exceptions under the Act. *See* Open Records Decision Nos. 387 at 3 (1983) (information not voluntarily released by governmental body that nevertheless comes into another party's possession not henceforth automatically available to everyone), 376 at 2 (1983). *Cf.* Open Records Decision No. 676 at 10-11 (2002) (where document has been voluntarily disclosed to opposing party, attorney-client privilege has generally been waived). Based on the information you have provided, we agree that the district has not waived its claim that this information is excepted from disclosure. Therefore, we will consider the exceptions you claim for the submitted information.

Next, we note that you have redacted information from a copy of the investigative report. A governmental body may redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code 552.147(b). However, you do not assert, nor does our review of our records indicate, that the district has been authorized to withhold the information that you have redacted without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). Because you have submitted multiple unredacted copies of this report, we can discern the nature of the redacted information; therefore, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested"), 552.302.

The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.[2] Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). The submitted information includes redacted and unredacted education records. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability

[2]A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/open/20060725usdoe.pdf.

of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of such records.[3] We will, however, address the applicability of the claimed exceptions to the submitted information.

Next, we note that the submitted documents include the agenda of a public meeting of the district's board of trustees. The agendas and minutes of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See id.* § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying upon request). Accordingly, the submitted agenda must be released in accordance with the Open Meetings Act.

We next note, and you acknowledge, that some of the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

> the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body; [and]
> >
> > . . .
> >
> > (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Id. § 552.022(a)(1), (3). Some of the submitted information consists of completed reports, evaluations, investigations, and executed contracts and contract modifications that are subject to sections 552.022(a)(1) and 552.022(a)(3) of the Government Code. Therefore, the district may only withhold this information if it is confidential under "other law." Although you raise sections 552.103, 552.107, and 552.116 of the Government Code, these sections are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived); 665 at 2 n.5 (2000) (discretionary exceptions

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[3]In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

generally), 663 (1999) (governmental body may waive section 552.103). As such, sections 552.103, 552.107, and 552.116 are not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the information that is subject to section 552.022 under sections 552.103, 552.107, or 552.116.

You also claim sections 552.101, 552.102, 552.117, 552.135, and 552.137 of the Government Code, which are "other law" for the purposes of section 552.022. The common-law informer's privilege, which you claim under section 552.101 of the Government Code, is also other law that makes information confidential for the purposes of section 552.022.[4] *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *Tex. Comm'n on Envtl. Quality v. Abbott*, No. GN-204227 (126th Dist. Ct., Travis County, Tex.). Therefore, we address your arguments under these exceptions for the information that is subject to section 552.022, along with the remaining submitted information.

Further, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d . at 336. The attorney-client privilege is also found under rule 503 of the Texas Rules of Evidence. Accordingly, we will consider your assertion of this privilege under rule 503 of the Texas Rules of Evidence for the information subject to section 552.022.

You assert that the submitted information in Exhibit C is excepted from public disclosure pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.[5] 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 that Exhibit C consists of evaluative and assessment information regarding the teacher's performance and should therefore be withheld from disclosure under section 21.355. We agree that some of the information in Exhibit C consists of evaluations of the teacher; therefore, provided the teacher was required to hold and did hold the appropriate certificate and was teaching at the

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[4]Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

[5]Section 552.101 encompasses information protected by other statutes.

time of the submitted teaching evaluations, the information that we have marked is confidential under section 21.355.[6] However, the remaining information in Exhibit C consists of an investigation of alleged wrongdoing by the teacher at issue. This information does not constitute an evaluation of the individual's performance as 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.

We next address your claim under section 552.103 of the Government Code for the information in Exhibit C not subject to section 552.022 and for Exhibit D. Section 552.103 provides in part:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . .
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> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that is seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App. —Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. —Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere

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[6]As our ruling is dispositive, we do not address your other arguments to withhold this information.

conjecture."[7] *Id.* You inform us that the remaining information not subject to section 552.022 in Exhibit C and the information in Exhibit D relates to an ongoing investigation of a teacher whose conduct appears to provide grounds for termination for cause. You state that the teacher's attorney has informed the district that the teacher denies the allegations and demands a hearing regarding any disciplinary action taken against him. You indicate that the hearing would be conducted under chapter 21 of the Education Code.

Section 21.256 of the Education Code provides that hearings requested under section 21.253 of the Education Code "shall be conducted in the same manner as a trial without a jury in a district court of [Texas]." Educ. Code § 21.256(e). Section 21.256 also specifically affords a teacher the right to be represented by a representative of the teacher's choice; the right to hear the evidence on which the charges are based; the right to cross-examine each adverse witness; and the right to present evidence. *See id.* § 21.256(c). Section 21.256(d) provides that the Texas Rules of Evidence apply at the hearing. *See id.* § 21.256(d). We also note that, in a chapter 21 hearing, the hearing examiner may issue subpoenas for the attendance of witnesses and the production of documents; an appeal of the proceedings to the commissioner of education is based only on the record of the local hearing; and in a judicial appeal of the commissioner's decision, the court must review the evidence pursuant to the substantial evidence rule. *Id.* §§ 21.255(a) (subpoena power of examiner), 21.301(c) (appeal based solely on local record), 21.307(e) (substantial evidence rule for judicial review). Having considered your arguments, we find that litigation in the form of a hearing under chapter 21 of the Education Code was reasonably anticipated when the district received these requests for information. *See* Open Records Decision Nos. 588 (1991) (contested case under Administrative Procedure Act, Gov't Code ch. 2001, qualifies as litigation under statutory predecessor to section 552.103), 301 (1982) (litigation includes contested case before administrative agency). We also find that the information at issue is related to the anticipated litigation. Therefore, section 552.103 is generally applicable to the remaining information in Exhibit C and to Exhibit D.

We note, however, that the opposing party in the anticipated litigation appears to have seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the anticipated litigation has seen or had

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[7]Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

access to the information at issue, any such information is not protected by section 552.103 and may not be withheld on that basis. Furthermore, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

We next address your claim that some of the information in the investigation file, which is subject to section 552.022, is protected from disclosure by the attorney-client privilege. Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the lawyer and the lawyer's representative;
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> > (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
> >
> > (D) between representatives of the client or between the client and a representative of the client; or
> >
> > (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege

enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.— Houston [14th Dist.] 1993, no writ).

You state that the information you have marked in the investigation file consists of communications between district employees and attorneys for the district that were made for the purpose of facilitating the rendition of professional legal services and were not intended to be disclosed to third parties. Based upon your representations and our review of the information at issue, we find that the district may withhold most of the information you have marked in Exhibit C pursuant to rule 503 of the Texas Rules of Evidence. However, we conclude you have not established that the remaining information at issue, which we have marked, consists of privileged attorney-client communications; therefore, none of this information may be withheld under rule 503.

Next, you contend that some of the remaining information is excepted under section 552.135 of the Government Code, which provides the following:

> (a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.
>
> (b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].
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> (c) Subsection (b) does not apply:
>
> > (1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or
> >
> > (2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or
> >
> > (3) if the informer planned, initiated, or participated in the possible violation.
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> (d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.
>
> (e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be

> constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under the exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* §§ 552.301(e)(1)(A),.135(a). You state that the allegations specifically contain complaints regarding alleged violations of provisions of the Texas Administrative Code regarding professional ethics and the district's policy on employee standards of conduct. However, we find that you have not identified any specific civil, criminal, or regulatory law that is alleged to have been violated. We therefore conclude that the district may not withhold any of the remaining information under section 552.135 of the Government Code.

You also claim that the identities of informers may be withheld pursuant to the common-law informer's privilege. Section 552.101 of the Government Code encompasses the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981); *see* Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

Upon review, we find that you have failed to provide any arguments explaining how the district has criminal or quasi-criminal law-enforcement authority over the subject of the allegations. Further, you do not inform us that the alleged conduct is a violation of a criminal or civil statute. Finally, witnesses who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege. We conclude that the district has failed to demonstrate the applicability of the common-law informer's privilege in this instance. Thus, the district may not withhold any of the submitted information pursuant to section 552.101 of the Government Code in conjunction with the informer's privilege.

Next, you assert that some of the submitted records consist of private information that is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. Section 552.102(a) 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 claims 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). Upon review, we find that some of the information at issue, which we have marked, is private, and the district must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy and under section 552.102(a) of the Government Code.

The remaining information, however, is either not highly intimate or embarrassing or is a matter of legitimate public interest because it involves a public employee's qualifications and performance. Further, although you claim the information at issue 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. We also note that the individual you notified has not submitted comments regarding why the requested information should not be released. Thus, we have no additional basis to conclude that the release of any portion of the remaining information would implicate the privacy interests of this individual. Accordingly, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy or under section 552.102(a) of the Government Code.

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. We note that section 552.117 also encompasses a personal cellular telephone number, provided that the service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular phone numbers provided and paid for by governmental body and intended for official use). 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. We have marked the types of information that must be withheld 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 addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). Therefore, unless the individuals at issue consented to release of their e-mail addresses, the e-mail addresses we have marked are 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.[8] 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.
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[8]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.

> (c) The 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. Because TEA is investigating the educator to determine whether it must take any action against him, 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 section 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, section 21.355 of the Education Code specifically protects results of teacher evaluations and specifically permits 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 at 5 (1986) ("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 section 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).

However, 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, which is otherwise subject to sections 552.101; 552.102; 552.103; 552.117; 552.137; and 552.022, in conjunction with rule 503.

In summary, we do not address the applicability of FERPA to any of the submitted records. The submitted agenda must be released in accordance with the Open Meetings Act. The

district must withhold the teacher evaluations we have marked under section 21.355 of the Education Code. The district must release the remaining information to TEA pursuant to section 249.14 of title 19 of the Texas Administrative Code.[9]

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.

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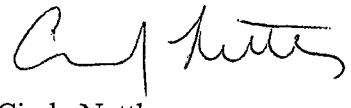
[9]Because TEA has a right of access to certain information in the submitted documents that otherwise would be excepted from release under the Act, the district must again seek a decision from this office if it receives a request for this information from a different requestor without such a right of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



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 328541

Enc. Submitted documents

c: Mr. Michael Franks
Staff Investigator
Texas Education Agency
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(w/o enclosures)