



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 5, 2009

Ms. Sonya M. Garcia
Escamilla & Poneck, Inc.
216 West Village Boulevard., Suite 202
Laredo, Texas 78041

OR2009-10821

Dear Ms. Garcia:

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# 351152.

The San Marcos Consolidated Independent School District (the "district"), which you represent, received a request from an investigator with the Texas Education Agency ("TEA") for information pertaining to a named district employee. 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.

Initially, we note that you have redacted several portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code §§ 552.301(a), .301(e)(1)(D). We note section 552.147(b) of the Government Code generally 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. Further, section 552.024 generally authorizes a governmental body to withhold information subject to section 552.117 of the Government Code without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. *See* Act of June 3, 2009, 81st. Leg., R.S., S.B. 1068, § 1 (to be codified at Gov't Code § 552.024(c)). However, you do not assert, nor does our review of our records indicate, that you have been authorized to withhold the other

types of information you have redacted without seeking a ruling from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2000). As such, these types of information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the district should refrain from redacting information not subject to section 552.117 or section 552.147(b) that it submits to this office in seeking an open records ruling, unless it is otherwise authorized to do so.

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, this office also concluded that a teacher is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* We note that some of the information you have submitted appears to document evaluations of performance; however, these evaluations were conducted prior to the date that the individual at issue held a teaching certificate required under chapter 21 of the Education Code. Upon review, we find you have failed to demonstrate how any portion of the submitted information consists of evaluations or written reprimands as contemplated by section 21.355 of the Education Code. Accordingly, the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

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

Section 552.101 also encompasses federal law. The submitted information includes an I-9 form, which is governed by section 1324a of title 8 of the United States Code. This section provides that this form “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5). Release of this document under the Act would be “for purposes other than for enforcement” of the referenced federal statute. Accordingly, we conclude that the submitted I-9 form, which we have marked, is confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

We note that 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 title 19 of the Texas Administrative Code.¹ Accordingly, we will consider whether section 249.14 of title 19 of the Texas Administrative Code permits TEA to obtain information that is otherwise protected by the exception discussed above. *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. § 249.1. 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 [SBEC] 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).

19 T.A.C. § 249.14. In this case, the requestor states that he is investigating a change in the criminal history record of the named district employee and that he needs to review the requested records to determine whether measures need to be taken against the employee's teaching credentials. Thus, we find that the information at issue is subject to the general right of access afforded to the TEA under section 249.14. However, because portions of the requested information are specifically protected from public disclosure by the exceptions discussed above, we find that there is a conflict between these exceptions and the right of access afforded to TEA investigators under this section.

With regard to the submitted I-9 form and attachment, we noted above that this form is confidential pursuant to section 1324a of title 8 of the United States Code. As a federal law, section 1324a preempts any conflicting state provisions, including section 249.14 of the Texas Administrative Code. *See Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law). Accordingly we find that, notwithstanding section 249.14 of the Texas Administrative Code, the submitted I-9 form is confidential pursuant to section 1324a of title 8 of the United States Code and must be withheld under section 552.101 of the Government Code.

In this instance, although section 249.14 generally allows TEA access to information relating to suspected misconduct on the part of an educator, section 21.048 of the Education Code specifically protects educator certification test results of an individual who did not fail the test more than five times. This section also specifically permits release to certain parties and in certain circumstances that do not include TEA's present request. Because this specific 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 that is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.048 of the Education Code. *See Open Records Decision No. 629 (1994)* (providing non-disclosure provision in Bingo Enabling Act 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).

As noted above, you have redacted information subject to sections 552.117 and 552.147 of the Government Code. However, these sections do not have their own release provisions. Therefore, TEA has a right of access to the remaining information, including the information you have redacted, pursuant to section 249.14. *See Open Records Decision No. 525 (1989)* (exceptions to disclosure do not apply to information made public by other statutes).

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.048 of the

Education Code and section 1324a of title 8 of the United States Code. The remaining information must be released.²

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/dls

Ref: ID# 351152

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note that because the requestor has a special right of access to this information in this instance, the district must again seek a decision from this office if it receives another request for the same information from another requestor.