



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 28, 2010

Mr. Justin Graham  
Abernathy, Roeder, Boyd & Joplin, P.C.  
For McKinney Independent School District  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2010-07824

Dear Mr. Graham:

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# 381015.

The McKinney Independent School District (the "district"), which you represent, received a request from an investigator with the Texas Education Agency ("TEA") for six categories of information pertaining to a former employee of the district and a specified investigation. You state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.116, 552.117, 552.135, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You state you have redacted student information from the records submitted in Exhibit D pursuant to the Family Educational Rights and Privacy Act ("FERPA"). The United States Department of Education Family Policy Compliance Office informed this office that FERPA, 20 U.S.C. § 1232g, 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.<sup>1</sup> However, FERPA is not applicable to law enforcement records maintained by a police department that were created by the department for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. A portion of the information in Exhibit D consists of law enforcement records prepared by the McKinney Police Department. Thus, this information is not subject to FERPA and may not be withheld on that basis.

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, including section 21.355 of the Education Code. Section 21.355 provides “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. Open Records Decision No. 643 (1996). This office has also 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.* In addition, the Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355. *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You state the submitted information consists of evaluative and assessment information pertaining to an individual who held a teacher’s certificate under chapter 21 of the Education Code and was performing the functions of a teacher at the time of the evaluations. Upon review, we agree the information we have marked constitutes evaluations subject to section 21.355 of the Education Code. Accordingly, the district must withhold the information we have marked under section 552.101 on that basis. However, we find none of the remaining information consists of evaluations of the performance of the teacher at issue for purposes of section 21.355; therefore, the district may not withhold any of the remaining information under section 552.101 on that ground.

Section 552.116 of the Government Code provides:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained

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<sup>1</sup>We have posted a copy of the letter on the Attorney General’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. For purposes of section 552.116, a school district must establish that an audit is authorized by a resolution or other action of a board of trustees of the school district. Gov't Code § 552.116(b)(1). You state that the submitted information is related to an investigation conducted pursuant to section 21.041 of the Education Code and section 249.14 of title 19 of the Texas Administration Code. We note that section 21.041 of the Education Code and section 249.14 of title 19 of the Texas Administration Code authorize the Texas Education Agency, and not the district, to investigate an educator. *See* Educ. Code § 21.041; 19 T.A.C. ch. 249. You have provided no arguments that the information at issue constitutes working papers of an audit conducted by the district. Thus, we conclude that you have failed to establish that section 552.116 of the Government Code is applicable to any of the remaining information, and it may not be withheld under this exception.

Section 552.101 of the Government Code also encompasses section 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 and "any information contained in or appended to such 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. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). You state that the information includes an I-9 Form. Based on your representations and our review, we find the district must withhold the I-9 Form we have

marked under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Next, we find that some of the information in Exhibit D, specifically, criminal history information obtained from the Safe Schools Project, is subject to the Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. § 1681 et seq. Section 22.083 of the Education Code permits the district to obtain criminal history record information from a private entity that is a consumer reporting agency governed by the FCRA. *See* Educ. Code § 22.083(a-1)(3). We understand that the Safe Schools Project is a consumer reporting agency that furnishes reports to the district to be used for employment purposes. *See* 15 U.S.C. § 1681a(f)(defining "consumer reporting agency"), (h)(defining "employment purposes"). A criminal history report compiled by a private consumer reporting agency is a "consumer report" under the FCRA. *See* 15 U.S.C. § 1681a(d)(defining "consumer report"); *see also* [www.ftc.gov/bcp/online/pubs/buspubs/credempl.shtm](http://www.ftc.gov/bcp/online/pubs/buspubs/credempl.shtm) (discussing Federal Trade Commission position that "consumer report" includes criminal histories). Section 1681b of the FCRA permits a consumer reporting agency to furnish a consumer report to a person that the consumer reporting agency has reason to believe intends to use the information for employment purposes. *See* 15 U.S.C. § 1681b(a)(3)(B); *see also id.* § 1681a(b), (d) (defining "person" and "consumer report"). Section 1681b further provides that "[a] person shall not use or obtain a consumer report for any purpose unless . . . the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and . . . the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification." *Id.* § 1681b(f). Section 1681e provides for the maintenance of procedures by consumer reporting agencies under which prospective users of consumer reports must identify themselves, certify the purposes for which they seek information, and certify that the information will be used for no other purpose. *See* 15 U.S.C. § 1681e(a); *see also* Open Records Decision No. 373 at 2 (1983) (stating that federal law strictly limits distribution of consumer credit reports by credit reporting agencies). Upon review, we find that the Safe Schools Project report is a consumer report for purposes of section 1681b of the FCRA. The FCRA does not permit the disclosure of information in a consumer report for the purpose of responding to a request for information under the Act. Therefore, we conclude that this information, which we have marked, must be withheld from the requestor under section 552.101 of the Government Code in conjunction with the FCRA.

Section 552.101 of the Government Code also encompasses confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. CHRI is defined as "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each

state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We note that the term CHRI does not include driving record information. *See id.* § 411.082(2)(B). Upon review, we find none of the remaining information constitutes CHRI for purposes of chapter 411 of the Government Code and, thus, may not be withheld under section 552.101 of the Government Code on this basis.

Section 552.135 of the Government Code provides in part:

(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 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].

(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.

Gov’t Code § 552.135(a)-(c). 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). We note that section 552.135 protects an informer's identity, but it does not generally encompass protection for witness statements. In this instance, you state that the submitted information reveals the identity of an employee of the district who reported possible violations of section 247.2 of title 19 of the Texas Administrative Code. *See* Educ. Code § 21.041(b) (TEA shall propose rules providing for disciplinary proceedings); 19 T.A.C. § 247.2 (Code of Ethics and Standard Practices for Texas Educators). Based on this representation and our review of the information at issue, we conclude the district must withhold the identity of the employee who reported the possible violation, which we have marked, under section 552.135 of the Government Code. However, we find that none of the remaining information at issue reveals an informer's identity for the purpose of section 552.135, and it may not be withheld on this basis.

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.<sup>2</sup> 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. § 249.4. 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.

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<sup>2</sup>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).

19 T.A.C. § 249.14. In this instance, the TEA requestor states that she is investigating alleged improper conduct by the named former district employee and 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 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 statutes and the right of access afforded to TEA investigators under section 249.14.

With regard to the submitted Employment Eligibility Verification Form I-9 and information subject to the FCRA, we noted above that this information is confidential pursuant to section 1324a of title 8 of the United States Code and section 1681e of title 15 of the United States Code. As federal law, sections 1324a and 1681e preempt 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. We also find the submitted information in the consumer report must be withheld under section 552.101 of the Government Code in conjunction with the FCRA.

We note that section 249.14 does not specifically grant access to information subject to section 552.135 of the Government Code. Section 552.135 of the Government Code has its own access provision authorizing release of information. 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 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 21.353 of the Education Code expressly authorizes limited release of appraisals to other school districts in connection with teachers' employment applications), DM-353 (1995) at 4-5 n.6 (detailed provisions in state law for disclosure of records would not permit disclosure "to other governmental entities and officials . . . without violating the record's confidentiality"), 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 also note that an interagency transfer of this information is not permissible where, the applicable statutes enumerate the specific entities to which information encompassed by the statute may be disclosed, and the enumerated entities do not include the requesting governmental body. *See* Open Records Decision Nos. 655 at 8-9 (1997), 516 at 4-5 (1989), 490 at 2 (1988); *see also* Attorney General Opinion GA-0055.

Furthermore, 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.*). Although section 249.14 generally allows TEA to access information relating to suspected misconduct on the part of an educator, section 552.135 specifically protects school district informers. This section specifically permits release to certain parties and in certain circumstances that do not include TEA's request in this instance. We, therefore, conclude that, notwithstanding the provisions of section 249.14, the district must withhold the information that is excepted from disclosure under section 552.135 of the Government Code. *See* 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).

You assert that some of the remaining information is excepted from disclosure under sections 552.101 and 552.102 in conjunction with common-law privacy and the common-law informer's privilege, as well as sections 552.102(b), 552.117, 552.137, and 552.147 of the Government Code. However, these sections are general exceptions to disclosure that do not have their own release provisions. Therefore, TEA's statutory right of access under section 249.14 prevails and none of the remaining information may be withheld under these sections. *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 21.355 of the Education Code. The district must also withhold the submitted I-9 Form pursuant to section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FCRA. The district must withhold the information we have marked under section 552.135. The remaining information must be released to the requestor.<sup>3</sup>

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

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<sup>3</sup>We 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.

responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](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, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Lauren J. Holmsley". The signature is written in black ink and is positioned above the typed name.

Lauren J. Holmsley  
Assistant Attorney General  
Open Records Division

LJH/dls

Ref: ID# 381015

Enc. Submitted documents

c: Requestor  
(w/o enclosures)