



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 10, 2010

Ms. Laura C. Rodriguez
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P.O. Box 460606
San Antonio, Texas 78246

OR2010-08496

Dear Ms. Rodriguez:

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# 382598.

The D'Hanis Independent School District (the "district"), which you represent, received a request for six categories of information related to a named teacher from an investigator with the Texas Education Agency ("TEA"). You state the district has released some of the requested information. You also state the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You claim that the remaining requested 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.

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. Section 21.355 of the Education Code 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

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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. 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>.

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 section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. See Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that a "teacher" for purposes of section 21.355 means a person who (1) is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. See *id.* at 4. You state that AG-0011 through AG-0118 relate to a teacher who held the appropriate teaching certificate and was teaching at the time of the evaluations. Based on your representations and our review, we agree that the most of the information you have marked consists of teacher evaluations subject to section 21.355. However, we conclude that the self report forms and memos written by the named teacher do not evaluate the employee for purposes of section 21.355. Accordingly, with the exception of the information we have marked for release, the district must generally withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

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). The document labeled AG-0119 contains ExCET exam results of the teacher at issue. You state subsections 21.048(c-1)(1) and (2) are not applicable. Thus, the district must generally withhold document AG-0119 under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

You raise section 261.201(a) of the Family Code for information you have marked in the documents labeled AG-0004, AG-0005, and AG-0008. Section 552.101 also encompasses section 261.201(a), which provides as follows:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a); *see also id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261). We note that the district is not an agency authorized to conduct a chapter 261 investigation. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). However, the information we have marked was used or developed by the Medina County Sheriff during an investigation of child abuse. Therefore, the marked information is generally confidential under section 261.201 of the Family Code. Section 261.201(a) provides, however, that information encompassed by subsection (a) may be disclosed “for purposes consistent with [the Family Code] and applicable federal or state law.” *Id.* § 261.201(a).

We note that section 22.082 of the Education Code constitutes “applicable state law” in this instance. Section 22.082 of the Education Code provides that the TEA “may obtain from any law enforcement or criminal justice agency all criminal history record information [“CHRI”] and all records contained in any closed criminal investigation file that relate to a specific applicant for or holder of a certificate issued under Subchapter B, Chapter 21.” 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); *see also id.* §§ 411.0901 (TEA entitled to obtain CHRI from Department of Public Safety (“DPS”) about a person who is employed or is an applicant for employment by a school district), 411.087(a)(2) (agency that is entitled to obtain CHRI from DPS is also authorized to “obtain from any other criminal justice agency in this state criminal history record information maintained by that [agency]”); *cf. Brookshire v. Houston Indep. Sch. Dist.*, 508 S.W.2d 675, 678-79 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (when legislature defines term in one statute and uses same term in relation to same subject matter in latter statute, later use of term is same as previously defined).

In this instance, the requestor is an investigator with the TEA, which has assumed the duties of the State Board for Educator Certification (the "SBEC").² The requestor states the TEA is conducting an investigation of an individual who has applied for or currently holds educator credentials. Thus, sections 22.082 and 411.087 are applicable state laws in this instance. However, this office cannot determine whether release of the CHRI is consistent with the Family Code. Consequently, if the district determines that release of the CHRI is consistent with the Family Code, the district must release information from the submitted documents to this requestor that shows the type of allegations made and whether there was an arrest, information, indictment, detention, conviction, or other formal charges and their dispositions. *See* Open Records Decision No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under statutory predecessor to Act). In that instance, the district must withhold the remainder of the information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

If, however, the district determines that release is not consistent with the Family Code, the district must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. *See* Attorney General Opinions DM-353 at 4 n.6 (1995) (finding interagency transfer of information prohibited where confidentiality statute enumerates specific entities to which release of information is authorized and where potential receiving governmental body is not among statute's enumerated entities), JM-590 at 4-5 (1986); Fam. Code § 261.201(b)-(g) (listing entities authorized to receive section 261.201 information).

With regard to the information subject to section 21.355 of the Education Code, section 21.048 of the Education Code, and section 261.201 of the Family Code, we again note that the requestor is a staff investigator with the TEA. TEA's request states that it is seeking this information under the authority provided to the 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 protected by the exceptions discussed above. *See* Open Records Decision No. 451 at 4 (1986) (specific access provision prevails over generally applicable exception to public disclosure).

²The 79th Texas legislature passed House Bill 1116, which required the transfer of SBEC's administrative functions and services to the TEA, effective September 1, 2005.

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).

Chapter 249 of title 19 of the Texas Administrative Code governs disciplinary proceedings, sanctions, and contested cases involving SBEC. *See* 19 T.A.C. § 249.14. Section 249.14 provides the following 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 [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.

19 T.A.C. § 249.14. In this case, the requestor states that he is investigating alleged improper conduct by the named teacher and that he needs to review the requested records to determine whether measures need to be taken against the teacher'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 statutes discussed above, we find that there is a conflict between these statutes and the right of access afforded to TEA investigators under this section.

Where general and specific provisions 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 access to information relating to suspected misconduct on the part of an educator, section 21.355 specifically protects educator evaluations, section 21.048 specifically protects educator certification test results, and section 261.201 of the Family Code specifically protects child abuse or neglect reports or investigative information. These sections specifically permit release to certain parties and in certain circumstances that do not include the TEA's request in this instance. Thus, these specific statutes prevail over the general TEA right of access. We therefore conclude that, notwithstanding the provisions of section 249.14, the district must withhold the information that is excepted from disclosure under section 552.101 of the Government Code in conjunction with sections 21.355 and 21.048 of the Education Code and section 261.201 of the Family Code.

In summary, with the exception of information we have marked for release, the district must withhold documents AG-0011 through AG-0118 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must also

withhold document AG-0119 under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. If the district determines that release of the submitted CHRI is consistent with the Family Code, then the CHRI in the documents subject to section 261.201 of the Family Code must be released, but the district must withhold the remaining marked information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. If, however, the district determines that release of the CHRI at issue is not consistent with the Family Code, then the district must withhold all of the marked information under section 552.101 in conjunction with section 261.201 of the Family Code. The remaining information must be released.⁴

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, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 382598

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note that because the requestor may have a special right of access to some of the requested 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.