



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 13, 2011

Mr. Robb D. Decker
Walsh, Anderson, Brown, Gallegos and Green, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2011-00705

Dear Mr. Decker:

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# 405932.

The Southwest 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 (the "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 portions of the remaining requested information are excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions 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

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>.

Code § 552.101. Section 552.101 encompasses section 261.201(a) of the Family Code, which provides as follows:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under [the Act], 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). You state pages AG-0014 through AG-0017 are confidential pursuant to section 261.201. We note the district is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). You state pages AG-0014 through AG-0017 could consist of communications between the Child Protective Services Division of the Texas Department of Family and Protective Services (“CPS”) and the district; however, you do not explain, and we cannot discern, whether this information was used by CPS in an investigation under chapter 261. Accordingly, we conclude you failed to explain how pages AG-0014 through AG-0017 are confidential under section 261.201(a)(2), and the district may not withhold this information under section 552.101 on that basis. However, some of the information at issue reveals the identity of an individual who reported alleged or suspected abuse to CPS. Therefore, this information, which we have marked, is confidential under section 261.201(a)(1) of the Family Code and the district must generally withhold it under section 552.101.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code. Section 21.355 provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. The Third Court of Appeals 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 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 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 pages AG-0009 through AG-0013 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 pages AG-0009 through AG-0013 constitute teacher evaluations subject to section 21.355. Accordingly, the district must generally withhold this information under section 552.101 in conjunction with section 21.355.

We next note the TEA seeks access to the submitted information under the authority provided to the State Board for Educator Certification (the "SBEC") by section 249.14 of title 19 of the Texas Administrative Code. Chapter 249 of title 19 of the Texas Administrative Code governs disciplinary proceedings, sanctions, and contested cases involving the SBEC. *See* 19 T.A.C. § 249.4. Section 249.14 provides in part:

(a) The [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.

Id. The requestor identifies himself as an investigator for the TEA and states the TEA is conducting an investigation of the named teacher. Thus, we find 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 information at issue is specifically protected from public disclosure by the statutes discussed above, we find 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 the legislature intended the general provision to prevail. *See* Gov't Code § 311.026(b); *Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App. 1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones). Although section 249.14 generally allows the TEA access to information relating to suspected misconduct on the part of an educator, section 21.355 of the Education Code specifically protects educator evaluations and section 261.201(a)(1) of the Family Code specifically protects the identity of an individual who makes a report under chapter 261 of the Family Code. 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, notwithstanding the provisions of section 249.14, the district must withhold the information that is excepted from disclosure under section 552.101 in conjunction with section 21.355 and section 261.201(a)(1).

You also seek to withhold some of the remaining information under subsections 552.102(a) and 552.102(b) of the Government Code.² Further you state the district will redact portions of the information under section 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009) and under section 552.147(b) of the Government Code.³ However, those sections are general exceptions to disclosure under the Act and do not have their own release provisions. Therefore, the TEA's statutory right of access under section 249.14 prevails over those sections, and none of the remaining information may be withheld under sections 552.102(a), 552.102(b), 552.136, and 552.147. *See* Open Records Decision No. 451 at 4 (1986) (specific access provision prevails over generally applicable exception to public disclosure). Further, although you assert some of the remaining information is excepted under section 552.101 in conjunction with common-law privacy, a statutory right of access generally prevails over the common law.⁴ *Centerpoint Energy Houston Elec. LLC v. Harris County Toll Road*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law); Attorney General Opinion GA-0290 at 4 (2005) (noting valid rules of administrative agencies have the same "for and effect of legislation"). Therefore, the TEA requestor has a right of access to the remaining information at issue pursuant to section 249.14.

In summary, the district must withhold pages AG-0009 through AG-0013 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must also withhold the information we marked under section 552.101 of the Government Code in conjunction with section 261.201(a)(1) of the

²Section 552.102(a) protects information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. *See* Gov't Code § 552.102(a). Section 552.102(b) excepts from disclosure a transcript from an institution of higher education maintained in a professional public school employee's personnel file, except for the degree obtained or the curriculum. *See id.* § 552.102(b).

³Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision. Section 552.147(b) of the Government Code 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. *See* Gov't Code § 552.147.

⁴Common-law privacy under section 552.101 protects highly intimate or embarrassing information, such that its release would be highly objectionable to a person of ordinary sensibilities, that is not a matter of legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

Family Code. The district must release the remaining information to the TEA requestor pursuant to section 249.14 of title 19 of the Texas Administrative Code.⁵

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 405932

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵Because the 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.