



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 22, 2011

Ms. LeAnne Lundy
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2011-02626

Dear Ms. Lundy:

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# 409841.

The New Caney Independent School District (the "district"), which you represent, received a request from an investigator from the Texas Education Agency (the "TEA") for six categories of information relating to a named individual, including: identification information; contact information; information pertaining to reprimands or disciplinary actions "relating to allegations of educator misconduct or criminal history" while the individual was employed by the district; any documents relating to allegations of educator misconduct or criminal history; and all employment documents, excluding "performance evaluations under the Performance Development Appraisal System or other authorized appraisal system[.]" You state the district will release a majority of the requested information. 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 must address the district's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e-1) provides the following:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body not later than the 15th business day after the date of receiving the written request. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

Gov't Code § 552.301(e-1). We note you have submitted to our office a copy of the letter the district provided to the requestor pursuant to section 552.301(e-1). Upon review, the submitted letter demonstrates the district redacted its discussion of the claimed exception, including information that does not disclose or contain the substance of the information requested. Consequently, we find the district failed to comply with the requirements of section 552.301(e-1).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). You raise section 552.101 of the Government Code, which can provide a compelling reason to withhold information. Therefore, we will consider the applicability of this exception to the submitted information.

You state the district has redacted some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit a state educational agency or institution to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). However, FERPA is not applicable to law enforcement records maintained by the district's police department for law enforcement purposes. 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3 (defining "education record"), .8. You state the submitted information relates to a criminal investigation by the district's police department, as well as an administrative investigation by the district. Accordingly, because the submitted one-page Incident Notification Form is maintained by a law enforcement unit of an educational agency, this information does not constitute an education record subject to FERPA and no portion of this document may 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, such as section 261.201 of the Family Code, which provides:

¹A 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>.

(a) [T]he 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). We note 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). The submitted information includes one document relating to the district's administrative investigation. You do not provide arguments explaining how such information could be subject to chapter 261. Thus, we find you have failed to demonstrate the applicability of section 261.201 to this information, and the document may not be withheld on this basis.

However, the district's police department is authorized to conduct chapter 261 investigations. *See id.* As previously discussed, a portion of the submitted information relates to the investigation of alleged child abuse by the district's police department. Thus, the submitted Incident Notification Form (the "incident form") is within the scope of section 261.201 of the Family Code. *See id.* §§ 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1), (4) (defining "abuse" for purposes of chapter 261 of the Family Code). You have not indicated the district's police department has adopted a rule that governs the release of this type of information. Given that assumption, we conclude the incident form is generally confidential under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

We note the requestor, the TEA, seeks access to the information at issue 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.² Accordingly, we will consider whether

²The 79th Texas legislature passed House Bill 1116, which required the transfer of SBEC's administrative functions and services to TEA, effective September 1, 2005. Chapter 21 of the Education Code authorizes the 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 the 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 the SBEC to "adopt rules as necessary for its own procedures." *Id.* § 21.041(a).

section 249.14 of title 19 of the Texas Administrative Code permits the TEA to obtain information that is otherwise protected by section 261.201 of the Family Code. *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 the SBEC. *See* 19 T.A.C. § 249.14. Section 249.14 provides the following in relevant 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. § 249.14(a), (c). In this case, the requestor states that he is investigating alleged educator misconduct or criminal history information of the named teacher and that he needs to review the requested records to conduct a complete investigation. Thus, we find that the submitted information is subject to the general right of access afforded to the TEA under section 249.14. However, because the incident form is specifically protected from public disclosure by section 261.201 of the Family Code, as discussed above, we find that there is a conflict between this statute and the right of access afforded to the TEA under section 249.14.

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 the TEA access to information relating to suspected misconduct on the part of an educator, section 261.201 of the Family Code specifically protects child abuse or neglect reports or investigative information. This section specifically permits release to certain parties and in certain circumstances that do not include the TEA's request in this instance. Thus, the specific protection of section 261.201 prevails over the general right of access of the TEA. We therefore conclude that the TEA does not have a right of access to the incident form under section 249.14.

However, section 261.201 of the Family Code also provides that information encompassed by subsection (a) may be disclosed "for purposes consistent with [the Family Code] and applicable federal or state law." Fam. Code § 261.201(a). In this instance, section 22.082 of the Education Code constitutes "applicable state law." Section 22.082 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 [of the Education Code].” Educ. Code § 22.082. CHRI consists of “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 is entitled to obtain CHRI from Texas Department of Public Safety (“DPS”) relating to certain employees of schools), .090 (State Board for Educator Certification (“SBEC”) is entitled to obtain CHRI from DPS about a person who has applied to SBEC for certificate under subchapter B, chapter 21, Education Code), .087(a)(2) (agency entitled to obtain CHRI from DPS 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 later statute, later use of term is same as previously defined).

As noted above, the requestor states that he is investigating alleged educator misconduct or criminal history information of the named teacher. You do not state and the submitted information does not indicate that the district’s police department’s criminal investigation is closed. Thus, as the information at issue relates to a holder of a certificate issued under subchapter B, Chapter 21 of the Education Code, we find section 22.082 of the Education Code gives the TEA a statutory right of access to any CHRI regarding the named individual. *See* Educ. Code § 22.082.

However, section 261.201(a) states that the release must be “for purposes consistent with the Family Code.” *See* Fam. Code § 261.201(a). This office cannot determine whether release of the information is consistent with the Family Code. Consequently, if the district determines that release of CHRI is consistent with the Family Code, then the district must release information from the incident form that shows the type of allegations made and whether there was an arrest, information, indictment, detention, conviction, or other formal charges and their dispositions. In that event, the district must withhold the rest of the incident form 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 is not consistent with purposes of the Family Code, the district must withhold the incident form in its entirety pursuant to section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. *See id.* § 261.201(b)-(g), (i), (k) (listing circumstances under which section 261.201 information can be released); 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).

In summary, if the district determines that it is consistent with the Family Code to release CHRI to this requestor in this instance, with the exception of any CHRI, the district must withhold the incident form under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. If the district determines that it is not consistent with the Family Code to release CHRI to the requestor in this instance, the district must withhold the incident form in its entirety under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The district must release the remaining information.³

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 409841

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³Because 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 another request for the same information from a different requestor without such a right of access.