



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 24, 2011

Ms. LeAnne Lundy
Ms. Ellen H. Spalding
Rogers, Morris & Grover, L.L.P.
For Klein Independent School District
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2011-07332

Dear Ms. Lundy and Ms. Spalding:

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# 418405.

The Klein Independent School District (the "district"), which you represent, received a request from an investigator with the Texas Education Agency (the "TEA") for information pertaining to a named former employee of the district, including disciplinary history, employment documents, and audit documents, but excluding employee birth dates and social security numbers. You state you have released some of the requested information. You state that some of the responsive information has been redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim the submitted information is excepted from disclosure under

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>.

sections 552.101, 552.102, 552.108, 552.117, and 552.130 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes, such as the Family Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). The document we have marked in Exhibit F is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find that none of the release provisions of the FMLA applies to the information. Thus, we conclude that

²You have redacted student identifying information in Exhibit C under FERPA. Thus, the students' identifications in Exhibit C are sufficiently protected and we need not address your arguments for this information.

³We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

the district must withhold the information we have marked in Exhibit F under section 552.101 of the Government Code in conjunction with the FMLA.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001-165.160. Section 159.002 of the MPA provides:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002. Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). Medical records may be released only as provided under the MPA. *Id.* We have marked the medical record in Exhibit F that is subject to the MPA. The district may only disclose this record in accordance with the MPA.

Section 552.101 also encompasses chapter 411 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. *See* 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 DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. A school district may obtain CHRI from DPS as authorized by section 411.097 and subchapter C of chapter 22 of the Education Code; however, a school district may not release CHRI except as provided by section 411.097(d). *See id.* §§ 411.097(d); *see also id.* 411.0845(d) (establishing an electronic criminal history clearinghouse for CHRI at DPS and providing for confidentiality of such information); Educ. Code § 22.083(c)(1) (authorizing school district to obtain from any law enforcement or

criminal justice agency all CHRI relating to school district employee). Section 411.087 authorizes a school district to obtain CHRI from the Federal Bureau of Investigation (the "FBI") or any other criminal justice agency in this state. Gov't Code § 411.087. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. Furthermore, any CHRI the district obtained from DPS or any other criminal justice agency in this state must be withheld under section 552.101 of the Government Code in conjunction with section 411.097(d) of the Government Code. *See* Educ. Code § 22.083(c)(1). You claim Exhibit D consists of CHRI that is confidential under chapter 411. Upon review, we find you have not demonstrated how the information at issue constitutes CHRI provided to the district by DPS pursuant to section 411.097 of the Government Code. Accordingly, the district may not withhold Exhibit D under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. 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 at 3 (1996). Additionally, we determined that for purposes of section 21.355, the word "teacher" means a person who 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 who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. We note that a court has concluded that a written reprimand constitutes an evaluation for the 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.).

You contend that two submitted memoranda are confidential under section 21.355.⁴ You state that the employee concerned was a teacher who held the appropriate teaching certificate and assert the employee was teaching at the time the information was created. We note the documents at issue consist of two letters, one placing an employee on administrative leave, and the other from the district to the TEA regarding the employee's resignation. Upon review, we find that you have failed to demonstrate how the information consists of "[a] document evaluating the performance of a teacher or administrator" as contemplated by section 21.355. Educ. Code § 21.355. Accordingly, we conclude the district may not withhold the information at issue based on section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

⁴Although you state that these documents are contained in Exhibit E, we note they are in Exhibit F.

We also understand you have redacted certain Texas motor vehicle record information under section 552.130 of the Government Code pursuant to the previous determination issued in Open Records Decision No. 684 (2009). Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130(a)(1)-(2). We note the remaining records contain other information, which we have marked, that also is subject to section 552.130. Therefore, the district must withhold the Texas motor vehicle record information you have redacted, as well as the additional information we have marked, under section 552.130 of the Government Code.

We note the TEA's request states 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.⁵ In this instance, the TEA requestor states she is investigating allegations made against the named former employee of the district and needs to review the requested records to determine whether disciplinary action needs to be taken against this person's educator certification. Accordingly, we will consider whether section 249.14 of title 19 of the Texas Administrative Code permits the TEA to obtain the submitted 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).

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 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.

⁵Chapter 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 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).

Id. § 249.14(a), (c). We note that these regulations do not specifically grant access to information subject to the FMLA, section 159.002 of the MPA, or section 552.130 of the Government Code. We further note that the FMLA, section 159.002 of the MPA, and section 552.130 of the Government Code have their own access provisions governing 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"); Open Records Decision No. 655 (1997) (because statute permitted Department of Public Safety to transfer confidential criminal history information only to certain entities for certain purposes, county could not obtain information from the department regarding applicants for county employment). We also note that an interagency transfer of this information is not permissible where, as here, 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, 516 at 4-5 (1989), 490 at 2 (1988); *see also* Attorney General Opinion GA-0055.

Further, 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, the FMLA specifically protects information created for purposes of the FMLA, section 159.002 of the MPA specifically protects medical records, and section 552.130 specifically protects Texas motor vehicle record information. The FMLA, the MPA, and section 552.130 specifically permit release to certain parties and in certain circumstances that do not include TEA's request in this instance. We therefore conclude that, notwithstanding section 249.14, the district must withhold from disclosure under section 552.101 of the Government Code the information that is confidential under the FMLA and the MPA, and also must withhold the information excepted under section 552.130 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 seek to withhold portions of the remaining information under sections 552.102 and 552.108 of the Government Code. Additionally, you state the district intends to redact portions of the requested information under section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code and under section 552.147(b) of the Government Code.⁶ However, these sections are general exceptions to disclosure under the Act. Therefore, the TEA's statutory right of access under section 249.14 prevails and none of the submitted information may be withheld under section 552.102, section 552.108, section 552.117, or section 552.147. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exception to disclosure under the Act). Further, although you assert some of the remaining information is excepted under section 552.101 of the Government Code in conjunction with common-law privacy, a statutory right of access generally prevails over the common law. *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 "force and effect of legislation"). Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

To summarize: The district must withhold the information we have marked in Exhibit F under section 552.101 of the Government Code in conjunction with the FMLA. The marked medical record may only be released in accordance with the MPA. The district must withhold the Texas motor vehicle record information you have redacted, as well as the additional information we have marked, under section 552.130 of the Government Code. The district must release the remaining information to TEA pursuant to section 249.14 of title 19 of the Texas Administrative Code.⁷

⁶Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body. Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 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* Gov't Code §§ 552.117, .024(c). 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.

⁷Because 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.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 418405

Enc. Submitted documents

c: Requestor
(w/o enclosures)