



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 1, 2011

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

OR2011-07733

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# 419221.

The New Caney Independent School District (the "district"), which you represent, received a request for six categories of information regarding a former employee from an investigator with the Texas Education Agency (the "TEA"). You state the district has released some of the requested information. You inform us the district has withheld student-identifying information 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 sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.²

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

²We 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.

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 Open Records Letter No. 643, this office interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, we concluded 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 held 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." *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). You state the records you marked under section 21.355 are evaluations and reprimands concerning the former employee. You also state the former employee currently holds the appropriate certification in the State of Texas and was acting in her capacity as a teacher at the time of the evaluations and reprimands. Based on your representations and our review, we conclude the records we marked are teacher evaluations for purposes of section 21.355. Accordingly, the records we marked are confidential under section 21.355 of the Education Code and generally must be withheld under section 552.101 of the Government Code. We note, however, you have failed to demonstrate two of the records you marked under section 21.355 are evaluations for purposes of section 21.355. Thus, you may not withhold the remaining documents you have marked under section 552.101 in conjunction with section 21.355.

Section 552.101 also encompasses section 261.201(a) of the Family Code, which provides:

(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). You have marked two of the remaining records under 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 or neglect investigations). However, a portion of these records is a report of alleged or suspected abuse of a child made to the Child Protective Services Division of the Texas Department of Family Protective Services. *See id.* § 261.001(1)(E) (definition of “abuse” for purposes of Family Code chapter 261 includes offense of indecency with a child under Penal Code section 21.11); *see also* Penal Code § 21.11(a) (defining “child” for purposes of Penal Code section 21.11 as person under 17 years of age). In addition, portions of these records reveal the identity of the individual who made the report of alleged or suspected child abuse. Therefore, the report of alleged child abuse and the identity of the person who made the report, which we marked, must generally be withheld under section 552.101 of the Government Code in conjunction with section 261.201(a)(1) of the Family Code. However, you have failed to demonstrate how the remaining information you marked under section 261.201 is a report of alleged or suspected child abuse or neglect, or was used or developed in an investigation conducted under chapter 261 of the Family Code. Thus, no portion of the remaining information at issue may be withheld under section 552.101 in conjunction with section 261.201.

As noted above, the requestor identifies herself as an investigator with the TEA. The investigator’s request states she is seeking the requested 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 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.

19 T.A.C. § 249.14(a), (c). The investigator states the TEA has opened an investigation regarding the alleged educator misconduct or criminal history information of the former employee and she needs to obtain the requested records in order to conduct a full and complete investigation. The investigator also states the alleged misconduct or criminal history information could warrant disciplinary action relating to the former employee’s educator certification. Thus, we find the submitted information is subject to the right of access afforded to the TEA under section 249.14. However, because most of the submitted information is protected from public disclosure by section 21.355 of the Education Code and section 261.201 of the Family Code, we find there is a conflict between these statutes and the right of access afforded to TEA investigators under section 249.14.

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 the legislature intended the general provision to prevail. *See id.* § 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.). Section 249.14 generally provides the TEA staff may obtain and investigate information concerning alleged improper conduct by an educator that would warrant the SBEC denying relief to or taking disciplinary action against the person or certificate. *See* 19 T.A.C. § 249.14(a). However, section 21.355 specifically protects “a document evaluating the performance of a teacher[.]” Educ. Code § 21.355. In addition, section 261.201 specifically protects child abuse or neglect reports and investigative information. *See* Fam. Code § 261.201(a). Thus, sections 21.355 and 261.201 are the more specific statutes. Further, sections 21.355 and 261.201 specifically permit release to certain parties and in certain circumstances that do not include the TEA’s request in this instance. Accordingly, notwithstanding section 249.14, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code and section 261.201 of the Family Code.

You also seek to withhold portions of the remaining information under section 552.102 of the Government Code.³ However, section 552.102 is a general exception to disclosure under the Act and does not have its own release provisions. Therefore, the TEA’s statutory right of access under section 249.14 prevails over section 552.102 and none of the remaining information may be withheld under section 552.102 of the Government Code. *See* Open Records Decision No. 451 at 4 (1986) (specific access provision prevails over generally applicable exception to public disclosure). Furthermore, 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 “effect of legislation”). Therefore, the TEA requestor has a right of access to the remaining information pursuant to section 249.14.

In summary, the district must withhold the records we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The information we marked under section 552.101 in conjunction with section 261.201 of the Family Code must also be withheld. The remaining information must be released.

³Section 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).

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).

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bs

Ref: ID# 419221

Enc. Submitted documents

c: Requestor
(w/o enclosures)