



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2011

Mr. Humberto Aguilera
For Clint Independent School District
Escamilla, Poneck & Cruz, L.L.P.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2011-08423

Dear Mr. Aguilera:

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# 420556.

The Clint Independent School District (the "district"), which you represent, received a request from an investigator with the Texas Education Agency (the "TEA") for six categories of information pertaining to a named individual. You state some responsive information has been made available to the requestor. You also state some of the submitted 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 sections 552.101, 552.102, 552.117, and 552.130 of the

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>.

Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.²

Initially, we note the district did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request." Gov't Code § 552.301(b). While the district raised section 552.101 within the ten-business-day time period as required by subsection 552.301(b), the district did not raise sections 552.102, 552.117, and 552.130 until after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). However, mandatory exceptions to disclosure cannot be waived by a governmental body. *See* Gov't Code § 552.352; Open Records Decision No. 574 at 3 n.4 (2001) (mandatory exceptions). Because sections 552.102, 552.117, and 552.130 are mandatory exceptions, we will consider the district's arguments under sections 552.102, 552.117, and 552.130 notwithstanding its violation of section 552.301(b) in raising these exceptions.

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 exception encompasses information that other statutes make confidential. You claim section 552.101 in conjunction with section 1324a of title 8 of the United States Code for the submitted I-9 Employment Eligibility Verification form. Section 1324a provides that an I-9 form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5). Release of the I-9 form under the Act would be "for purposes other than for enforcement" of the referenced federal laws. Therefore, the submitted I-9 form is generally confidential under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You claim Exhibit B contains evaluations of the named district employee. Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code. Section 21.355 provides "a document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted this section

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.

to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher. Open Records Decision No. 643 (1996). This office has also concluded that 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 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.” *Abbot v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You state the individual at issue held a teacher’s certificate under chapter 21 of the Education Code and was performing the functions of a teacher at the time of the evaluations. Upon review of the information at issue, we conclude the information we have marked is evaluations that are confidential under section 21.355 and must generally be withheld pursuant to section 552.101 of the Government Code. However, we note the remaining information in Exhibit B consists of documents regarding an investigation of alleged wrongdoing by a district employee. This information does not constitute an evaluation of the individual’s performance as a teacher for the purposes of section 21.355. Accordingly, we find you have failed to demonstrate the remaining information constitutes a teacher evaluation subject to section 21.355 of the Education Code, and it may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses criminal history record information (“CHRI”). Chapter 411 authorizes the Texas Department of Public Safety (the “DPS”) to compile and maintain criminal history record information (“CHRI”) from law enforcement agencies throughout the state and to provide access to authorized persons to federal criminal history records. *See* Gov’t Code §§ 411.042, .087.

In 2007, the Legislature enacted section 411.0845 of the Government Code, which provides in relevant part:

(a) The [DPS] shall establish an electronic clearinghouse and subscription service to provide [CHRI] to a particular person entitled to receive [CHRI] and updates to a particular record to which the person has subscribed under this subchapter.

(b) On receiving a request for [CHRI] from a person entitled to such information under this subchapter, the [DPS] shall provide through the electronic clearinghouse:

(1) the [CHRI] reported to the [DPS] or the Federal Bureau of Investigation relating to the individual who is the subject of the request; or

(2) a statement that the individual who is the subject of the request does not have any [CHRI] reported to the [DPS] or the Federal Bureau of Investigation.

...

(d) The [DPS] shall ensure that the information described by Subsection (b) is provided only to a person otherwise entitled to obtain [CHRI] under this subchapter. Information collected under this section is confidential and is not subject to disclosure under [the Act].

Id. § 411.0845(a)-(b), (d). Section 411.097(b) of the Government Code provides in part, “[a] school district . . . is entitled to obtain from [DPS CHRI] maintained by [DPS] that the district . . . is required or authorized to obtain under Subchapter C, Chapter 22, Education Code, that relates to a[n] . . . employee of the district[.]” *Id.* § 411.097(b). Pursuant to section 22.083(a-1) of the Education Code, a school district is authorized to obtain CHRI from DPS’s electronic clearinghouse. *See* Educ. Code § 22.083(a-1)(1). Section 22.08391(d) of the Education Code states any CHRI received by a school district is subject to section 411.097(d) of the Government Code. *Id.* § 22.08391(d). Section 411.097 provides in relevant part:

(d) [CHRI] obtained by a school district, charter school, private school, service center, commercial transportation company, or shared services arrangement in the original form or any subsequent form:

(1) may not be released to any person except:

(A) the individual who is the subject of the information;

(B) the [TEA];

(C) the State Board for Educator Certification;

(D) the chief personnel officer of the transportation company, if the information is obtained under Subsection (a)(2); or

(E) by court order[.]

Gov’t Code § 411.097(d). You assert the information in you have marked Exhibit E was obtained from DPS in accordance with chapter 22 of the Education Code. Based on your representations, we conclude the information at issue constitutes CHRI for the purposes of chapter 411. Accordingly, the district must generally withhold this information under section 552.101 of the Government Code in conjunction with sections 411.0845

and 411.097(d) of the Government Code. *See* Gov't Code § 411.097; *see also* Educ. Code § 22.08391(d) (stating CHRI received by school district under subchapter C of chapter 22 of Education Code is subject to section 411.097(d) of Government Code).

However, the requestor is an investigator for the TEA. Section 411.097(d) governs the release of CHRI by a school district. Pursuant to section 411.097(d)(1)(B), the TEA is authorized to obtain from the district the CHRI the district obtained from DPS's electronic clearinghouse. *Id.*; *see also* Educ. Code § 22.08391(d); Gov't Code § 411.0901 (the TEA entitled to obtain CHRI from DPS on certain school employees or applicants for employment). Therefore, this CHRI obtained pursuant to section 411.0845 is subject to release to this requestor under section 411.097(d)(1)(B). Therefore, the CHRI in Exhibit E must be released to this requestor in its entirety.

You raise section 261.201(a) of the Family Code for Exhibit C. Section 552.101 also encompasses section 261.201(a), which provides as follows:

(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); *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, some of the information at issue involves reports of alleged or suspected abuse made to the Child Protective Services Division of the Texas Department of Family and Protective Services and the identity of the person making the report. Therefore, this information, which we have marked, is generally confidential under section 552.101 of the Government Code in conjunction with section 261.201(a)(1) of the Family Code.

Section 552.130 provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). Accordingly, the district must generally

withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code.

We note 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.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).

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 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 [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). In this instance, the requestor states he is investigating allegations made against the individual at issue and that he needs to review the requested records to determine whether measures need to be taken against this person'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 there is a conflict between these statutes and the right of access afforded to TEA investigators under section 249.14.

With regard to the submitted I-9 form, we noted above this form is confidential pursuant to section 1324a of title 8 of the United States Code. As a federal law, section 1324a preempts

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).

any conflicting state provisions, including section 249.14 of the Texas Administrative Code. *See Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law). Accordingly we find, notwithstanding section 249.14 of the Texas Administrative Code, the submitted I-9 is confidential pursuant to section 1324a of title 8 of the United States Code and must be withheld under section 552.101 of the Government Code.

We note section 249.14 does not specifically grant access to information subject to section 21.355 of the Education Code, section 261.201 of the Family Code, or section 552.130 of the Government Code. We further note section 21.355 of the Education Code, section 261.201 of the Family Code, and section 552.130 of the Government Code have their own access provisions authorizing 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, 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 (1997), 516 at 4-5 (1989), 490 at 2 (1988); *see also* Attorney General Opinion GA-0055.

Furthermore, 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 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 to access information relating to suspected misconduct on the part of an educator, section 21.355 of the Education Code specifically protects educator evaluations, section 261.201 of the Family Code specifically protects child abuse or neglect reports or investigative information, and section 552.130 of the Government Code specifically protects Texas motor vehicle record information. These sections specifically permit release to certain parties and in certain circumstances that do not

include TEA's request in this instance. We therefore conclude section 249.14 of the Texas Administrative Code does not provide the requestor access to information subject to section 21.355 of the Education Code, section 261.201 of the Family Code, or section 552.130 of the Government Code. We therefore conclude that, notwithstanding the provisions of section 249.14, the district must withhold from TEA any information that is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code or section 261.201 of the Family Code and section 552.130 of the Government Code.

You also assert portions of the remaining information are excepted from disclosure under sections 552.102(a), 552.102(b), and 552.117 of the Government Code.⁴ In addition, you have redacted a social security number under section 552.147(b) of the Government Code.⁵ However, these sections are general exceptions to disclosure under the Act. Therefore, TEA's statutory right of access under section 249.14 prevails and none of the submitted information may be withheld under section 552.102(a), section 552.102(b), 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 (specific statutory right of access provisions overcome general exception to disclosure under the Act). 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.⁶ *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"). Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

⁴Section 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* Gov't Code § 552.102(b). Section 552.117 excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Gov't Code § 552.117.

⁵Section 552.147 excepts from disclosure the social security number of a living person. Gov't Code § 552.147.

⁶Common-law privacy protects information if: (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976).

In summary, the submitted I-9 form is confidential under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code and may only be released in compliance with the federal laws and regulations governing the employment verification system. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a)(1) of the Family Code. In addition, the district must withhold the Texas motor vehicle record information we have marked pursuant to section 552.130 of the Government Code. The remaining information must be released to the requestor.⁷

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# 420556

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁷We note that because the requestor has a special right of access to this 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.