ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 11, 2011

Ms. Ellen H. Spalding
Feldman, Rogers, Morris & Grover, LLP
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2011-09798

Dear 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# 423699.

KIPP, Inc. ("KIPP"), 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 KIPP. You state you have released most of the requested information. You claim 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 representative sample of information.[1]

Initially, we note, and you acknowledge, KIPP has not complied with the time periods prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public and must be released unless there is a compelling reason to withhold it. *See* Gov't Code § 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); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling

[1]We 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.

reason to withhold information by a showing the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 at 2 (1977). Because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider your argument under this section.

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, recently amended by the 82nd Legislature, provides, in relevant part, as follows:

> (a) A document evaluating the performance of a teacher or administrator is confidential.
>
> (b) Subsection (a) applies to a teacher or administrator employed by an open-enrollment charter school regardless of whether the teacher or administrator is certified under Subchapter B.

Act of May 25, 2011, 82nd Leg., R.S., H.B. 2971, § 1 (to be codified at Educ. Code § 21.355(a), (b)). 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." *Abbott v. North East Indep. Sch. Dist.*, 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 administrator. *See* Open Records Decision No. 643 (1996). We note section 21.355 does not apply to evaluations of teacher interns. *See id.* at 5 (concluding teacher interns, trainees, and educational aides are not "teachers" for the purposes of section 21.355).

You argue the submitted information consists of evaluations of the named employee in her performance as a teacher and as an administrator at KIPP, an open-enrollment charter school. Upon review, we find pages 1 through 3 of the submitted information contain teacher certification exam results and evaluations of the named individual in her performance as an intern. This information does not consist of evaluations of a teacher or administrator for purposes of section 21.355. Therefore, KIPP may not withhold pages 1 through 3 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. You further contend pages 4 through 8 of the submitted information evaluate the performance of the named individual in her role as a school leader at KIPP. Upon review, we find pages 4 through 8 do not evaluate the performance of an administrator for purposes of section 21.355. Thus, KIPP may not withhold pages 4 through 8 of the submitted information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 also encompasses section 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(c-1) provides the following:

> The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:
>
> > (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
> >
> > (2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). We note page 1 of the submitted information contains teacher certification examination results. We further note subsections 21.048(c-1)(1) and (2) are not applicable in this instance. Therefore, KIPP must generally withhold the information we have marked within page 1 pursuant to section 552.101 in conjunction with section 21.048(c-1) of the Education Code.

As noted above, in this instance, the requestor is a staff investigator with the TEA. 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. 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 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 TEA requestor states she is investigating alleged improper conduct by or criminal history information of the named employee, which could warrant disciplinary action relating to that person's educator certification. Thus, we find the submitted information is generally subject to the right of access afforded to the TEA under section 249.14. However, because the marked information within page 1 of the submitted information is specifically protected from public disclosure by section 21.048 of the Education Code, we find there is a conflict between this statute and the right of access afforded to TEA investigators under section 249.14 of the Texas Administrative Code.

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). Section 249.14 generally allows the TEA access to information relating to suspected misconduct on the part of an educator. However, section 21.048(c-1) of the Education Code specifically protects teacher certification examination results. Section 21.048 of the Education Code specifically permits release in certain circumstances that do not include the TEA investigator's request in this instance. Thus, section 21.048(c-1) of the Education Code prevails over the general TEA right of access. Therefore, notwithstanding the provisions of section 249.14, KIPP must withhold the information we marked within page 1 under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

In summary, KIPP must withhold the information we marked within page 1 of the submitted information under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. KIPP must release the remaining information.

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,

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/em

Ref: ID# 423699

Enc. Submitted documents

c: Requestor
(w/o enclosures)