



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2012

Mr. Chris Pirtle
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OR2012-10516

Dear Mr. Pirtle:

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# 458898.

The McLean Independent School District (the "district"), which you represent, received two requests from two different requestors.¹ The first requestor, an investigator with the Texas Education Agency (the "TEA"), requested all information pertaining to a named district employee. The second requestor requested "all documentation that the district has forwarded to [the TEA] related to any investigation being conducted by [the TEA] that allege that [the named district employee] engaged in conduct that is detrimental to the welfare of children, specifically[,] inappropriate conduct with a female student." You state the district has released some information to the first requestor. Because the district has released some responsive information to the first requestor, and does not claim any exceptions to disclosure for that information with respect to the second requestor, the district must also release the information at issue to the second requestor. You state the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act

¹The first request was received on April 23, 2012, while the second request was received on May 1, 2012. For purposes of this ruling, the requestor whose request was received on April 23 will be referred to as the "first requestor," and the requestor whose request was received on May 1 will be referred to as the "second requestor."

("FERPA"), 20 U.S.C. § 1232g.² You claim that 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.

Initially, we note the submitted information is not responsive to the second requestor's request for information because it has not been forwarded to the TEA.³ We further note that the TEA excludes performance evaluations under the Performance Development Appraisal System ("PDAS") from the scope of its request. Thus, the submitted PDAS performance evaluations, which we have marked, are not responsive to the first request. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to either requestor's request.

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 information in Exhibits 5, 6, and 7 are evaluations and reprimands concerning the named district employee. You also state, and provide documentation showing, the employee currently holds the appropriate certification in the State of Texas and was acting in his capacity as a teacher at the time of the evaluations and reprimands. Based on your representations and our review, we conclude the documents we have marked are teacher evaluations for purposes of section 21.355. Accordingly, the marked information is confidential under section 21.355 of the Education Code and generally must be withheld

²The 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>.

³Since the district requested a ruling from our office regarding the submitted information, which was pending when the second requestor's request was received by the district, the submitted information is not considered to have been "forwarded to [the TEA]."

under section 552.101 of the Government Code. However, we note the remaining information consists of documents regarding an investigation of alleged wrongdoing by the district employee and a “directive and notice to return to work” letter. This remaining information does not constitute an evaluation of the individual’s performance as a teacher for the purposes of section 21.355. Thus, you may not withhold the remaining information under section 552.101 in conjunction with section 21.355.

As noted above, the first requestor identifies himself as an investigator with the TEA and states he 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 first requestor states the TEA has opened an investigation regarding the alleged educator misconduct or criminal history information of the district employee and he requires 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 district employee’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 some of the submitted information is protected from public disclosure by section 21.355 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.

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. Further, section 21.355 specifically permits release to certain parties

and in certain circumstances that do not include the TEA's request in this instance. Thus, we find section 21.355 prevails over the TEA's general right of access. Accordingly, notwithstanding section 249.14, 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.

You also seek to withhold the remaining information under section 552.102 of the Government Code.⁴ 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). Therefore, the TEA requestor has a right of access to the remaining information pursuant to section 249.14.

In summary, if the district has not done so already, it must release to the second requestor the information previously released to the first requestor. The district must withhold from the first requestor the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The remaining information must be released to the first requestor.

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,



Sean Opperman
Assistant Attorney General
Open Records Division

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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).*

Ref: ID# 458898

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)
