



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 30, 2008

Mr. Tony Resendez
Walsh, Anderson, Brown, Schulze, & Aldridge, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2008-10369

Dear Mr. Resendez:

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# 317321.

The Pearsall Independent School District (the "district"), which you represent, received a request for six categories of personnel information relating to a named district employee. You state that you have released a portion of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.130, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments received from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that the requestor asserts that he previously sent an identical information request to the district that was ignored. Consequently, the requestor argues that the district violated the requirements of section 552.301(b) by untimely submitting its request for a decision from this office. *See* Gov't Code § 552.301(b). In this instance, we need not address the requestor's assertion, as the district only raises mandatory exceptions to disclosure. Unlike discretionary exceptions that protect the interests of a governmental body, mandatory exceptions cannot be waived by the governmental body's failure to timely request a decision from this office. Thus, even if the district's request for a decision is untimely, this office is compelled to address the merits of the district's arguments. *See id.* § 552.302; Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

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. Section 552.101 encompasses section 21.355 of the Education Code, which provides, “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This office has interpreted this section 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).

The submitted information contains performance evaluations of a district employee, including a memorandum of reprimand. You state that the employee named in the present request was serving the district as a certified educator at the time of the submitted performance evaluations. You argue that the evaluations and memorandum are therefore subject to section 21.355 of the Education Code. However, the requestor argues that the submitted memorandum of reprimand should not be considered a document reflecting the formal appraisal process and should, therefore, not be subject to section 21.355. Whether or not such a memorandum is subject to section 21.355 has already been ruled upon by Texas courts in *North East Independent School District v. Abbot*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). In that case, the court concluded that 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.” *Id.* In this instance, the submitted memorandum of reprimand reflects the district’s athletic director’s judgment regarding the named employee, gives corrective action, and provides for further review. Accordingly, we find that this memorandum of reprimand, as well as the remaining documents you have marked, constitute teacher evaluations subject to section 21.355 of the Education Code.

You assert that the remaining documents contain information that is excepted under section 552.130 of the Government Code, which 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). We have marked the Texas motor vehicle record information that is generally subject to section 552.130.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail address at issue is not of a type specifically excluded by section 552.137(c). Therefore, section 552.137 of Government Code is generally applicable to the e-mail address you have marked.

Finally, you have marked a social security number that is subject to section 552.147 of the Government Code. This section provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Gov’t Code § 552.147(a). We agree that the social security number you have marked within the submitted documents is generally subject to section 552.147 of the Government Code.

We note that the requestor is a staff investigator with the Texas Education Agency ("TEA"). TEA's request states that 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. § 249.1. Section 249.14 provides the following in relevant part:

(a) Staff [of TEA] 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 board denying relief to or taking disciplinary action against the person or certificate.

Id. In this case, the requestor states that he is investigating alleged improper conduct by the named district employee and that he needs to review the requested records "to determine whether enforcement actions are warranted against [the named employee]." Thus, we find that the information at issue is subject to the general right of access afforded to the TEA under 19 T.A.C. § 249.1. However, because some of the requested information is specifically protected from public disclosure by the exceptions discussed above, we find that there is a conflict between these exceptions and the right of access afforded to TEA investigators under 19 T.A.C. § 249.1. 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. 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, section 21.355 of the Education Code and section 552.130 of the Government Code specifically protect educator evaluations and Texas motor vehicle record information. These sections also specifically permit release to certain parties and in certain circumstances that do not include TEA's present request. However, the requestor argues, from a policy standpoint, that he should be entitled to the requested teacher evaluations because the Texas legislature did not intend section 21.355 to restrict SBEC's ability to investigate allegations of educator misconduct. Although we appreciate these policy concerns, in crafting section 21.355, the Texas legislature did not provide TEA investigators a right of access to evaluations. *See* Open Records Decision No. 643 at 2 (1996) (*citing Acker v. Texas Water Comm'n*, 790 S.W.2d 299 (Tex. 1990)) (legislature is presumed to have enacted a statute with complete knowledge of and reference to existing law). In determining whether or not information is subject to public disclosure, this office is constrained by the express language of the applicable statutes at issue. *Cf. Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986) (stating that in developing plain language rule, Court recognizes reality of legislative process and concludes that only rarely will outside evidence of broad purposes underlying enactment of legislation be useful); *Kofa v. INS*, 60 F.3d 1084 (4th Cir. 1995) (stating that statutory construction must begin with

language of statute; to do otherwise would assume that Congress does not express its intent in words of statutes, but only by way of legislative history); *Coast Alliance v. Babbitt*, 6 F. Supp. 2d 29 (D.D.C. 1998) (stating that if, in following Congress' plain language in statute, agency cannot carry out Congress' intent, remedy is not to distort or ignore Congress' words, but rather to ask Congress to address problem).

Because the specific statutes raised by the district prevail over the general TEA right of access, we conclude that, notwithstanding the provisions of section 249.14, the district must withhold the information that is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, as well as the information we marked under section 552.130 of the Government Code. However, sections 552.137 and 552.147 of the Government Code are general exceptions to disclosure under the Act, and we find that TEA's statutory right of access prevails over these general exceptions. *See* Open Records Decision No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Accordingly, TEA has a right of access to information subject to sections 552.137 and 552.147 pursuant to 19 T.A.C. § 249.1. The district must therefore release this information to the requestor.

In summary, the district must withhold the information marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, as well as the information marked under section 552.130 of the Government Code. The district must release the remaining information to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the

requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 317321

Enc. Submitted documents

c: Mr. Michael Franks
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(w/o enclosures)