



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 19, 2009

Ms. Kelli H. Karczewski
Feldman, Rogers, Morris, & Grover, L.L.P.
222 North Mound, Suite 2
Nacogdoches, Texas 75961

OR2009-02200

Dear Ms. Karczewski:

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# 335282.

The Longview Independent School District (the "district"), which you represent, received a request from an investigator with the Texas Education Agency ("TEA") for six categories of information pertaining to a named former district teacher. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), 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

¹While you cite to section 552.024 of the Government Code for your argument to withhold the home address, home telephone number, and cellular telephone number of the named teacher, we understand you to raise section 552.117 of the Government Code, as section 552.117 is the proper exception for the substance of your argument.

the Act.² Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). The submitted information includes unredacted education records. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of such records.³ We will, however, address the applicability of the claimed exceptions to the submitted information.

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.” 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. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that a “teacher” for purposes of section 21.355 means a person who (1) is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. You indicate that the teacher at issue did hold the appropriate certificate and was a teacher at the time of the evaluations. Upon review, we conclude that the submitted documents do not evaluate the teacher as contemplated by section 21.355. Accordingly, the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.102(b) excepts from disclosure all information from transcripts of a professional public school employee other than the employee’s name, the courses taken, and the degree obtained. Gov’t Code § 552.102; Open Records Decision No. 526 (1989). Thus, except for the information that reveals the employee’s name, the courses taken, and the degree obtained, the information in the submitted transcripts may generally be withheld under section 552.102(b) of the Government Code.

²A copy of this letter may be found on the attorney general’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³In the future, if the district does obtain consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note that section 552.117 also encompasses a personal cellular telephone number, provided that the service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). You also contend e-mail addresses are excepted under section 552.117. We note, however, that e-mail addresses do not constitute "home addresses" for purposes of section 552.117.⁴ Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. You state, and have provided an election form showing, that one of the employees at issue elected to keep his home address, telephone number, and social security number confidential prior to the date the district received the instant request. Accordingly, we find that section 552.117(a)(1) is generally applicable to this employee's personal information.

We have also marked the cellular telephone number of a district administrator under section 552.117(a)(1). The submitted information does not reflect whether the district administrator elected to keep his telephone number confidential pursuant to section 552.024 of the Government Code prior to the district receiving the request at issue. If the district administrator made a timely election under section 552.024 and the cellular telephone service was not paid for by the district, then section 552.117(a)(1) is generally applicable to the administrator's cellular telephone number. If the district administrator did not make a timely election under section 552.024, or if the district paid for the cellular telephone service, the cellular telephone number of the district administrator is not subject to being withheld under section 552.117(a)(1).

Next, we address your argument that the e-mail addresses in the submitted information are subject to section 552.137 of the Government Code. Section 552.137 states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under

⁴*See generally*, Open Records Decision No. 622 at 4 (1994) (purpose of confidentiality provision excepting public employee's personal information from required disclosure is to protect them from being harassed at home) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)).

[the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov’t Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Upon review, we determine that section 552.137 is generally applicable to the e-mail addresses in the remaining information. We note that cellular telephone numbers are not protected under section 552.137 of the Government Code. Thus, none of the cellular telephone numbers you seek to withhold under section 552.137 may be withheld on that basis.

We note that the remaining information contains ExCET Exam results of a district teacher. 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). You do not inform us that subsection 21.048(c-1)(1) or (2) is applicable; therefore, the district must generally withhold the information we have marked in the remaining information under section 552.101 in conjunction with section 21.048 of the Education Code.

We next 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 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.

19 T.A.C. § 249.14. In this instance, the requestor states that he is investigating alleged improper conduct by the named former district employee and that he needs to review the requested records “to determine whether enforcement actions are warranted against [the named former 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 portions of the requested information are 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.).

In this instance, although section 249.14 generally allows TEA access to information relating to suspected misconduct on the part of an educator, section 21.048 of the Education Code specifically protects educator certification test results of an individual who did not fail the test more than five times. This section also specifically permits release to certain parties and in certain circumstances that do not include TEA's present request. Because this specific provision prevails 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 21.048 of the Education Code. *See* Open Records Decision No. 629 (1994) (providing non-disclosure provision in Bingo Enabling Act prevailed over provision that generally provided for public access to applications, returns reports, statements and audits submitted to or conducted by Texas Alcoholic Beverage Commission). However, sections 552.102(b), 552.117(a)(1), and 552.137 of the Government Code are general exceptions to disclosure under the Act. Therefore, 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 552.102(b), 552.117(a)(1), and 552.137 as well as the remaining information at issue, pursuant to 19 T.A.C. § 249.1.

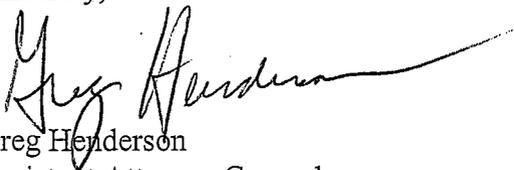
In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.048 of the Education Code. The district must release the remaining information to TEA pursuant to section 249.14 of Title 19 of the Texas Administrative Code.⁵

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.

⁵Because TEA has a right of access to certain information in the submitted documents that otherwise would be excepted from release under the Act, the district must again seek a decision from this office if it receives a request for this information from a different requestor without such a right of access.

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 at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "Greg Henderson", with a long horizontal flourish extending to the right.

Greg Henderson
Assistant Attorney General
Open Records Division

GH/cc

Ref: ID# 335282

Enc. Submitted documents

c: Requestor
(w/o enclosures)