



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 3, 2009

Ms. Laura C. Rodriguez  
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P.O. Box 460606  
San Antonio, Texas 78246

OR2009-04404

Dear Ms. Rodriguez:

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# 338876.

The Southwest Independent School District (the "district"), which you represent, received a request from an investigator with the Texas Education Agency ("TEA") for information pertaining to a named former district employee. It appears you have redacted student information pursuant to FERPA.<sup>1</sup> You indicate you will release some information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, and 552.130 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

You claim pages AG-0001 through AG-0054 are evaluations of the named district employee. 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, including section 21.355 of the Education Code. Section 21.355 provides "a document evaluating the

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<sup>1</sup>The Department of Education has informed this office that it is the responsibility of the educational agency or institution to make determinations under FERPA. A copy of the Department of Education's letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>2</sup>Although you raise section 552.101 in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002).

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. 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.*

You state, and provide documentation showing, 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 pages AG-0001 through AG-0054 are evaluations that are confidential under section 21.355 and must generally be withheld pursuant to section 552.101 of the Government Code.

You raise section 261.201(a) of the Family Code for the documents labeled AG-0060 through AG-0065. Section 552.101 also encompasses section 261.201(a), which provides as follows:

(a) The 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 (“CPS”), as well as the identity of the person making the report. Therefore, this information, which we have marked, is generally confidential under section 261.201 of the Family Code. Section 261.201(a) provides, however, that information encompassed by subsection (a) may be disclosed “for purposes consistent with [the Family Code] and applicable federal or state law.” *Id.* § 261.201(a).

We note that section 22.082 of the Education Code constitutes “applicable state law” in this instance. Section 22.082 of the Education Code provides that the TEA “may obtain from any law enforcement or criminal justice agency all criminal history record information [“CHRI”]

and all records contained in any closed criminal investigation file that relate to a specific applicant for or holder of a certificate issued under Subchapter B, Chapter 21.” CHRI is defined as “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2); *see also id.* §§ 411.0901 (TEA entitled to obtain CHRI from Department of Public Safety (“DPS”) about a person who is employed or is an applicant for employment by a school district), 411.087(a)(2) (agency that is entitled to obtain CHRI from DPS is also authorized to “obtain from any other criminal justice agency in this state criminal history record information maintained by that [agency]”); *cf. Brookshire v. Houston Indep. Sch. Dist.*, 508 S.W.2d 675, 678-79 (Tex. Civ. App.—Houston [14<sup>th</sup> Dist.] 1974, no writ) (when legislature defines term in one statute and uses same term in relation to same subject matter in latter statute, later use of term is same as previously defined).

In this instance, the requestor is an investigator with the TEA, which has assumed the duties of the State Board for Educator Certification (the “SBEC”).<sup>3</sup> The requestor states the TEA is conducting an investigation of an individual who has applied for or currently holds educator credentials. Thus, sections 22.082 and 411.087 are applicable state laws in this instance. However, this office cannot determine whether release of the CHRI is consistent with the Family Code. Consequently, if the district determines that release of the CHRI is consistent with the Family Code, the district must release information from the submitted documents to this requestor that shows the type of allegations made and whether there was an arrest, information, indictment, detention, conviction, or other formal charges and their dispositions. *See* Open Records Decision No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under statutory predecessor to Act). In that instance, the district must withhold the remainder of the information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

If, however, the district determines that release is not consistent with purposes of the Family Code, the district must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. *See* Attorney General Opinions DM-353 at 4 n.6 (1995) (finding interagency transfer of information prohibited where confidentiality statute enumerates specific entities to which release of information is authorized and where potential receiving governmental body is not among statute’s enumerated entities), JM-590 at 4-5 (1986); Fam. Code § 261.201(b)-(g) (listing entities authorized to receive section 261.201 information).

We now turn to your argument regarding the submitted I-9 form. Section 1324a of title 8 of the United States Code, which is also encompassed by section 552.101, provides that an Employment Eligibility Verification Form I-9 “may not be used for purposes other than for

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<sup>3</sup>The 79<sup>th</sup> Texas legislature passed House Bill 1116, which required the transfer of SBEC’s administrative functions and services to the TEA, effective September 1, 2005.

enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of this form under the Act would be “for purposes other than for enforcement” of the referenced federal provisions. Accordingly, the submitted I-9 form and its attachment, labeled AG-0057 through AG-0059, are generally confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

With regard to the information subject to section 21.355 of the Education Code, section 261.201 of the Family Code, and section 1324a of title 8 of the United States Code, we again note that the requestor is a staff investigator with the TEA. TEA’s request states that it is seeking this information under the authority provided to the SBEC by section 249.14 of title 19 of the Texas Administrative Code.<sup>4</sup> 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. § 249.14. Section 249.14 provides the following in relevant part:

(a) [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. In this case, 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 measures need to be taken against the former employee’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

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<sup>4</sup>Chapter 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).

discussed above, we find that there is a conflict between these statutes and the right of access afforded to TEA investigators under this section.

With regard to the submitted I-9 form and attachment, we noted above that this form is confidential pursuant to section 1324a of title 8 of the United States Code. As a federal law, section 1324a preempts 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 that, notwithstanding section 249.14 of the Texas Administrative Code, the submitted I-9 and attachment, pages AG-0057 through AG-0059, are 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.<sup>5</sup>

We note that section 249.14 does not specifically grant access to information subject to section 21.355 of the Education Code or section 261.201 of the Family Code. We further note that section 21.355 of the Education Code and section 261.201 of the Family 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*

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<sup>5</sup>As our ruling on this information is dispositive, we need not address your remaining argument against the disclosure of information on pages AG-0057 and AG-0059.

*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 and section 261.201 of the Family Code specifically protects child abuse or neglect reports or investigative 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 that 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 or section 261.201 of the Family Code. *See* Open Records Decision No. 629 (1994) (provision of Bingo Enabling Act that specifically provided for non-disclosure of information obtained in connection with examination of books and records of applicant or licensee 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). 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.

You assert some of the remaining information is excepted under section 552.101 of the Government Code in conjunction with common-law privacy. However, unlike section 21.355 of the Education Code or section 261.201 of the Family Code, this exception does not have its own release provision. Further, you assert some of the remaining information is excepted from disclosure under section 552.107 of the Government Code.<sup>6</sup> However, this section is a general exception to disclosure under the Act. Thus, we find TEA's statutory right of access prevails over this general exception. *See* Open Records Decision No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Therefore, based on TEA's representation that it is obtaining information pursuant to section 249.14, TEA has a right of access to the remaining submitted information.

In summary, the district must withhold pages AG-0001 through AG-0054 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. If the district determines that release of the submitted CHRI is consistent with the Family Code, then the CHRI in the documents subject to section 261.201 of the Family Code must be released, but the district must withhold the remaining information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. If, however, the district determines that release of the CHRI at issue is not consistent with the purposes of the Family Code, then the district must withhold all of the information we have marked under section 552.101 in conjunction with

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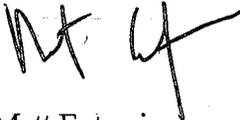
<sup>6</sup> Section 552.107 protects information that "an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct." Gov't Code § 552.107.

section 261.201 of the Family Code. The district must withhold pages AG-0057 through AG-0059 pursuant to section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. The remaining information must be released.<sup>7</sup>

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](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,



Matt Entsminger  
Assistant Attorney General  
Open Records Division

MRE/dls

Ref: ID# 338876

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>7</sup>We 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.