



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 23, 2011

Mr. Mike Leasor
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2011-02724

Dear Mr. Leasor:

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# 409809.

The Plano Independent School District (the "district"), which you represent, received requests from representatives of two named district employees, parents of four district students, and an investigator with the Texas Education Agency (the "TEA") for information relating to the named employees' employment with the district and information concerning a specified incident. You state the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You have also redacted social security numbers under 552.147(b) of the Government Code.² You state the district has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.116, 552.117, 552.135, and 552.137 of the Government Code. You also state release of the

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office 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 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>.

²Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. See Gov't Code § 552.147.

submitted information may implicate the privacy interests of certain individuals. Accordingly, you have notified these individuals of the requests and of their right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information, a portion of which consists of a representative sample.³ We have also received comments from one of the requestors and four individuals whose privacy may be implicated. *See id.*

First, you inform us Exhibit F is responsive to the requests from the two named district employees and the parents of the four district students. We note Exhibit F consists of a completed district investigation subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." *Id.* § 552.022(a)(1). Although you raise section 552.116 of the Government Code for portions of Exhibit F, this section is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.116 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any portion of Exhibit F under section 552.116 of the Government Code. However, sections 552.101, 552.102, 552.117, 552.135, and 552.137 of the Government Code are other law for section 552.022(a)(1) purposes. Therefore, we will consider your arguments under these sections for Exhibit F.

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. Section 552.101 encompasses statutes such as section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. 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." *North East Indep. Sch. Dist. v. Abbott*, 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 an administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined 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. In addition, the Third

³We 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.

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.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You assert Exhibit F relates to a teacher who held the appropriate teaching certificate and was teaching at the time of the evaluations. Based on your representation and our review, we conclude Exhibit F constitutes an evaluation as contemplated by section 21.355. Accordingly, the district must withhold Exhibit F in its entirety under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure of Exhibit F.

Next, you inform us Exhibit K is responsive to the requests from the TEA staff investigator. As noted above, section 552.101 encompasses section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. We note section 21.355 does not apply to evaluations of educational aides. *See* ORD 643 at 5 (concluding teacher interns, trainees, and educational aides are not “teachers” for the purposes of section 21.355). You state Exhibit K relates to a teacher who held the appropriate teaching certificate and was teaching at the time of the evaluations. Based on your representations and our review, we agree the information we have marked in Exhibit K constitutes teacher evaluations subject to section 21.355. Accordingly, the district must generally withhold this information under section 552.101 in conjunction with section 21.355 of the Education Code. However, we find the remaining documents do not constitute teacher evaluations for purposes of section 21.355. Thus, the district may not withhold any of the remaining information in Exhibit K under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

You also assert the information in Exhibit K is excepted from disclosure pursuant to section 552.135 of the Government Code. In this instance, you indicate the information in Exhibit K reveals the identities of informers. However, upon review, we find the district has failed to demonstrate how the information in Exhibit K reveals the identity of an informer for the purposes of section 552.135. Thus, the district may not withhold the submitted information under section 552.135 of the Government Code.

As previously noted, 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) [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). In this instance, the TEA requestor states he is investigating alleged improper conduct by or criminal history information of the named district employees and needs to review the requested records to determine whether disciplinary action related to the employee's certification is warranted. Thus, we find 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 section 21.355 of the Education Code, we find that there is a conflict between this statute and the right of access afforded to TEA investigators under section 249.14.

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). Although section 249.14 generally allows the TEA access to information relating to suspected misconduct on the part of an educator, section 21.355 of the Education Code specifically protects educator evaluations. This section specifically permits release to certain parties and in certain circumstances that do not include the TEA investigator's request in this instance. Thus, this specific statute prevails over the general TEA right of access. We therefore conclude, notwithstanding the provisions of section 249.14, the district must withhold the information in Exhibit K that is excepted from disclosure, which we have marked, under section 552.101 in conjunction with section 21.355.

You also seek to withhold the remaining information in Exhibit K under sections 552.101 and 552.102 in conjunction with common-law privacy and the common-law informer's privilege, as well as sections 552.102(b), 552.116, 552.117, 552.137, and 552.147. However, those sections are general exceptions to disclosure under the Act and do not have their own release provisions. Therefore, TEA's statutory right of access under section 249.14 prevails, and none of the remaining information in Exhibit K may be withheld under these sections. *See* Open Records Decision No. 525 (1989) (exceptions to disclosure do not apply to information made public by other statutes).

In summary, the district must withhold Exhibit F in its entirety from the representatives of the two named district employees and the parents of the four district students under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold from the TEA staff investigator the information

we have marked in Exhibit K under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must release the remaining information in Exhibit K to the TEA staff investigator.

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 409809

Enc. Submitted documents

c: Requestors
(w/o enclosures)

All Third Parties
c/o Mr. Mike Leasor
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