



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 25, 2011

Ms. Elizabeth A. Donley  
Law Offices of Robert E. Luna, P.C.  
4411 North Central Expressway  
Dallas, Texas 75205

OR2011-04117

Dear Ms. Donley:

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# 412225.

The Frisco 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 district employee. You state the district has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, 552.130, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us some of the information you have submitted in Exhibit E is not responsive to the instant request because the request specifically excludes performance evaluations. The district need not release nonresponsive information in response to this request, and this ruling will not address that 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. Article 20.02(a) of the Code of Criminal Procedure provides that "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). Article 20.02, however, does not

define “proceedings” for purposes of subsection (a). Therefore, we have reviewed case law for guidance and found that Texas courts have not often addressed the confidentiality of grand jury subpoenas under article 20.02. Nevertheless, the court in *In re Reed* addressed the issue of what constitutes “proceedings” for purposes of article 20.02(a) and stated that although the court was aware of the policy goals behind grand jury secrecy, the trial court did not err in determining the grand jury summonses at issue were not proceedings under article 20.02. *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, no pet.). The court further stated that the term “proceedings” could “reasonably be understood as encompassing matters that take place before the grand jury, such as witness testimony and deliberations.” *Reed*, 227 S.W.3d at 276. The court also discussed that, unlike federal law, article 20.02 does not expressly make subpoenas confidential. *See Reed*, 227 S.W.3d at 276; FED. R. CRIM. P. 6(e)(6).

Subsequent to the ruling in *Reed*, the 80<sup>th</sup> Legislature, modeling federal law, added subsection (h) to article 20.02 to address grand jury subpoenas. *See* Crim. Proc. Code art. 20.02; FED. R. CRIM. P. 6(e)(6) (“Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.”). Article 20.02(h) states that “[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” Crim. Proc. Code art. 20.02(h). This provision, however, does not define or explain what factors constitute “necessary to prevent the unauthorized disclosure of a matter before the grand jury.” *Id.* Because subsection (h) is modeled on federal law, we reviewed federal case law for guidance on a definition or explanation of the factors that would constitute “necessary to prevent the unauthorized disclosure of a matter before the grand jury” for the purposes of keeping grand jury subpoenas secret. Our review of federal case law revealed that federal courts have ruled inconsistently on the issue of whether or not grand jury subpoenas must be kept secret. FED. R. CRIM. P. 6(e)(6) advisory committee’s note (stating federal case law has not consistently stated whether or not subpoenas are protected by rule 6(e)). Furthermore, even if we considered article 20.02 to be a confidentiality provision, information withheld under this statute would only be secret “for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” *Id.*

You have not submitted any arguments explaining how the matter upon which the submitted subpoena was based is still “before the grand jury” to warrant keeping the subpoena secret. Therefore, upon review of article 20.02 and related case law, it is not apparent, and you have not otherwise explained, how this provision makes the submitted grand jury subpoena in Exhibit E confidential. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Consequently, the submitted subpoena in Exhibit E may not be withheld under article 20.02 of the Criminal Code of Procedure.

The district also asserts that the documents responsive to the subpoena cannot be disclosed pursuant to article 20.02. We note, however, that the information at issue consists of information that the district compiled in the normal course of business. The requestor did not request records subpoenaed by a grand jury; he requested records the district normally maintains. The fact that certain records may have been subpoenaed by a grand jury does not make the records confidential under article 20.02. We therefore conclude that the district may not withhold any of the remaining information in Exhibit E under section 552.101 in conjunction with article 20.02(a) of the Code of Criminal Procedure. *Cf.* ORD 513 at 4 (fact that information collected or prepared by another person or entity is submitted to grand jury does not necessarily mean that such information is confidential in possession of district attorney).

Section 552.101 also encompasses the federal Fair Credit Reporting Act (the "FCRA"), 15 U.S.C. § 1681 *et seq.* You assert some of the information, specifically criminal history information obtained from the Safe Schools Project, is subject to the FCRA. Section 22.083 of the Education Code permits the district to obtain criminal history record information from a private entity that is a consumer reporting agency governed by the FCRA. *See* Educ. Code § 22.083(a-1)(3). We understand that the Safe Schools Project is a consumer reporting agency that furnishes reports to the district to be used for employment purposes. *See* 15 U.S.C. §§ 1681a(f) (defining "consumer reporting agency"), (h) (defining "employment purposes"). A criminal history report compiled by a private consumer reporting agency is a "consumer report" under the FCRA. *See* 15 U.S.C. § 1681a(d) (defining "consumer report"); *see also* [www.ftc.gov/bcp/edu/pubs/business/credit/bus08.pdf](http://www.ftc.gov/bcp/edu/pubs/business/credit/bus08.pdf) (discussing Federal Trade Commission position that "consumer report" includes criminal histories). Section 1681b of the FCRA permits a consumer reporting agency to furnish a consumer report to a person that the consumer reporting agency has reason to believe intends to use the information for employment purposes. *See* 15 U.S.C. § 1681b(a)(3)(B); *see also id.* §§ 1681a(b), (d) (defining "person" and "consumer report"). Section 1681b further provides that "[a] person shall not use or obtain a consumer report for any purpose unless . . . the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and . . . the purpose is certified in accordance with section 1681e of this title by a prospective user of the report through a general or specific certification." *Id.* § 1681b(f). Section 1681e provides for the maintenance of procedures by consumer reporting agencies under which prospective users of consumer reports must identify themselves, certify the purposes for which they seek information, and certify that the information will be used for no other purpose. *See* 15 U.S.C. § 1681e(a); *see also* Open Records Decision No. 373 at 2 (1983) (stating that federal law strictly limits distribution of consumer credit reports by credit reporting agencies). Upon review, we find the Safe Schools Project report, which you have marked in Exhibits B-1 and E, is a consumer report for purposes of section 1681b of the FCRA. The FCRA does not permit the disclosure of information in a consumer report for the purpose of responding to a request for information under the Act. Therefore, we conclude the consumer report you have marked in Exhibits B-1

and E must generally be withheld from the requestor under section 552.101 of the Government Code in conjunction with the FCRA.

Section 552.101 of the Government Code also encompasses information protected by section 6103(a) of title 26 of the United States Code. Section 6103(a) renders tax return information confidential. *See* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4<sup>th</sup> Cir. 1993). Accordingly, the district must withhold the W-2 forms you have marked in Exhibits B-2 and E pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Section 552.101 also encompasses section 825.507 of the Government Code, which provides in relevant part:

(a) Records of a participant that are in the custody of the retirement system or of an administrator, carrier, attorney, consultant, or governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure in a form that would identify an individual and are exempt from the public access provisions of Chapter 552, except as otherwise provided by this section[.]

(b) The retirement system may release records of a participant, including a participant to which Chapter 803 [of the Government Code] applies, to:

(1) the participant or the participant's attorney or guardian or another person who the executive director determines is acting on behalf of the participant;

(2) the executor or administrator of the deceased participant's estate, including information relating to the deceased participant's beneficiary;

- (3) a spouse or former spouse of the participant if the executive director determines that the information is relevant to the spouse's or former spouse's interest in member accounts, benefits, or other amounts payable by the retirement system;
- (4) an administrator, carrier, consultant, attorney, or agent acting on behalf of the retirement system;
- (5) a governmental entity, an employer, or the designated agent of an employer, only to the extent the retirement system needs to share the information to perform the purposes of the retirement system, as determined by the executive director;
- (6) a person authorized by the participant in writing to receive the information;
- (7) a federal, state, or local criminal law enforcement agency that requests a record for a law enforcement purpose;
- (8) the attorney general to the extent necessary to enforce child support; or
- (9) a party in response to a subpoena issued under applicable law if the executive director determines that the participant will have a reasonable opportunity to contest the subpoena.

...

(g) In this section, "participant" means a member, former member, retiree, annuitant, beneficiary, or alternate payee of the retirement system.

Gov't Code § 825.507(a)-(b), (g). You state that the information you have marked in Exhibits B-3 and E consist of records of participants in the retirement system that are in the custody of the district in cooperation with the retirement system. We note the requestor has not asserted any of the provisions of section 825.507(b) are applicable in this instance, nor provided any information that would allow the district to determine that any of these provisions apply. *See id.* § 825.507(b). Accordingly, we conclude the information you have marked within Exhibits B-3 and E is confidential under section 825.507 of the Government Code and must be withheld under section 552.101 of the Government Code.

Section 552.130 of the Government Code 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. *Id.* § 552.130(a)(1), (2). Accordingly, the district must withhold the copies of the Texas driver's license you have marked in Exhibits D and E and the Texas driver's license number you have marked in Exhibit E under section 552.130 of the Government Code.<sup>1</sup>

We note 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.<sup>2</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. § 249.4. 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 [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 allegations made against the named district employee and that he needs to review the requested records to determine whether measures need to be taken against this person's

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<sup>1</sup>You acknowledge this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision. We note the ten categories of information include a W-2 form under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code and a copy of a Texas driver's license and a Texas driver's license number under section 552.130 of the Government Code.

<sup>2</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).

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 discussed above, we find there is a conflict between these statutes and the right of access afforded to TEA investigators under section 249.14.

With regard to the W-2 forms submitted in Exhibits B-1 and E, we noted above that these forms are confidential pursuant to section 6103(a) of title 26 of the United States Code. As a federal law, section 6103(a) 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). Therefore, notwithstanding section 249.14 of the Texas Administrative Code, the district must withhold the W-2 forms you have marked in Exhibits B-2 and E under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. We also find the consumer report in Exhibits B-1 and E must be withheld under section 552.101 of the Government Code in conjunction with the FCRA.

Next, we note 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 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. Civ. 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 825.507 of the Government Code specifically protects records of a participant in the retirement system. Section 825.507 specifically permits release to certain parties and in certain circumstances that do not include TEA's request in this instance. Furthermore, section 552.130 of the Government Code specifically protects Texas motor vehicle record information and has its own release provisions. Thus, sections 825.507 and 552.130 prevail over the general TEA right of access. We therefore conclude that, notwithstanding the provisions of section 249.14 of the Texas Administrative Code, the district must withhold the information that is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 825.507 of the Government Code, as well as section 552.130 of the Government Code.

You also seek to withhold some of the remaining information in Exhibits B-3, C, D, and E under section 552.101 of the Government Code in conjunction with common-law privacy and under sections 552.102(a), 552.102(b), 552.108(a)(1), 552.117, 552.137, and 552.147

of the Government Code.<sup>3</sup> Those sections are general exceptions to disclosure under the Act, however, and do not have their own release provisions. Therefore, TEA's statutory right of access under section 249.14 prevails over those sections, and none of the remaining information in Exhibits B-3, C, D, and E may be withheld under sections 552.101, 552.102(a), 552.102(b), 552.108(a)(1), 552.117, 552.137, and 552.147. *See* ORD 451 at 4.

In summary, the district must withhold the consumer report you have marked in Exhibits B-1 and E under section 552.101 of the Government Code in conjunction with the FCRA. The district must withhold the W-2 forms you have marked in Exhibits B-2 and E pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The district must withhold the information you have marked within Exhibits B-3 and E under section 552.101 of the Government Code in conjunction with section 825.507 of the Government Code. The district must withhold the copy of the Texas driver's license you have marked in Exhibits D and E and the Texas driver's license number you have marked in Exhibit E under section 552.130 of the Government Code. The district must release the remaining information to the TEA requestor pursuant to section 249.14 of title 19 of the Texas Administrative Code.<sup>4</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

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<sup>3</sup>Common-law privacy under section 552.101 protects highly intimate or embarrassing information, such that its release would be highly objectionable to a person of ordinary sensibilities, that is not a matter of legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Section 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). Section 552.102(b) excepts from disclosure a transcript from an institution of higher education maintained in a professional public school employee's personnel file, except for the degree obtained or the curriculum. *See id.* § 552.102(b). Section 552.108 excepts information held by a law enforcement agency if release of the information would interfere with the detection, investigation, or prosecution of crime. *See id.* § 552.108(a)(1). Section 552.117 excepts the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request confidentiality for the information under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). Section 552.137 excepts an e-mail address of a member of the public provided for the purpose of communicating electronically with a governmental body. *See* Gov't Code § 552.137(a). Section 552.147 excepts a living person's social security number. *See id.* § 552.147(a).

<sup>4</sup>Because the TEA has a right of access to certain information in these 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.

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, toll free at (888) 672-6787.

Sincerely,



Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/eeg

Ref: ID# 412225

Enc. Submitted documents

c: Requestor  
(w/o enclosures)