



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 24, 2015

Mr. Stephen Trautmann, Jr.
Counsel for the United Independent School District
J. Cruz & Associates, LLC
216 West Village Boulevard, Suite 202
Laredo, Texas 78041

OR2015-20022

Dear Mr. Trautmann:

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# 580992.

The United Independent School District (the "district"), which you represent, received a request for information pertaining to a named individual. The district claims the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.147 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

The United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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.¹ 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

¹A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

“personally identifiable information”). The district has submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing these education 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 the education records.²

We must next address the district’s obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov’t Code § 552.301(b). The district informs us it was closed for business on June 26, 2015, July 3 through 10, 2015, and July 17, 2015. Although the district informs us it received the request for information on June 26, 2015, as noted above, the district also informs us it was closed for business on that date. Thus, we consider the district to have received the request on the next business day, which was June 29, 2015. Accordingly, the district’s ten-business-day deadline under section 552.301(b) was July 22, 2015. Although you timely raised sections 552.101 and 552.147 of the Government Code, you did not raise section 552.107 of the Government Code until July 29, 2015. Therefore, the district failed to comply with the procedural requirements mandated by section 552.301(b) in raising section 552.107.

Generally, a governmental body’s failure to comply with section 552.301 results in the waiver of the claimed exception. *See generally id.* § 552.302. Section 552.107 of the Government Code is discretionary in nature; it serves only to protect a governmental body’s interests. As such, the district’s claim under this section is not a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 676 at 12 (2002) (attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 constitutes compelling reason to withhold information under section 552.302 only if information’s release would harm third party); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Therefore, the district may not withhold any of the submitted information under section 552.107.

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 section 261.201(a) of the Family Code, which provides as follows:

²In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

[T]he following information is confidential, is not subject to public release under [the Act], 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). The district asserts some of the submitted information was used or developed in an investigation under chapter 261. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201), 261.001(1) (defining “abuse” for purposes of section 261.201). We note 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). Nevertheless, we note the submitted information contains a district Alleged Child Abuse or Neglect Reporting Form (the “reporting form”). We are unable to determine whether the district produced the reporting form to the Texas Department of Family and Protective Services (“DFPS”) or the district’s police department (the “department”). Accordingly, we must rule conditionally. If the district produced the reporting form to DFPS or the department, then it consists of information used or developed in an investigation of alleged or suspected child abuse under chapter 261, and the district must generally withhold it in its entirety under section 552.101 of the Government Code in conjunction with subsection 261.201(a)(2) of the Family Code. If the district did not produce the reporting form to DFPS or the department, then it is not confidential in its entirety under section 261.201(a)(2), and the department may not withhold it under section 552.101 on that ground. However, we note the form contains the identifying information of a person who reported alleged or suspected abuse or neglect to the Child Protective Services division of DFPS. This information, which we have marked, is within the scope of subsection 261.201(a)(1) of the Family Code. Thus, if the reporting form is not confidential under section 261.201(a)(2), then the district must generally withhold the identifying information of the reporting party we have marked in the reporting form under section 552.101 in conjunction with section 261.201(a)(1). We also find some of the remaining information was obtained from DFPS. Therefore, the district must generally withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 261.201(a)(2) of the Family Code. We find the district has failed to demonstrate the remaining information was used or developed in an investigation of alleged or suspected child abuse, or consists of a report of alleged or suspected abuse or neglect under chapter 261 of the Family Code. Therefore, the remaining information is not

confidential under section 261.201 of the Family Code, and the district may not withhold any of it under section 552.101 of the Government Code on that basis.

Section 552.101 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 [the Act], unless the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057.

Act of June 1, 2015, 84th Leg., R.S., ch. 931, § 11, 2015 Tex. Sess. Law Serv. 3210, 3215 (to be codified as an amendment to Educ. Code § 21.048(c-1)). The submitted information reveals teacher certification examination results administered under section 21.048. Thus, the district must generally withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. However, we find you have not established any of the remaining information is confidential under section 21.048(c-1), and the district may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code. Section 21.355(a) provides “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). Additionally, the Third Court of Appeals has concluded that a written reprimand constitutes an evaluation for purposes of section 21.355 as it “reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *N. E. 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. *See* Open Records Decision No. 643 at 3 (1996). We also 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.

The district indicates the information at issue contains evaluations of the performance of a teacher who holds the appropriate certificate for the purpose of section 21.355. Upon review, we find some of the submitted information is confidential under section 21.355. Therefore, the district must generally withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with section 21.355. However, we find the district has not established any of the remaining information consists of “[a] document evaluating the performance of a teacher or administrator” as contemplated by section 21.355. Accordingly, we conclude the district has not established the remaining

information is confidential under section 21.355, and the district may not withhold it under section 552.101 on that ground.

We note the requestor is an investigator with the Texas Education Agency (“TEA”) and she states she is seeking the requested 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, the following:

(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) 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). The requestor states TEA has opened an investigation regarding the alleged misconduct or criminal history information of the teacher at issue, and she requires the requested records in order to conduct a full and complete investigation. The requestor also states the alleged misconduct or criminal history information could warrant disciplinary action relating to the teacher’s educator certification. Thus, we find the requestor has a right of access to information regarding the teacher pursuant to section 249.14. The district asserts some of the information at issue is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy and under section 552.147 of the Government Code.³ However, a statute governing the release of specific information prevails over the common-law and exceptions to disclosure found in the Act. *CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road*, 436 F.3d 541, 544 (5th Cir. 2006) (common-law controls only where there is no conflicting or controlling statutory law); Attorney General Opinion DM-146 at 3 (1992); Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 at 4 (1986) (specific statutory right of access provisions overcome Act’s general exceptions to disclosure). Therefore, the district may not withhold the submitted information from the requestor under section 552.101 of the Government Code in conjunction with common-law privacy or section 552.147 of the Government Code.

³We note section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

Nevertheless, we must address the conflict between the requestor's right of access to the submitted information pursuant to section 249.14 and the confidentiality provided under section 261.201 of the Family Code and sections 21.048(c-1) and 21.355 of the Education Code.

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 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.). Section 249.14 generally provides TEA staff may obtain and investigate information concerning alleged improper conduct by an educator that would warrant SBEC denying relief to or taking disciplinary action against the educator or the educator's certificate. *See* 19 T.A.C. § 249.14(a).

Section 261.201 of the Family Code specifically protects a report made under chapter 261 and the identity of the person making the report; section 21.048(c-1) of the Education Code specifically protects teacher certification examination results; and section 21.355 of the Education Code specifically protects a document evaluating the performance of a teacher. In addition, sections 261.201, 21.048(c-1), and 21.355 specifically permit release to certain parties and in certain circumstances that do not include TEA's request in this instance. Thus, we find the confidentiality provided by section 261.201 of the Family Code and sections 21.048(c-1) and 21.355 of the Education Code prevails over TEA's general right of access under section 249.14 of title 19 of the Texas Administrative Code. Accordingly, the district must withhold under section 552.101 of the Government Code the submitted information that is confidential under section 261.201 of the Family Code and sections 21.048(c-1) and 21.355 of the Education Code.

To conclude, the district must withhold the following: (1) the reporting form in its entirety under section 552.101 of the Government Code in conjunction with section 261.201(a)(2) of the Family Code if the district produced it to DFPS or the department; (2) the identifying information of the reporting party we have marked in the reporting form under section 552.101 of the Government Code in conjunction with section 261.201(a)(1) of the Family Code if the reporting form is not confidential under section 261.201(a)(2); (3) the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a)(2) of the Family Code; and (4) the information we have marked under section 552.101 of the Government Code in conjunction with sections 21.048(c-1) and 21.355 of the Education Code. The district must release the remaining information.⁴ This ruling does not address the applicability of FERPA to the submitted information.

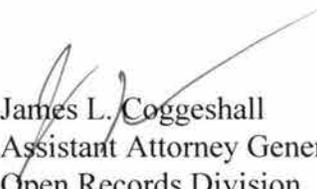
⁴Because the requestor has a special right of access to some of the information being released, the district must again seek a decision from this office if it receives another request for the same information from another requestor.

Should the district determine that all or portions of the submitted information consist of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/cbz

Ref: ID# 580992

Enc. Submitted documents

c: Requestor
(w/o enclosures)