



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 21, 2016

Mr. Robb D. Decker
Counsel for Northside Independent School District
Walsh Gallegos Treviño Russo & Kyle P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2016-14025

Dear Mr. Decker:

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# 615111.

The Northside Independent School District (the "district"), which you represent, received a request from an investigator with the Texas Education Agency (the "TEA") for information pertaining to a named individual. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office 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 or an adult student's 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 "personally identifiable information"). You have

¹A copy of this letter may be found on the Office of the Attorney General's website at <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

submitted redacted and 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, other than to note parents have a right of access to their child's education records and their right of access prevails over state law. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records. However, we will consider your arguments against disclosure of 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. Section 552.101 of the Government Code encompasses section 261.201 of the Family Code. Section 261.201 provides, in relevant part:

(a) Except as provided by Section 261.203, the 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). You assert portions of the submitted information are confidential under section 261.201. *See id.* §§ 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1), (4) (defining "abuse" and "neglect" for purposes of chapter 261 of the Family Code). We note the district is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). Upon review, we find the information at issue relates to an internal administrative investigation by the district. Thus, the information does not consist of files, reports, records, communications, audiotapes, videotapes, or working papers used or developed in an investigation of alleged or suspected child abuse or neglect under chapter 261 of the Family Code. However, portions of the submitted information, which we have marked, consist of the identity of a person making a report of alleged or suspected child abuse or neglect to Child Protective Services ("CPS"). Thus, we find the information we have marked is within the scope of section 261.201(a)(1). Therefore, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a)(1). However, we find you have failed to demonstrate any of the remaining information was used

or developed in an investigation of alleged or suspected child abuse or neglect, or consists of a report of alleged or child suspected abuse or neglect under chapter 261 of the Family Code. Therefore, no portion of the remaining information is confidential under section 261.201 and none of it may be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code. Section 21.355(a) provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). 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). We have determined that for purposes of section 21.355, “teacher” means a person who 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 who 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 Court of Appeals has held 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.” *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You contend the information you indicated under section 21.355 of the Education Code evaluates the performance of a certified teacher. You state, and provide documentation demonstrating, the teacher at issue was required to and did hold the appropriate certification under chapter 21 of the Education Code at the time of the evaluations. Further, the submitted information demonstrates the teacher at issue was acting as a teacher at the time of the evaluations for the purposes of section 21.355. Based on your representations and our review, we conclude the district must withhold the information we have marked under section 552.101 in conjunction with section 21.355(a). However, the remaining information at issue does not consist of an evaluation of a teacher for the purposes of section 21.355(a). Accordingly, the remaining information you indicated may not be withheld under section 552.101 on that basis.

We note the TEA’s request states it is seeking information under the authority provided to the State Board of Educator Certification (“SBEC”) by section 249.14 of title 19 of the Texas Administrative Code.² Chapter 249 of title 19 of the Texas Administrative Code governs

²Chapter 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 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). The 79th Texas legislature passed House Bill 1116, which required the transfer of SBEC’s administrative functions and services to the TEA, effective September 1, 2005.

disciplinary proceedings, sanctions, and contested cases involving SBEC. *See* 19 T.A.C. § 249.4. Section 249.14 provides in relevant part:

(a) The [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). The requestor states the TEA has opened an investigation regarding the alleged misconduct of the district employee. Upon review, we find the information at issue is subject to the general right of access afforded to the TEA under section 249.14. Accordingly, 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 section 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 the identity of the person making a report under chapter 261 and section 21.355 of the Education Code specifically protects a document evaluating the performance of a teacher. In addition, section 261.201 of the Family Code and section 21.355 of the Education Code 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 section 21.355 of the Education Code prevail 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 section 21.355 of the Education Code.

The district also seeks to withhold some of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy and sections 522.102, 552.117, and 552.147 of the Government Code. However, we note a statutory right of access generally prevails over the common-law. *See CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd. Auth.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law). Further, this office has concluded that a statute's specific access provision prevails over generally applicable exceptions to public disclosure under the Act. *See Open Records Decision No. 451 at 4* (1986). Therefore, TEA's statutory right of access under section 249.14 prevails over those claims, and none of the submitted information may be withheld under section 552.101 in conjunction with common-law privacy, or sections 552.102, 552.117, and 552.147. *See* ORD 451 at 4.

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The district must withhold the information we have marked 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.³

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,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/bw

³Because the 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.

Ref: ID# 615111

Enc. Submitted documents

c: Requestor
(w/o enclosures)