



Office of the Attorney General
State of Texas

March 4, 1994

DAN MORALES
ATTORNEY GENERAL

Ms. Gayle Gordon
General Counsel
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711-3127

OR94-116

Dear Ms. Gordon:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (formerly V.T.C.S. article 6252-17a).¹ Your request was assigned ID# 24283.

The Texas Alcoholic Beverage Commission (the "TABC") received an open records request for, among other things, the following categories of information pertaining to Mr. James Mercer:

- 1) All records relative to internal/external investigations in which Mr. Mercer was directly or peripherally involved; and
- 2) Records pertaining to any lawsuits or other charges initiated by Mr. Mercer during his employment with TABC.

We note at the outset that the TABC received the initial open records request for this information on December 17, 1993, and a subsequent clarification of the request on January 3, 1994. However, you did not request an open records decision from this office until January 25, 1994. Consequently, you failed to request a decision within the ten days specified in section 552.301(a) of the Government Code.

Section 552.301(a) requires a governmental body either to release requested information or to request a decision from the attorney general within ten days of receipt of the open records request. When a governmental body fails to request a decision within

¹The Seventy-third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

ten days of receiving a request for information, a legal presumption arises that the information is public. Gov't Code § 552.302; *see Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 324 (Tex. App.--Houston [1st Dist.] 1984, no writ). The governmental body must show a compelling interest in withholding the information to overcome this presumption. *Hancock*, 797 S.W.2d at 381; *City of Houston*, 673 S.W.2d at 324.

In this instance, you do not raise on behalf of the TABC any of the exceptions to disclosure listed in subchapter C of the act. You inform us, however, that Mr. Mercer has asserted to the TABC a personal privacy interest in the nondisclosure of these records. Section 552.102(a) of the Government Code protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy . . ." A governmental body's demonstration that information comes under the protection of section 552.102(a) constitutes a compelling reason for nondisclosure because this exception protects the privacy interest of a third party. *See Open Records Decision No. 71 (1975) at 2, overruled on other grounds by Open Records Decision No. 444 (1986).*

The test for section 552.102(a) protection is the same as that for information protected by common-law privacy under section 552.101: to be protected from required disclosure the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). The information at issue here is not about the private affairs of Mr. Mercer, but rather about his job performance as a public servant and his allegations of racial discrimination against him while he was an employee of the TABC. As such, the requested information is of legitimate public interest. Section 552.102(a) does not protect this type of information.

A governmental body also must withhold information, despite the failure to request timely a decision under section 552.301, if some other law makes the information confidential. *See Open Records Decision No. 150 (1977) at 2 (and authorities cited therein).* Although the attorney general ordinarily will not raise an exception that might apply but that the governmental body has failed to claim, *see Open Records Decision No. 325 (1982) at 1*, we will raise section 552.101 because a governmental body's improper release of confidential information constitutes a misdemeanor. *See Gov't Code § 552.352.*

With regard to the records pertaining to Mr. Mercer's complaint with the State Commission on Human Rights (the "commission"), we note that section 21.304 of the Labor Code provides in pertinent part that:

[a]n officer or employee *of the commission* may not disclose to the public information obtained by the commission under Section 21.204 except as necessary to the conduct of a proceeding under this chapter. [Emphasis added.]

This prohibition on the release of information does not, however, apply to the TABC. *Cf.* Open Records Decision No. 155 (1977) at 2 (copy enclosed). Consequently, while section 21.304 makes confidential certain information if it is in the possession of the commission, this confidentiality does not extend to the same information if it is in the possession of the TABC.

Similarly, although employees of the United States Equal Employment Opportunity Commission ("EEOC") are prohibited from releasing any information pertaining to a discrimination complaint unless a complainant files a lawsuit to remedy the discriminatory practice, *see* 42 U.S.C. § 2000e-8(e), this prohibition does not extend to an employer's disclosure of information relating to a claim of employment discrimination. Open Records Decision No. 155 at 2. Consequently, the TABC must release all of its records that pertain to Mr. Mercer's discrimination claims, as well as the records pertaining to the two "internal" investigations.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Kymerly K. Oltrogge
Assistant Attorney General
Open Government Section

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Ref.: ID# 24283

Enclosures: Open Records Decision No. 155
Submitted documents

cc: Mr. Dan Hurlbut
Consolidated Consultants, Inc.
333 Gulf Bank Road
Houston, Texas 77037
(w/o enclosures)