



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 26, 2006

Ms. Margo M. Kaiser
Staff Attorney - Open Records Unit
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2006-12675

Dear Ms. Kaiser:

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#263052.

The Texas Workforce Commission (the "commission") received a request for a complete copy of a named individual's complaint file. You state that most of the responsive information will be released to the requestor. However, you claim that the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we must address the commission'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

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

written request. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e)(1)(D). You state you received the request August 2, 2006. However, the commission did not request a decision from this office or submit the information at issue until August 24, 2006. Accordingly, we conclude that the commission failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although you raise section 552.111 of the Government Code, this section is a discretionary exception that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision No. 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver); *see also* Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). Therefore, the commission may not withhold any of the requested information under section 552.111 of the Government Code. However, because section 552.101 can provide a compelling reason to withhold information, we will address your claim regarding this exception.

You claim that the submitted information is subject to FOIA. Section 2000e-5(b) of title 42 of the United States Code states in relevant part:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the [Equal Employment Opportunity Commission (the "EEOC")] shall serve a notice of the charge . . . on such employer . . . , and shall make an investigation thereof Charges shall not be made public by the [EEOC]."

42 U.S.C. § 2000e-5(b). The EEOC is authorized by statute to utilize the services of state fair employment practices agencies to assist in meeting its statutory mandate to enforce laws prohibiting discrimination. *See id.* § 2000e-4(g)(1). You inform us that the commission has a contract with the EEOC to investigate claims of employment discrimination allegations.

You assert that under the terms of this contract, “access to charge and complaint files is governed by FOIA, including the exceptions to disclosure found in FOIA.” You claim that because the EEOC would withhold the submitted information under section 552(b)(5) of title 5 of the United States Code, the commission should also withhold this information on this basis. We note, however, that FOIA is applicable to information held by an agency of the federal government. *See* 5 U.S.C. § 551(1). In this instance, the information at issue was created and is maintained by the commission, which is subject to the state laws of Texas. *See* Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988), 124 (1976); *see also* Open Records Decision No. 561 at 7 n. 3 (1990) (noting that federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law); *Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA). Furthermore, this office has stated in numerous opinions that information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. *See, e.g.*, Attorney General Opinion MW-95 (1979) (concluding that neither FOIA nor the federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); Open Records Decision No. 124 (1976) (concluding fact that information held by federal agency is excepted by FOIA does not necessarily mean that same information is excepted under the Act when held by Texas governmental body). You do not cite to any federal law, nor are we aware of any such laws, that would pre-empt the applicability of the Act and would allow the EEOC to make FOIA applicable to information created and maintained by a state agency. *See* Attorney General Opinion JM-830 (1987) (EEOC lacks authority to require a state agency to ignore state statutes). Thus, you have not shown how the contract between the EEOC and the commission makes FOIA applicable to the commission in this instance. Accordingly, the commission may not withhold the submitted information under FOIA.

We next address your arguments under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information protected by statutes. Pursuant to section 21.204 of the Labor Code, the commission may investigate a complaint of an unlawful employment practice. *See* Lab. Code § 21.204; *see also id.* §§ 21.0015 (powers of Commission on Human Rights under Labor Code chapter 21 transferred to commission’s civil rights division), 21.201. Section 21.304 of the Labor Code provides 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.” *Id.* § 21.304.

You indicate that the submitted information pertains to a complaint of unlawful employment practices investigated by the commission under section 21.204 and on behalf of the EEOC. We therefore agree that the submitted information is generally confidential under section 21.304 of the Labor Code. In this instance, however, the requestor is an attorney who

represents a party to the complaint. Section 21.305 of the Labor Code concerns the release of commission records to a party of a complaint filed under section 21.201 and provides:

(a) The commission shall adopt rules allowing a party to a complaint filed under Section 21.201 reasonable access to commission records relating to the complaint.

(b) Unless the complaint is resolved through a voluntary settlement or conciliation, on the written request of a party the executive director shall allow the party access to the commission records:

(1) after the final action of the commission; or

(2) if a civil action relating to the complaint is filed in federal court alleging a violation of federal law.

Id. § 21.305. At section 819.92 of title 40 of the Texas Administrative Code, the commission has adopted rules that govern access to its records by a party to a complaint. Section 819.92 provides:

Pursuant to Texas Labor Code § 21.304 and § 21.305, [the commission] shall, on written request of a party to perfected complaint under Texas Labor Code, § 21.201, allow the party access to the [commission's] records, unless the perfected complaint has been resolved through a voluntary settlement or conciliation agreement:

(1) following the final action of the [commission]; or

(2) if a party to the perfected complaint or the party's attorney certifies in writing that a civil action relating to the perfected complaint is pending in federal court alleging a violation of federal law.

40 T.A.C. § 819.92. You indicate that there has been a final Agency action taken in this case. Moreover, the complaint was not resolved through a voluntary settlement or conciliation agreement. Thus, the requestor would have a right of access to the submitted information pursuant to sections 21.305 of the Labor Code and 819.92 of the Administrative Code.

You also claim that a portion of the submitted information pertains to mediation and conciliation efforts. With regards to that information, you raise section 552.101 of the Government Code in conjunction with section 21.207(b) of the Labor Code. Section 21.207(b) provides in part:

(b) Without the written consent of the complainant and respondent, the commission, its executive director, or its other officers or employees may not disclose to the public information about the efforts in a particular case to resolve an alleged discriminatory practice by conference, conciliation, or persuasion, regardless of whether there is a determination of reasonable cause.

Labor Code § 21.207(b). You claim that the information you have marked consists of information regarding efforts at mediation or conciliation between the parties to the dispute, and you state that the commission has not received the written consent of both parties to release this information. Based on your representations and our review, we determine that the information you have marked concerning efforts at mediation or conciliation is confidential pursuant to section 21.207(b) of the Labor Code and must be withheld under section 552.101 of the Government Code. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Holly R. Davis
Assistant Attorney General
Open Records Division

HRD/krl

Ref: ID# 263052

Enc. Submitted documents

c: Mr. Derek A. Howard
Howard & Kobelan
100 Congress Avenue, Suite 1720
Austin, Texas 78701
(w/o enclosures)