



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 14, 2007

Mr. George E. Hyde
Denton, Navarro, Rocha & Bernal
For Bandera County
2517 North Main Avenue
San Antonio, Texas 78212

OR2007-06458

Dear Mr. Hyde:

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# 279350.

Bandera County (the "county"), which you represent, received a request for a copy of a settlement agreement offer pertaining to a complaint made against the county that resulted in an Equal Employment Opportunity Commission ("EEOC") investigation.¹ You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.² We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹With regard to the questions raised by the requestor, we note that the Act does not require a governmental body to answer questions. *See* Open Records Decision No. 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information it holds. *See* Open Records Decision No. 561 at 8 (1990).

²We note that the county also provided notice of this request for information to the complainant. As of the date of this decision, this office has received no correspondence from the complainant. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

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. You assert that the submitted information is excepted under section 552.101 in conjunction with the EEOC Compliance Manual. This manual contains the EEOC’s policy statement on alternative dispute resolution, approved July 17, 1995, and states in part “[m]aintaining confidentiality is an important part of any successful ADR program. Subject to the limited exceptions imposed by statute or regulation, confidentiality in any ADR proceeding must be maintained *by the parties*, EEOC employees who are involved in the ADR proceeding, and any outside neutral or other ADR staff[.]” EEOC Comp. Man. (CCH) at 2-3 (emphasis added). While you assert that the EEOC is authorized under section 2000e-12(a) of title 42 of the United States Code to issue procedural regulations, we note that the EEOC’s Compliance Manual is not a federal regulation adopted pursuant to statute, but is a statement of policy. *See* 42 U.S.C. § 2000e-12(a); Attorney General Opinion. No. DM-40 at 1, n. 1 (1991). Accordingly, we conclude that section 552.101 does not encompass the compliance manual; therefore, the submitted settlement offer is not excepted under section 552.101 on this basis.

Next, you claim that the submitted settlement offer is excepted from disclosure under section 552.101 in conjunction with section 574(b) of title 5 of the United States Code, which provides in part “[a] party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication[.]” You state that the county made a written settlement offer to a former employee who had filed a complainant with the EEOC. However, you have not established that this offer was made during a dispute resolution proceeding under section 572(a) of title 5 of the United States Code. *See* 5 U.S.C. § 572(a) (providing for the use of dispute resolution proceedings in the administrative process). Accordingly, the submitted information may not be withheld under section 552.101 in conjunction with section 574(b) of title 5 of the United States Code.

Section 552.101 also encompasses section 2000e-5 of title 42 of the United States Code, which provides 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 [EEOC] shall serve a notice of the charge . . . and shall make an investigation thereof. . . . Charges shall not be made public *by the [EEOC]*. If the [EEOC] determines after such investigation that there is reasonable cause to believe that the charge is true, the [EEOC] shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public *by the [EEOC], its officers or employees*, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person

who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both[.]

42 U.S.C. § 2000e-5 (emphasis added). We have previously held that “[section 2000e-5(b)] only restricts disclosure by those enforcing the Equal Employment Opportunity Act.” *See* Open Records Decision Nos. 245 (1980), 155 (1977), 59 (1974); *Whitaker v. Carney*, 778 F. 2d 216 (1985), *cert. denied*, 479 U.S. 813 (1986) (Title VII proscribes release of information only when held by EEOC or EEOC employees not when held by employer). In this case, the county is the employer and is not acting as the agent of the EEOC. Therefore, the submitted settlement offer may not be withheld under section 552.101 in conjunction with section 2000e-5 of title 42 of the United States Code.

You also argue that the submitted information is confidential under sections 1601.20, 1601.22, and 1601.26 of title 29 of the Code of Federal Regulations.³ Section 1601.20 provides:

(a) [p]rior to the issuance of a determination as to reasonable cause the [EEOC] may encourage the parties to settle the charge on terms that are mutually agreeable. District Directors, Field Directors, Area Directors, Local Directors, the Director of the Office of Field Programs, the Director of Field Management Programs, or their designees, shall have the authority to sign any settlement agreement which is agreeable to both parties. When the [EEOC] agrees in any negotiated settlement not to process that charge further, the [EEOC]’s agreement shall be in consideration for the promises made by the other parties to the agreement. Such an agreement shall not affect the processing of any other charge, including, but not limited to, a Commissioner charge or a charge, the allegations of which are like or related to the individual allegations settled.

(b) [i]n the alternative, the [EEOC] may facilitate a settlement between the person claiming to be aggrieved and the respondent by permitting withdrawal of the charge pursuant to § 1601.10.

29 C.F.R. § 1601.20. Although section 1601.20 discusses the EEOC’s involvement in settlement agreements, this section does not expressly make any information confidential. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to the public). Accordingly, the county may not withhold the submitted documents under section 552.101 in conjunction with section 1601.20 of title 29 of the Code of Federal Regulations.

³Section 552.101 also encompasses the Code of Federal Regulations.

Section 1601.22 provides:

[n]either a charge, nor information obtained during the investigation of a charge of employment discrimination under the ADA or title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to the ADA or title VII, shall be made matters of public information *by the [EEOC]* prior to the institution of any proceeding under the ADA or title VII involving such charge or information. This provision does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested Federal, State, and local authorities as may be appropriate or necessary to the carrying out of the [EEOC]'s function under title VII or the ADA, nor to the publication of data derived from such information in a form which does not reveal the identity of charging parties, respondents, or persons supplying the information.

29 C.F.R. § 1601.22 (emphasis added). Upon review, we find that section 1601.22 prohibits employees of the EEOC from releasing any information pertaining to a discrimination complaint unless a complainant files a lawsuit to remedy the discriminatory practice. *See also* 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. ORD 155 at 2. Therefore, the submitted documents may not be withheld under section 552.101 in conjunction with section 1601.22 of title 29 Code of Federal Regulations.

Section 1601.26 provides:

(a) [n]othing that is said or done during and as part of the informal endeavors of the [EEOC] to eliminate unlawful employment practices by informal methods or conference, conciliation, and persuasion may be made a matter of public information by the [EEOC], its officers or employees or used as evidence in a subsequent proceeding without the written consent of the persons concerned. This provision does not apply to such disclosures to the representatives of Federal, State or local agencies as may be appropriate or necessary to the carrying out of the [EEOC]'s functions under title VII or the ADA: *Provided, however,* That the [EEOC] may refuse to make disclosures to any such agency which does not maintain the confidentiality of such endeavors in accord with this section or in any circumstances where the disclosures will not serve the purposes of the effective enforcement of title VII or the ADA.

(b) Factual information obtained by the [EEOC] during such informal endeavors, if such information is otherwise obtainable by the [EEOC] under section 709 of Title VII, for disclosure purposes will be considered by the [EEOC] as obtained during the investigatory process.

29 C.F.R. § 1601.26 (emphasis in original). Upon review, we find that section 1601.26 prohibits employees of the EEOC from releasing any information pertaining to the EEOC's informal endeavors to eliminate unlawful employment practices. This prohibition does not extend to an employer's disclosure of such information. ORD 155 at 2. Therefore, the submitted documents may not be withheld under section 552.101 in conjunction with section 1601.26 of title 29 of the Code of Federal Regulations.

Finally, you claim that the submitted information is excepted from disclosure under section 552.101 in conjunction with section 154.073 of the Texas Civil Practice and Remedies Code, which provides in pertinent part:

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

Civ. Prac. & Rem. Code § 154.073(a). Upon review, we find that the county has not established that the submitted settlement offer constitutes a communication relating to a civil or criminal dispute made by a participant in an alternative dispute resolution procedure. *See* Gov't Code § 552.301(e)(1)(A) (governmental body claiming exception to disclosure bears the burden to explain how and why the claimed exception is applicable to the information at issue). Therefore, the submitted information may not be withheld under section 552.101 in conjunction with section 154.073(a) of the Civil Practices and Remedies Code.

However, we note that a portion of the information may be subject to section 552.117 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security numbers, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the county may only

⁴The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employee timely elected to keep her personal information confidential, the county must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The county may not withhold this information under section 552.117(a)(1) if the employee did not make a timely election to keep her information confidential. 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,

A handwritten signature in cursive script, appearing to read "M. Alan Akin". A horizontal line is drawn above the signature, extending from the right side of the page towards the center.

M. Alan Akin
Assistant Attorney General
Open Records Division

MAA/mcf

Ref: ID# 279350

Enc. Submitted documents

c: Mr. Roger Sullivan
P.O. Box 64064
Pipe Creek, Texas 78063
(w/o enclosures)