ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 17, 2009

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

OR2009-08383

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# 346369 (TWC Tracking No. 090327-047).

The Texas Workforce Commission (the "commission") received a request for the complete file regarding a specified discrimination charge. You inform us the commission will release some of the responsive information to the requestor. You claim 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. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). The commission received this request for information on March 27, 2009.

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

You did not, however, ask this office for a decision until April 13, 2009. Therefore, we find the commission failed to comply with the procedural requirements of section 552.301. *See* Gov't Code § 552.308(b) (state agency can meet the ten-day requirement if the request is sent by interagency mail and the agency provides evidence sufficient to establish that the request was deposited in interagency mail within that period).

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 the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.111 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under section 552.111 is not compelling reason to withhold information under section 552.302), 663 at 5 (1999) (governmental body may waive section 552.111); *see also* Open Records Decision No. 665 at 2 n. 5 (2000) (discretionary exceptions in general). In failing to comply with section 552.301, the commission has waived its claim under section 552.111. Therefore, the commission may not withhold any of the submitted information under section 552.111. However, section 552.101 of the Government Code can provide a compelling reason to overcome this presumption; therefore, we will consider the applicability of this section to the submitted information.

The commission claims the information at issue is subject to the federal Freedom of Information Act ("FOIA"). Section 2000e-5(b) of title 42 of the United States Code states in relevant part the following:

> 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). The commission informs us it has a contract with the EEOC to investigate claims of employment discrimination allegations. The commission asserts under the terms of this contract, "access to charge and complaint files is governed by FOIA, including the exceptions to disclosure found in the FOIA." The commission claims because the EEOC would withhold the information at issue 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, FOIA is applicable to information held by an agency of the federal government. *See* 5 U.S.C. § 551(1). 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) (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) (neither FOIA nor federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); ORD 124 (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 law, that would pre-empt the applicability of the Act and 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 information at issue pursuant to FOIA.

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 exception encompasses information protected by other statutes. Pursuant to section 21.204 of the Labor Code, the commission may investigate a complaint of an unlawful employment practice. *See* Labor 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), .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 the information at issue 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 this information is confidential under section 21.304 of the Labor Code. However, we note the requestor is the attorney for 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 the following:

> (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. In this case, the commission has taken final action; therefore, section 21.305 is applicable. 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 the following:

> (a) Pursuant to Texas Labor Code § 21.304 and § 21.305, [the commission] shall, on written request of a party to a perfected complaint filed 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:
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> > (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.
>
> (b) Pursuant to the authority granted the [c]ommission in Texas Labor Code § 21.305, reasonable access shall not include access to the following:
>
> > (1) information excepted from required disclosure under Texas Government Code, chapter 552; or
> >
> > (2) investigator notes.

40 T.A.C. § 819.92.[2] The commission states the "purpose of the rule amendment is to clarify in rule the [c]ommission's determination of what materials are available to the parties in a civil rights matter and what materials are beyond what would constitute reasonable access

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[2]The commission states the amended rule was adopted pursuant to sections 301.0015 and 302.002(d) of the Labor Code, "which provide the [c]ommission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of [commission] services and activities." 32 Tex. Reg. 554. The commission also states section 21.305 of the Labor Code "provides the [c]ommission with the authority to adopt rules allowing a party to a complaint filed under § 21.201 reasonable access to [c]ommission records relating to the complaint." *Id.*

to the file." 32 Tex. Reg. 553 (2007). A governmental body must have statutory authority to promulgate a rule. *See Railroad Comm'n v. ARCO Oil*, 876 S.W.2d 473 (Tex. App.—Austin 1994, writ denied). A governmental body has no authority to adopt a rule that is inconsistent with existing state law. *Id.*; *see also Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 750 (Tex. 1995); Attorney General Opinion GA-497 (2006) (in deciding whether governmental body has exceeded its rulemaking powers, a determinative factor is whether provisions of rule are in harmony with general objectives of statute at issue).

As noted above, section 21.305 of the Labor Code requires the release of commission complaint records to a party to a complaint under certain circumstances. *See* Labor Code § 21.305. In correspondence to our office, you contend under section 819.92(b) of the rule, the Act's exceptions apply to withhold information in a commission file even when requested by a party to the complaint. *See* 40 T.A.C. § 819.92(b). Section 21.305 of the Labor Code states the commission "*shall* allow the party access to the commission's records." *See* Labor Code § 21.305 (emphasis added). The commission's rule in subsection 819.92(b) operates as a denial of access to complaint information provided by subsection 819.92(a). *See* 40 T.A.C. § 819.92. Further, the rule conflicts with the mandated party access provided by section 21.305 of the Labor Code. The commission submits no arguments or explanation to resolve this conflict and submits no arguments to support its conclusion that section 21.305's grant of authority to promulgate rules regarding reasonable access permits the commission to deny party access entirely. Being unable to resolve this conflict, we cannot find rule 819.92(b) operates in harmony with the general objectives of section 21.305 of the Labor Code. Thus, we must make our determination under section 21.305 of the Labor Code. *See Edgewood*, 917 S.W.2d at 750.

In this case, as we have previously noted, final agency action has been taken. You do not inform us the complaint was resolved through a voluntary settlement or conciliation agreement. Thus, pursuant to sections 21.305 and 819.92(a), the requestor has a right of access to the commission's records relating to the complaint. Accordingly, none of the submitted information may be withheld on that basis.

Section 552.101 of the Government Code also encompasses section 21.207(b) of the Labor Code, which provides in relevant part the following:

> (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 inform us that the information you have marked pursuant to section 21.207 consists of information regarding efforts at mediation or conciliation between the parties to the dispute, and you inform us that the commission has not received the written

consent of both parties to release this information. Therefore, we find the commission must withhold the information concerning efforts at mediation or conciliation you have marked under section 552.101 in conjunction with section 21.207(b) of the Labor Code.

In summary, the commission must withhold the conciliation and mediation information you have marked under section 552.101 of the Government Code in conjunction with section 21.207 of the Labor Code. The remaining information must be released.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

Ref: ID# 346369

Enc. Submitted documents

cc: Requestor
(w/o enclosures)