



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 30, 2009

Mr. Robert N. Jones, Jr.  
Assistant General Counsel  
Texas Workforce Commission  
101 East 15th Street  
Austin, Texas 78778-0001

OR2009-16870

Dear Mr. Jones:

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# 362581 (TWC Tracking No. 090909-058).

The Texas Workforce Commission (the "commission") received a request for all information regarding a specified discrimination complaint. You state the commission will provide some of the requested information to the requestor. You claim portions of the submitted discrimination complaint information are excepted from disclosure under sections 552.101, 552.117, 552.1175, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

You seek to withhold a submitted college transcript as an education record under the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, which governs the availability of education records held by educational institutions or agencies receiving federal funds. These provisions only apply to student records in the custody of educational institutions and to records directly transferred from an educational institution to a third party. 34 C.F.R. § 99.33(a)(2). In this instance, the commission maintains the transcript at issue, and the commission is not an educational institution. You do not assert, nor does it appear from our review, the commission received

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<sup>1</sup>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.

the transcript directly from the educational institution at issue. Therefore, FERPA does not apply to the submitted transcript, and the commission may not withhold it on that ground.

The commission claims the requested information 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:

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 that 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 that because the EEOC would withhold the requested 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, 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 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); Open Records Decision No. 124 (1976) (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 requested information pursuant to the exceptions available under FOIA.

Section 552.101 of the Government Code exempts 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 requested 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 the submitted information is confidential under section 21.304 of the Labor Code. However, we note the requestor is an attorney representing 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. 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:

(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:

(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.<sup>2</sup> 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 to the file." 32 Tex. Reg. 553. 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, 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 that under section 819.92(b) of the rule, the Act's exceptions apply to withhold information in a commission file, including investigator notes, 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 that 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

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<sup>2</sup>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 section 21.201 reasonable access to [c]ommission records relating to the complaint." Labor Code § 21.305.

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 section 21.305, the requestor has a right of access to the commission's records relating to the complaint and the requested information may not be withheld by the commission under section 552.101 in conjunction with section 21.304.

You seek to withhold portions of the submitted information under section 552.101 in conjunction with constitutional privacy and common-law privacy, as well as sections 552.117, 552.1175, and 552.147 of the Government Code. However, these sections are general exceptions to disclosure under the Act. A specific statutory right of access prevails over the common law and general exceptions to disclosure under the Act. *See Gallagher Headquarters Ranch Dev., Ltd. v. City of San Antonio*, 269 S.W.3d 628, 637 (Tex. App.—San Antonio 2008, pet. filed) (when statute directly conflicts with common law principle or claim, statutory provision controls and preempts common law; legislature may enact legislation that preempts or supersedes common law principle); *see also* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 at 4 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Because the requestor, in this instance, has a statutory right of access to the requested information, the commission may not withhold the information you have marked under section 552.101 in conjunction with constitutional privacy or common-law privacy, section 552.117, section 552.1175, or section 552.147.

You claim some of the submitted information, which you have marked, consists of a medical record subject to the Medical Practices Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(b), (c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). Upon review, we agree the marked letter from a physician constitutes a medical record for purposes of the MPA. Medical records are generally subject to the MPA, and may only be released as provided under the MPA. ORD 598.

We note the submitted information contains an accident report that was completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 552.101 also encompasses Section 550.065(b), which states, except as provided by subsection (c) or (e), accident reports are privileged for the confidential use of certain specified entities. Transp. Code § 550.065(b). Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, a governmental entity is required to release a copy of an accident report to a person who provides two or more pieces of information specified by the statute. *Id.* In this instance, the requestor has not provided the commission with at least two of the three items of information specified by section 550.065(c)(4). Therefore, the submitted accident report, which we have marked, is generally confidential pursuant to section 550.065(b) of the Transportation Code.<sup>3</sup>

You contend a Texas driver's license number in the submitted information is excepted from disclosure under section 552.130 of the Government Code, which excepts from disclosure information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130(1), (2). Upon review, we agree the Texas driver's license number you have marked, and the additional information we have marked, is generally excepted from disclosure under section 552.130.

Where information falls within both a general and a specific provision of law, the specific provision prevails over the general. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000) ("more specific statute controls over the more general"); *Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App. 1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451. As previously noted, the requestor has a statutory right of access to the requested information. Therefore, we must address the conflict between the access provided under section 21.305 of the Labor Code and the confidentiality provided under the MPA, section 550.065 of the Transportation Code, and section 552.130 of the Government Code. In this instance, section 21.305 generally applies to any type of record contained in commission complaint records, while the MPA specifically protects medical records and section 550.065 specifically protects accident reports. Thus, we conclude the confidentiality provided under the MPA and section 550.065 is more specific than the general right of access provided under section 21.305. As previously noted, however, a specific statutory right of access prevails over general exceptions to disclosure under the Act. ORD 451 at 4. Nevertheless, because section 552.130 has its own access provisions, we conclude section 552.130 is not a general exception under the Act. Again, section 21.305 generally applies to any type of record contained in commission complaint records, while section 552.130 specifically protects Texas motor vehicle record information.

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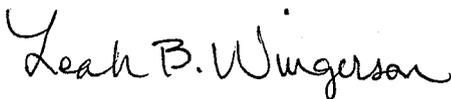
<sup>3</sup>As our ruling is dispositive for this information, we need not address your argument against disclosure for a portion of this information.

Thus, we find the confidentiality provided by section 552.130 is more specific than the general right of access provided by section 21.305. Accordingly, the marked medical record may only be released in accordance with the MPA. ORD 598. Furthermore, the commission must withhold the marked accident report under section 552.101 of the Government Code in conjunction with section 550.065 of the Transportation Code and the marked Texas driver's license information under section 552.130 of the Government Code. The remaining information must be released.<sup>4</sup>

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](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, toll free, at (888) 672-6787.

Sincerely,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 362581

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</sup>You state the commission has redacted portions of the remaining information regarding efforts at mediation and conciliation under section 552.101 of the Government Code in conjunction with section 21.207(b) of the Labor Code pursuant to a previous determination issued to the commission in Open Records Letter No. 2009-10954 (2009).