



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 11, 2011

Ms. Margo Kaiser  
Staff Attorney  
Texas Workforce Commission  
101 East 15<sup>th</sup> Street  
Austin, Texas 78778-0001

OR2011-06564

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# 417274 (TWC Tracking No. 110222-027).

The Texas Workforce Commission (the "commission") received a request for information pertaining to a specified claim of discrimination filed with the commission's Civil Rights Division. You state the commission has redacted any mediation and conciliation information under section 21.207(b) of the Labor Code pursuant to the previous determination issued to the commission in Open Records Letter No. 2009-10954 (2009). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001). You claim the submitted information is excepted from disclosure under sections 552.101, 552.116, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

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 other statutes make confidential. Pursuant to section 21.204 of the Labor Code, the commission may investigate a complaint

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<sup>1</sup>We assume the "representative sample" of information 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 those submitted to this office.

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); 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.

The information at issue pertains to a complaint of unlawful employment discrimination that was investigated by the commission under section 21.204 and on behalf of the Equal Employment Opportunity Commission. Thus, the information at issue is confidential under section 21.304 of the Labor Code. However, in this instance, the requestor is a party to the complaint. Section 21.305 of the Labor Code addresses the release of commission records to a party to a complaint filed under section 21.201 of the Labor Code and provides as follows:

(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 as follows:

(a) Pursuant to Texas Labor Code § 21.304 and § 21.305, [the commission] shall, on written request of a party to a 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.

(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. 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. 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. 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. Being unable to resolve this conflict, we cannot find that 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, 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.

Section 552.101 also encompasses the federal Family and Medical Leave Act (the "FMLA"). *See* 29 U.S.C. § 2801 *et seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements pertaining to information that is subject to the FMLA. Subsection (g) of section 825.500 provides that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for

purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review, we find that the information we have marked is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find that none of the release provisions of the FMLA apply to the information. Because the marked information is confidential under the FMLA, we find that there is a conflict between the FMLA and the requestor's right of access pursuant to section 21.305 of the Labor Code in conjunction with section 819.92(a) of title 40 of the Texas Administrative Code. However, we note that, as a federal law, the FMLA preempts any conflicting state provisions. *See Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law). Accordingly we find that, notwithstanding the applicability of sections 21.305 and 819.92(a), the information we have marked must be withheld pursuant to section 552.101 of the Government Code in conjunction with the FMLA.

You assert the remaining submitted information is excepted under section 552.101 of the Government Code in conjunction with common-law privacy and sections 552.116 and 552.136 of the Government Code. Further, you state the commission will withhold information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009) and has redacted information pursuant to section 552.147 of the Government Code.<sup>2</sup> However, sections 552.116, 552.136, 552.137 and 552.147 are general

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<sup>2</sup>As you acknowledge, Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See Gov't Code § 552.147(b)*.

exceptions to disclosure under the Act and a specific statutory right of access prevails over the common law and general exceptions to disclosure under the Act. *Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.— Fort Worth 2009, no pet.) (statutory provision controls and preempts common law only when statute directly conflicts with common-law principle); *CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls only where there is no conflicting or controlling statutory law); *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 any part of the remaining submitted information under section 552.101 in conjunction with common-law privacy or under sections 552.116 and 552.136. Further, the commission may not redact any information under section 552.137 or section 552.147.

You assert a portion of the remaining information is confidential pursuant to the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 552.101 of the Government Code also encompasses the MPA. Section 159.002 of the MPA provides in part the following:

(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.

Occ. Code § 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). We also have concluded when a file is created as the result of a hospital stay, all of the documents in the file that relate to diagnosis and treatment constitute either physician-patient communications or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician. *See* Open Records Decision No. 546 (1990). Medical records are generally confidential, and may only be released as provided under the MPA. ORD 598. Upon review, we find the information we have marked constitutes medical records that are subject to the MPA.

You also assert a portion of the remaining information contains criminal history record information (“CHRI”) that is confidential under section 411.083 of the Government Code.

Section 552.101 also encompasses section 411.083. CHRI generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center (“TCIC”) is confidential. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *See id.* § 411.083. Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (the “DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See id.* Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from the DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Furthermore, any CHRI obtained from the DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Upon review, we find the information we have marked must generally be withheld under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

You contend the information you have marked is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts from disclosure “information [that] relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.” Gov’t Code § 552.130(a)(1)-(2). You have marked a Texas driver’s license number and a copy of a Texas driver’s license under section 552.130. Additionally, we note the remaining submitted information includes a Texas driver’s license class and expiration date, which we have marked. Accordingly, we find both the Texas driver’s license number and the copy of the Texas driver’s license you have marked, as well as the license class and expiration date we have marked in the remaining submitted information are generally excepted under section 552.130 of the Government Code.

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, 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 and sections 411.083 and 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 411.083 of the Government Code specifically makes CHRI generated by TCIC or NCIC confidential. Thus, we conclude the confidentiality provided under the MPA and section 411.083 of the

Government Code is more specific than the general right of access provided under section 21.305. As previously noted, a specific statutory right of access prevails over general exceptions to disclosure under the Act. ORD 451 at 4. However, 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. 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 medical records we have marked may only be released in accordance with the MPA and the CHRI we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. ORD 598. Furthermore, the commission must withhold the Texas driver's license number and the copy of the Texas driver's license you have marked, as well as the license class and expiration date we have marked under section 552.130 of the Government Code.<sup>3</sup>

You state some information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the commission must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with the FMLA. The commission may only release the marked medical records in accordance with the MPA. The commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The commission must withhold the information you and we have marked under section 552.130 of the Government Code. The remaining information must be released to this requestor, but any information subject to copyright may only be released in accordance with copyright law.<sup>4</sup>

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<sup>3</sup>As previously noted, and as you acknowledge, this office issued Open Records Decision No. 684 (2009) as a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number and a copy of a Texas driver's license under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>4</sup>We note that because the requestor has a special right of access to this information in this instance, the commission must again seek a decision from this office if it receives another request for the same information from another requestor.

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,



Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/eeg

Ref: ID# 417274

Enc. Submitted documents

c: Requestor  
(w/o enclosures)