



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2011

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

OR2011-14165

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# 430071 (TWC Tracking No. 110628-010).

The Texas Workforce Commission (the "commission") received a request for all documents concerning a specified employment discrimination claim filed against the requestor's client. You state the commission redacted 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 section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we address your claim that some of the submitted records are education records that must be withheld under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g). These provisions apply only to student records in the custody of

¹We 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 those submitted to this office.

educational institutions and to records directly transferred from an educational institution to a third party. *See* 34 C.F.R. §§ 99.33(a)(2), 99.3 (defining “student”). The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.² Although the commission is not an education authority, you inform us the commission obtained the records at issue during the course of its investigation. Because our office is prohibited from reviewing education records to determine the applicability of FERPA, we will not address FERPA with respect to those records. Such determinations under FERPA must be made by the educational authority from which the records were obtained. Thus, the commission must contact the educational institution from which the records at issue were obtained, as well as the DOE, regarding the applicability of FERPA to these records.

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. Section 552.101 encompasses section 21.204 of the Labor Code, which authorizes the commission to 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, “[a]n officer or employee of the commission may not disclose to the public information obtained by the commission under Section 21.204 except in compliance with Section 21.305 and as necessary to the conduct of a proceeding under this chapter.” Act of May 30, 2011, 82nd Leg., R.S., H.B. 2463, § 1 (to be codified as an amendment to Labor Code §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 generally confidential under section 21.304 of the Labor Code. However, in this instance, the requestor represents 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) Except as provided by Subsection (c), 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.

²A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

(b) Except as provided by Subsection (c), 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.

(c) Notwithstanding Section 552.023, Government Code, the following information is not considered public information for the purposes of [the Act] and may not be disclosed to a party to a complaint filed under Section 21.201:

(1) identifying information of persons other than the parties and witnesses to the complaint;

(2) identifying information about confidential witnesses, including any confidential statement given by the witness;

(3) sensitive medical information about the charging party or a witness to the complaint that is:

(A) provided by a person other than the person requesting the information; and

(B) not relevant to issues raised in the complaint, including information that identifies injuries, impairments, pregnancies, disabilities, or other medical conditions that are not obviously apparent or visible;

(4) identifying information about a person other than the charging party that is found in sensitive medical information regardless of whether the information is relevant to the complaint;

(5) nonsensitive medical information that is relevant to the complaint if the disclosure would result in an invasion of personal privacy, unless the information is generally known or has been previously reported to the public;

(6) identifying information about other respondents or employers not a party to the complaint;

(7) information relating to settlement offers or conciliation agreements received from one party that was not conveyed to the other and information contained in a separate alternative dispute resolution file prepared for mediation purposes; and

(8) identifying information about a person on whose behalf a complaint was filed if the person has requested that the person's identity as a complaining party remain confidential.

(d) In this section, "identifying information" has the meaning assigned by Section 32.51, Penal Code.

Act of May 30, 2011, 82nd Leg., R.S., H.B. 2463, § 2 (to be codified as an amendment to Labor Code § 21.305). You state the commission has taken final action in the case that is the subject of this request; therefore, section 21.305 is applicable. You do not inform us the complaint was resolved through a voluntary settlement or conciliation agreement. Thus, the requestor generally has a right of access, except as provided by section 21.305(c), to the commission's records relating to the complaint.

Upon review, we understand some of the submitted information contains identifying information of persons other than the parties and witnesses to the complaint. Therefore, the identifying information we have marked is excluded from the requestor's right of access and must be withheld under section 552.101 of the Government Code in conjunction with sections 21.304 and 21.305(c)(1) of the Labor Code. The requestor, however, generally has a right of access to the remaining information pursuant to section 21.305(b) of the Labor Code.

You assert the information the requestor has a right of access to is excepted under section 552.101 in conjunction with common-law privacy. However, a specific statutory right of access prevails over the common law. *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). Because the requestor has a statutory right of access to the requested information, the commission may not withhold the information at issue under section 552.101 in conjunction with common-law privacy.

You also seek to withhold the information the requestor has a right of access to under section 552.101 in conjunction with section 611.002 of the Health and Safety Code. Section 611.002 is applicable to mental health records and provides "[c]ommunications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential."

Health & Safety Code § 611.002(a); *see also id.* § 611.001 (defining “patient” and “professional”). Upon review, we find none of the information at issue consists of mental health records for purposes of section 611.002. Thus, the commission may not withhold any of the information at issue under section 611.002(a) of the Health and Safety Code.

Finally, 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:

(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). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). This office also has 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). Upon review, we find the information we have marked constitutes medical records that are subject to the MPA.

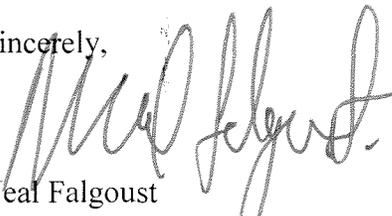
As previously noted, the requestor has a statutory right of access to the information at issue. Therefore, we must address the conflict between the access provided under section 21.305(b) and the confidentiality provided under the MPA. Where information falls within both a general and a specific provision of law, the specific provision typically prevails over the general provision. *See* Gov’t Code § 311.026(b); *City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, writ ref’d n.r.e.). 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. Thus, we find the confidentiality provided by the MPA is more specific than the general right of access provided by section 21.305(b). Accordingly, the medical records we have marked may only be released in accordance with the MPA.

In summary, the medical records we have marked may only be released in accordance with the MPA. The identifying information we have marked must be withheld under section 552.101 of the Government Code in conjunction with sections 21.304 and 21.305(c)(1) of the Labor Code. The requestor, however, has a right of access to the remaining information pursuant to section 21.305(b) of the Labor Code. The remaining information must be released.³

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, toll free at (888) 672-6787.

Sincerely,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/agn

Ref: ID# 430071

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the requestor in this case has a statutory right of access to the information being released. Therefore, if the commission receives another request for this same information from a different requestor, it must again seek a ruling from this office.