



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

November 8, 1989

Mr. William M. Hale
Executive Director
Texas Commission on Human
Rights
P. O. Box 13493
Capitol Station
Austin, Texas 78711

Open Records Decision No. 534

Re: Whether section 8.02 of
article 5221k, V.T.C.S., the
Texas Commission on Human Rights
Act, protects certain investi-
gative files from public dis-
closure and related questions
(RQ-1663)

Dear Mr. Hale:

The Texas Commission on Human Rights received a request under the Texas Open Records Act, article 6252-17a, V.T.C.S., for 9 categories of information. The categories requested relate (1) to specific charges of discrimination made against the Texas Department of Corrections and (2) to the hiring, promotion, assignment, and discipline practices and procedures of the department. The information requested may be summarized as follows:

1. all files relating to charges of discrimination filed with the commission against the Texas Department of Corrections (TDC);
2. all discrimination charges filed with the federal Equal Employment Opportunity Commission against the TDC and referred to the commission;
3. the personnel files, including disciplinary matters, for all TDC employees;
4. all studies concerning salaries at the TDC;
5. all studies concerning the hiring procedures of the TDC;
6. all studies concerning the promotion procedures of the TDC;

7. all studies concerning the disciplinary procedures of the TDC;

8. all studies concerning the procedure for determining job assignments and staffing at the TDC;

9. all documents containing the name, sex, ethnicity, salaries, and dates of employment of TDC employees.

You state that the commission does not possess the information requested in items 4 through 9 of the request and that the commission would have information from item 3 only to the extent that the information had been made part of the investigation of a specific complaint.

As a general rule, the Open Records Act does not require that the commission take affirmative steps to create or obtain information that is not in its possession. Open Records Decision No. 445 (1986); see Economic Opportunities Dev. Corp. v. Bustamante, 562 S.W.2d 266, 268 (Tex. Civ. App. - San Antonio 1978, writ dism'd) (writ of mandamus will not issue under section 8 of the Open Records Act to compel disclosure of information not in possession of governmental body). The act applies only to

[i]nformation collected, assembled, or maintained by or for governmental bodies, except in those situations where the governmental body does not have either a right of access to or ownership of the information, pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hours of any governmental body, with the following exceptions only. (Emphasis added.)

V.T.C.S. art. 6252-17a, § 3(a); see also Open Records Decision No. 462 (1987).

So long as no entity holds the information requested in items 4 through 9 on behalf of the commission, the commission has no duty to obtain the information. We do not believe that the Texas Department of Corrections maintains personnel files "for" the Texas Commission on Human Rights (hereinafter the commission). Additionally, unless

the TDC prepared a study on its employment practices at the request of or at the direction of the commission, the study could not be deemed to be within the constructive possession of the commission. The fact that the commission has the right to subpoena records that relate to a complaint, see V.T.C.S. art. 5221k, § 8.02(b), does not mean that the records are held "for" the commission within the meaning of section 3(a). The "right of access" referred to in section 3(a) refers to "information collected, assembled, or maintained by or for governmental bodies." The TDC does not maintain its files "for" the commission. For this reason, the requestor should seek items 4 through 9 from the TDC. Assuming that the requested information exists, whether the information would be public depends on whether any of the Open Records Act exceptions protect it.

With regard to items 1 through 3, you note that the commission would have item 3, personnel file information, only in connection with an investigation conducted by the commission. The commission contends that section 8.02 of the Texas Commission on Human Rights Act, article 5221k, V.T.C.S., protects the information from required public disclosure. Section 3(a)(1) of the Open Records Act protects information deemed confidential by specific statutes. See Hutchins v. Texas Rehab. Comm'n, 544 S.W.2d 802 (Tex. Civ. App. - Austin 1976, no writ).

Section 8.02 of article 5221k authorizes the commission to obtain information necessary to conduct investigations and provides for the confidentiality of that information. Section 8.02 provides:

(a) An officer or employee of the commission may not make public any information obtained by the commission under its authority under Section 6.01 of this Act except as necessary to the conduct of a proceeding under this Act. The commission shall adopt rules that allow a party to a complaint filed under Section 6.01 reasonable access to the commission records relating to the complaint. Unless the complaint is resolved through a voluntary settlement or conciliation, the executive director shall, on the written request of a party, allow the party access to the commission records:

(1) following the final action of the commission; or

(2) if a civil action relating to the complaint has been filed in federal court alleging a violation of federal law.

(b) If a person fails to permit access, examination, photographing, or copying or fails to make, keep, or preserve records or make reports in accordance with this article, the commission may issue a subpoena requiring compliance. On a failure to comply with a subpoena of the commission, the commission shall apply to the district court of the county in which the person is found, resides, or transacts business for an order directing compliance.

As will be shown in the discussion to follow, a distinction must be made between public access and the rights of access of the parties to a grievance.

Section 6.01 of article 522k authorizes the commission to conduct investigations of alleged discriminatory employment practices. The purpose of such investigations is to determine whether probable cause exists to believe that the respondent has engaged in an unlawful employment practice. V.T.C.S. art. 522k, § 6.01. If the commission determines that probable cause does not exist, the commission must issue a written determination to that effect. Id. § 6.01(b). If the commission determines, as provided in subsection (c) of section 6.01, that probable cause exists, the commission may attempt to eliminate the unlawful employment practice (1) informally through "conference, conciliation, and persuasion," see id. § 6.01(c), or (2) by filing suit in district court to obtain temporary relief for the complainant. See id. § 6.01(e). Investigations and actions under section 6.01 are limited to situations in which no other proceedings, either administrative or judicial, have been initiated on the basis of the same unlawful employment practice. Id. § 6.01(f). In other words, a person who has initiated another action on the same grievance may not file a complaint under section 6.01.

When the commission acts under subsection (c) of section 6.01 to attempt to resolve a complaint informally,

the efforts to resolve the complaint are confidential. Subsection (c) provides, in part:

The commission, its executive director, or its other officers or employees may not make public, without the written consent of the complainant and respondent, information about the efforts in a particular case to resolve an alleged discriminatory practice by conference, conciliation, or persuasion, whether or not there is a determination of reasonable cause.

The confidentiality created by subsection (c), however, by its terms extends only to information about efforts to resolve a case informally. Attorney General Opinion JM-830 (1987). The confidentiality conferred by section 8.02(a) is broader than that conferred by section 6.01(c).

In Attorney General Opinion JM-275 (1984), this office considered whether the commission could transfer information subject to the confidentiality protection of section 8.02(a) to a local human rights commission when a particular complaint was transferred to a local commission pursuant to article 5221k. Attorney General Opinion JM-275 determined that such a transfer did not violate section 8.02(a). That opinion also noted that the scope of the confidentiality protection of section 8.02(a) is limited by its terms to "information obtained by the commission under its authority under Section 6.01 of this Act."

You submitted two representative investigative files for review. They include statements from the complainant, the respondent, and the witnesses, and the notations of investigators. The files also include copies of memoranda that could be deemed to be part of the complaining employee's personnel file. All of the information submitted for review is clearly information collected or created by the commission under section 6.01. It does not matter that the commission's power to act may have been preempted under section 6.01(f) if the information was collected in good faith pursuant to section 6.01. For example, an individual may become disgruntled with the commission's action and file a court action on the grievance. In that situation any information would nevertheless be collected under the authority of section 6.01. Similarly, an individual might have filed a grievance with a local committee and with the commission. If the commission begins an investigation

before it learns of the other filing, any information collected would have been collected pursuant to the authority of section 6.01. It is not clear, however, that information would be deemed to be collected under the "authority" of section 6.01 if the commission acted with knowledge of another filing within the meaning of section 6.01(f).

You also indicate that the commission receives open records requests for its investigative files from complainants and respondents or from their respective attorneys. Even when information is confidential under section 3(a)(1) of the Open Records Act in conjunction with a specific statute, and therefore not available for public inspection, specific individuals may have a right of access granted by laws other than the Open Records Act. See, e.g., Hutchins v. Texas Rehab. Comm'n, supra (common-law right of access of former patient of Texas Rehabilitation Commission to information about that patient held by the commission); Attorney General Opinions JM-1048 (1989) (Open Records Act exceptions do not create privileges from civil discovery); H-626 (1975) (due process right of parties to Texas Employment Commission proceedings to information upon which the commission bases its decision). It is beyond the scope of an open records decision to determine whether a specific party to a proceeding, including the commission's informal attempts to resolve discrimination complaints by conciliation, has a common-law or due process right of access to the commission's investigative file.

It is, however, significant in this regard that section 8.02(a) of article 5221k prohibits the release of information collected pursuant to section 6.01 of article 5221k "except as necessary to the conduct of a proceeding under this Act." Clearly, the commission could determine that release of its investigative information to the parties to a particular complaint could facilitate informal resolution of the complaint. Moreover, as indicated, such release could also be required by laws other than the Open Records Act. In both circumstances, we believe the disclosure of investigative information arguably could be deemed "necessary to the conduct of a proceeding under the Act." At the least, such a release of information would not be a release to the public in violation of sections 10(b) and 10(f) of the Open Records Act. See Open Records Decision Nos. 501, 490 (1988).

Moreover, the 71st Texas Legislature amended section 8.02(a) to grant parties to a complaint filed under section 6.01 a right of "reasonable access to the commission records relating to the complaint." Acts 1989, 71st Leg., ch. 1186, § 20, at 4832. The amendment directs that the commission adopt rules allowing such access. Id. The amendment also requires that, unless a complaint is resolved informally through conciliation, the commission allow access to its records

(1) following the final action of the commission; or

(2) if a civil action relating to the complaint has been filed in federal court alleging a violation of federal law.

Id. A release to the parties under the quoted provision is not inconsistent with the prohibition on release of the information to the public; such a release would not constitute a release to the public under the Open Records Act.

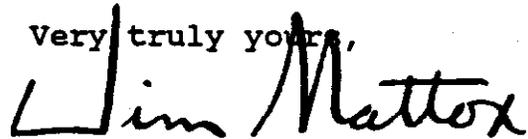
S U M M A R Y

Section 8.02(a) of the Texas Commission on Human Rights Act, article 5221k, V.T.C.S., in conjunction with section 3(a)(1) of the Texas Open Records Act, article 6252-17a, V.T.C.S., protects from required public disclosure the investigative files of the Texas Commission on Human Rights. The protection accorded by section 8.02(a) extends to all information collected or created by the commission under the authority of section 6.01 of article 5221k.

This does not mean, however, that the commission is authorized to withhold the information from the parties subject to the investigation. Section 8.02(a), as amended by the 71st Texas Legislature, grants a special right of access to a party to a complaint filed under section 6.01. Other laws may also grant a special right of access to specific information.

Whether governmental bodies' personnel file information that may be related to a particular complaint of unlawful employment practices but that has not been submitted to the commission under section 6.01 must be disclosed to the public depends on whether any of the Open Records Act exceptions protect the information. Requests for such information should be directed to the governmental body that holds it; the Open Records Act does not, as a general rule, require that the commission obtain information not in its possession.

Very truly yours,



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