



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 31, 2006

Ms. Lona Chastain  
Assistant General Counsel  
Texas Workforce Commission  
101 East 15<sup>th</sup> Street  
Austin, Texas 78778-0001

OR2006-05692

Dear Ms. Chastain:

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# 250412.

The Texas Workforce Commission (the "commission") received a request for information related to the commission's hiring for specified job positions, including the selection criteria for hired applicants; information regarding alleged and substantiated employment discrimination in the commission's Civil Rights Division (the "division"), or its predecessor agency; and, demographic information about employees in the division. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code and Texas Rule of Evidence 503. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note the submitted information does not include information responsive to the portion of the request regarding demographic information about employees in the division. The requestor specifically requests "[n]umber, job titles, respective dates-of-hire, dates-of-birth, race/ethnicity/national origin of all employees currently employed by the [division]." We therefore assume that, to the extent it exists, any information maintained by the commission that is responsive to that portion of the request has been released to the requestor. *See* Gov't Code § 552.022(a)(2) (providing that the name, sex, ethnicity, salary, title, and dates of employment of each employee of a governmental body is public

information unless expressly confidential under other law.) If not, the commission must release such information immediately. See Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that Gov't Code § 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under circumstances). We now address your arguments with respect to the information you have submitted.

We note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part that

[w]ithout limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...  
(15) information regarded as open to the public under an agency's policies; [and]

...  
(18) a settlement agreement to which a governmental body is a party

Gov't Code § 552.022(a)(15), (18). The submitted documents include job vacancy notices that are subject to section 552.022(a)(15) and a settlement agreement to which the commission is a party that is subject to section 552.022(a)(18).<sup>1</sup> The commission must release this information unless it is expressly confidential under other law. Although you claim this information is excepted from disclosure under section 552.103 of the Government Code, this is a discretionary exception that protects a governmental body's interests and may be waived. *Id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the commission may not withhold the job vacancy notices or settlement agreement under section 552.103. As you do not raise any other exceptions for the submitted job vacancy notices, that information must be released. However, you claim the submitted settlement agreement to which the commission is a party is excepted under section 552.101. Because section 552.101 constitutes other law for purposes of section 552.022, we will address your arguments under that exception for the conciliation agreement. The Texas Supreme Court has held that the Texas Rules of Evidence are also other law for purposes of section 552.022, thus we will address your claim under Rule 503 as well. See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001).

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<sup>1</sup> We note that the settlement agreement at issue incorporates an attached Equal Employment Opportunity Commission Conciliation Agreement to which the commission is also a party.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes, such as section 2000e-5 of title 42 of the United States Code and chapter 21 of the Texas Labor Code. Section 2000e-5(b) 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). You state that the commission “has been certified by the authorized federal agencies to investigate discrimination charges.” Pursuant to section 21.204 of the Labor Code, the commission may investigate a complaint of an unlawful employment practice. *See* Lab. 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.”

However, we have previously held that “[section 2000e-5(b)] only restricts disclosure by those enforcing the Equal Employment Opportunity Act.” *See* Open Records Decision Nos. 245 (1980), 155 (1977), 59 (1974); *Whitaker v. Carney*, 778 F.2d 216 (1985), *cert denied*, 479 U.S. 813 (1986) (Title VII proscribes release of information only when held by EEOC or EEOC employees not when held by employer). In the settlement agreement at issue, the commission is the employer settling allegations of employment discrimination and is not acting as the agent of the EEOC. No federal statute or regulation prevents an employer’s disclosure of information relating to a claim of employment discrimination. *See* Open Records Decision No. 132 (1976). Therefore, in the hands of the commission, as an employer, the submitted settlement agreement is not made confidential by federal law and may not be withheld under section 552.101 on that basis. Furthermore, as the employer in this instance, the submitted information reflects the commission did not investigate the subject matter of the settlement agreement pursuant to section 201.204 of the Labor Code. Because the settlement agreement was not obtained by the commission pursuant to section 201.204, the confidentiality provision of section 201.304 of the Labor Code is inapplicable to the settlement agreement. Thus, the settlement agreement may not be withheld under section 552.101 on the basis of chapter 21 of the Labor Code.

You also claim the settlement agreement is protected by the attorney-client privilege found in Texas Rule of Evidence 503. Rule 503 provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). The settlement agreement at issue is between the commission and an adversarial party, the complainant to charges of employment discrimination against the commission. Accordingly, we find that the settlement agreement does not constitute a privileged communication protected by Rule 503 and it may not be withheld on that basis. As you do not raise any other exceptions to disclosure for the settlement agreement, it must be released.

We will now address your section 552.103 claim for the remaining submitted information. Section 552.103 of the Government Code provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the requestor filed a lawsuit against the division's predecessor agency in Travis County District Court in 2003 alleging, among other claims, employment discrimination. You inform us the commission has assumed the defense of this lawsuit and you have provided a copy of the Plaintiff's First Amended Original Petition from the lawsuit. The commission received the present request on March 13, 2006, thus, litigation was pending when the commission received the request. You claim that the remaining submitted information is related to the pending litigation in that it pertains to the requestor's claims in the lawsuit. Upon review of your representations and the submitted documentation, we agree that the remaining submitted information is related to the pending litigation. Accordingly, we find section 552.103 is applicable to the remaining submitted information.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information to which all parties in the pending civil litigation have had access is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a)

ends once the litigation has been concluded. Attorney General Opinion MW- 575 (1982); Open Records Decision No. 350 (1982).

In summary, the job vacancy notices and settlement agreement we have marked must be released pursuant to section 552.022 of the Government Code. The remaining submitted information may be withheld at this time pursuant to section 552.103 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ramsey A. Abarca  
Assistant Attorney General  
Open Records Division

RAA/eb

Ref: ID# 250412

Enc. Submitted documents

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(w/o enclosures)