ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 8, 2007

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

OR2007-00228

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# 268537.

The Texas Workforce Commission (the "commission") received a request for information relating to complaints of discrimination involving either of two named individuals, the City of Elgin, and a specified time interval. You inform us that the commission will release some of the requested information. You state that the commission will redact any social security number contained in the requested information under section 552.147 of the Government Code.[1] You claim that other responsive information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.[2]

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[1]Section 552.147 provides in part that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Gov't Code § 552.147(a). Section 552.147(b) 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 under the Act.

[2]This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the commission to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

First, we must address the commission's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires a governmental body to ask for the attorney general's decision and state its claimed exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) provides that a governmental body must submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App. – Austin 1990, no writ).

In this instance, the commission failed to comply with the deadlines prescribed by subsections 552.301(b) and 552.301(e).[3] Therefore, the submitted information is presumed to be public under section 552.302. This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. Although the commission claims an exception to disclosure under section 552.111 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Thus, your claim under section 552.111 does not provide a compelling reason for non-disclosure, and the commission may not withhold any of the submitted information under that exception. Because your claim under section 552.101 of the Government Code can provide a compelling reason for non-disclosure, we will consider your other arguments.

You initially contend that the information at issue is subject to the federal Freedom of Information Act ("FOIA"). Section 2000e-5(b) of title 42 of the United States Code provides in relevant part as follows:

> 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

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[3]You state that the commission received the instant request for information on September 29, 2006. Consequently, the commission's deadlines under subsections 552.301(b) and 552.301(e) were October 13, 2006 and October 20, 2006, respectively. The commission requested this decision on October 30, 2006.

> "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 inform us that the commission has a contract with the EEOC to investigate claims of employment discrimination allegations. You assert 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." You claim that because the EEOC would withhold the submitted information under section 552(b)(5) of title 5 of the United States Code, the commission should also withhold the information on this basis. We note, however, that FOIA is applicable to information held by an agency of the federal government. *See* 5 U.S.C. § 551(1). The information at issue here 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 that 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 information at issue pursuant to the exceptions available under FOIA.

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 that other statutes make confidential. 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 Lab. Code ch. 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.

You indicate that the information at issue pertains to complaints of unlawful employment practices investigated by the commission under section 21.204 and on behalf of the EEOC. We therefore agree that the information at issue is generally confidential under section 21.304 of the Labor Code. We note, however, that since the requestor is an attorney representing a party to the complaints, the submitted information is subject to section 21.305 of the Labor Code and section 819.92 of title 40 of the Texas Administrative Code. Section 21.305 concerns the release of commission records to a party of a complaint filed under section 21.201 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.
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> (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:
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> > (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. 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:

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

40 T.A.C. § 819.92. You indicate that the commission has completed its investigations of the complaints to which the submitted information pertains. You do not indicate that these complaints were resolved through a voluntary settlement or a conciliation agreement. Therefore, the requestor would have a right of access under sections 21.305 and 819.92.

You also state, however, that the submitted documents include information pertaining to mediation and conciliation efforts. With respect to that information, you raise section 552.101 of the Government Code in conjunction with section 21.207(b) of the Labor Code. Section 21.207(b) provides in part:

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

Lab. Code § 21.207(b). You indicate that the information that you have marked relates to efforts at mediation or conciliation between the parties to the dispute. You state that the commission has not received the written consent of both parties to release that information. Based on your representations and our review of the information in question, we conclude that the commission must withhold the marked information under section 552.101 of the Government Code in conjunction with section 21.207(b) of the Labor Code.

In summary, the commission must withhold the marked information that relates to efforts at mediation or conciliation under section 552.101 of the Government Code in conjunction with section 21.207(b) of the Labor Code. The rest of the submitted information must be released.

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

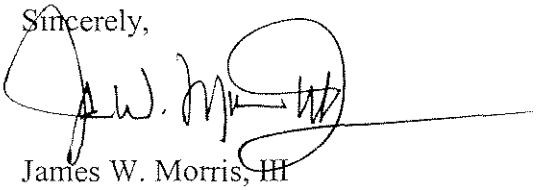
requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



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JWM/jww

Ref: ID# 268537

Enc: Submitted documents

c: Mr. Michael Burnett
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(w/o enclosures)