



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

CORRECTED COPY

June 20, 2007

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

OR2007-04196A

Dear Ms. Kaiser:

This office issued Open Records Letter No. 2007-04196 (2007) on April 16, 2007. We have examined this ruling and determined that Open Records Letter No. 2007-04196 is incorrect. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2007-04196. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 274656.

The Texas Workforce Commission (the "commission") received a request for information pertaining to a named individual. You claim that the requested information is excepted from disclosure under sections 552.101, 552.111, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

The commission claims that the submitted information is subject to the federal Freedom of Information Act ("FOIA"). Section 2000e-5(b) of title 42 of the United States Code states in relevant part the following:

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). The commission informs us that it has a contract with the EEOC to investigate claims of employment discrimination allegations. The commission asserts that under the terms of this contract, "access to charge and complaint files is governed by FOIA, including the exceptions to disclosure found in FOIA." The commission claims 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 this 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 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 submitted information pursuant to the exceptions available under FOIA.

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. This exception encompasses information protected by statutes. 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.” *Id.* § 21.304.

You indicate that a portion of the submitted information pertains to a complaint of unlawful employment practices investigated by the commission under section 21.204 and on behalf of the EEOC. We therefore agree that this information is confidential under section 21.304 of the Labor Code. However, we note that the requestor is the attorney for a party to the complaint. Section 21.305 of the Labor Code concerns the release of commission records to a party of a complaint filed under section 21.201 and provides the following:

(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 the following:

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

32 Tex. Reg. 553-4 (2007) (to be codified as an amendment to 40 T.A.C. § 819.92).² The commission states that the "purpose of the rule amendment is to clarify in rule the [c]ommission's determination of what materials are available to the parties in a civil rights matter and what materials are beyond what would constitute reasonable access to the file." *Id.* at 553. 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* Lab. Code § 21.305. In correspondence to our office, you contend that under section 819.92(b) of the rule, the Act's exceptions apply to withhold information in a commission file even when requested by a party to the complaint. *See* 40 T.A.C. § 819.92(b). Section 21.305 of the Labor Code states that the commission "*shall* allow the party access to the commission's records." *See* Lab. Code § 21.305 (emphasis added). 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. Further, 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 and submits no arguments to support its conclusion that section 21.305's grant of authority to promulgate rules regarding reasonable access permits the commission to deny party access entirely. Being unable to resolve this

²The commission states that the amended rule was adopted pursuant to sections 301.0015 and 302.002(d) of the Labor Code, "which provide the [c]ommission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of [commission] services and activities." 32 Tex. Reg. 554. The commission also states that section 21.305 of the Labor Code "provides the [c]ommission with the authority to adopt rules allowing a party to a complaint filed under §21.201 reasonable access to [c]ommission records relating to the complaint." *Id.*

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, as we have previously noted, final agency action has been taken. You do not inform us that 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.

Turning to your section 552.111 claim, we note that this office has long held that information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under the Act. *See e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). You contend, however, that "[a]n exception to the general rule of release to a party exists for confidential internal agency memoranda," and seek to withhold the submitted information under section 552.111. In support of your contention, you claim that, in *Mace v. EEOC*, 37 F. Supp.2d 1144 (E.D. Mo. 1999), a federal court recognized a similar exception by finding that "the EEOC could withhold an investigator's memorandum as predecisional under [FOIA] as part of the deliberative process." In the *Mace* decision, however, there was no access provision analogous to sections 21.305 and 819.92(a). The court did not have to decide whether the EEOC may withhold the document under section 552(b)(5) of title 5 of the United States Code despite the applicability of an access provision. We therefore conclude that the present case is distinguishable from the court's decision in *Mace*. Furthermore, in Open Records Decision No. 534 (1989), this office examined whether the statutory predecessor to section 21.304 of the Labor Code protected from disclosure the Commission on Human Rights' investigative files into discrimination charges filed with the EEOC. We stated that, while the statutory predecessor to section 21.304 of the Labor Code made confidential all information collected or created by the Commission on Human Rights during its investigation of a complaint, "[t]his does not mean, however, that the commission is authorized to withhold the information from the parties subject to the investigation." *See* Open Records Decision No. 534 at 7 (1989). Therefore, we concluded that the release provision grants a special right of access to a party to a complaint. Thus, because access to the commission's records created under section 21.201 is governed by sections 21.305 and 819.92(a), we determine that this information may not be withheld by the commission under section 552.111.

However, the submitted information includes information pertaining to mediation and conciliation efforts. You also raise section 552.101 in conjunction with section 21.207(b) of the Labor Code for this information. 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.

Labor Code § 21.207(b). You inform us that the information you have marked consists of information regarding efforts at mediation or conciliation between the parties to the dispute, and that the commission has not received the written consent of both parties to release the submitted information at issue. Based on your representations and our review, we determine that the information you have marked concerning efforts at mediation or conciliation is confidential pursuant to section 21.207(b) of the Labor Code and must be withheld under section 552.101 of the Government Code.

We next address your contention that certain references you have marked relating to a civil rights complaint filed by a third party are excepted from disclosure under section 552.101. You argue that section 21.304 of the Labor Code requires that the commission maintain the confidentiality of information regarding complaints of employment discrimination and prohibits the release of this type of information to any third party. Upon review of your arguments and the information you have marked, however, we note that the third party at issue had a companion claim to the claim at issue in this ruling, and that the requestor in the instant case was also a party to the third party's claim. In this regard, we note that in Open Records Letter Ruling No. 2007-04443 (2007), this office ruled that pursuant to sections 21.305 and 819.92(a), the requestor had a right of access to the commission's records relating to the third party's complaint information, except for mediation information. Accordingly, we conclude that, pursuant to sections 21.305 and 819.92(a), the requestor has a right of access to the third party information you have marked, and that therefore, such information may not be withheld under section 21.304 of the Labor Code.

Next, we address your arguments with respect to the rest of the submitted information. You state that a portion of the remaining information is confidential under section 552.101 in conjunction with section 301.081 of the Labor Code, which provides in part:

- (a) Each employing unit shall keep employment records containing information as prescribed by the commission and as necessary for the proper administration of this title. The records are open to inspection and may be copied by the commission or an authorized representative of the commission at any reasonable time and as often as necessary.
- (b) The commission may require from an employing unit sworn or unsworn reports regarding persons employed by the employing unit as necessary for the effective administration of this title.
- (c) Employment information thus obtained or otherwise secured may not be published and is not open to public inspection, other than to a public employee in the performance of public duties, except as the commission considers necessary for the proper administration of this title.

Labor Code § 301.081(a)-(c). This office interpreted the predecessor provision of section 301.081(c) to apply to information the commission obtained from the records and reports that employers are required to file with the commission. *See* Open Records Decision

No. 599 (1992) (construing former V.T.C.S. art. 5221b-9). You indicate that the responsive records also include wage record information that was compiled from quarterly reports submitted to the commission for the purpose of administering the state UI program. Based on your representations, we conclude that the commission must withhold the submitted wage record information you have marked under section 552.101 of the Government Code in conjunction with section 301.081 of the Labor Code.

You seek to withhold a portion of the submitted information under common law privacy.³ Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision Nos. 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 (1989) (information related to an individual's mortgage payments, assets, bills, and credit history is excepted from disclosure under the common law right to privacy). The commission must withhold the personal financial information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy, except where we have noted otherwise. We have also marked additional information that must be withheld under section 552.101 in conjunction with common-law privacy.

We further note that a portion of the remaining information is subject to section 552.136 of the Government Code. Section 552.136(b) states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." The commission must withhold the account numbers we have marked under section 552.136.

Finally, you have also marked social security numbers that you seek to withhold under section 552.147. 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 under the Act. Therefore, the commission may withhold the social security in the submitted documents from the requestor pursuant to section 552.147(b).⁴

³We note that section 552.101 also encompasses the doctrine of common-law privacy.

⁴We note that none of the social security numbers at issue are contained in documents to which the requestor has a right of access under section 819.92(a) of title 40 of the Texas Administrative Code and section 21.305 of the Labor Code.

In summary, the commission must withhold the following: the information concerning efforts at mediation or conciliation that you have marked under section 552.101 of the Government Code in conjunction with sections 21.207; the submitted wage record information you have marked under section 552.101 in conjunction with 301.081 of the Labor Code; the personal financial information you have marked under section 552.101 in conjunction with common-law privacy, except where we have noted otherwise, as well as the personal financial information we have marked; and the information we have marked under section 552.136. The commission may withhold the social security numbers in the submitted information under section 552.147. The commission must release the remaining information.

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jb

Ref: ID# 274656

Enc. Submitted documents

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