



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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OR2008-12743

Dear Ms. Kaiser and Ms. Cutrone:

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# 321798.

The Texas Workforce Commission (the "commission") received two requests for information pertaining to a specified discrimination charge. You state that you have provided the requestors with a portion of the requested information. You claim that the remaining information is excepted from disclosure under sections 552.101 and 552.111 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.

Initially, we must address the commission's procedural obligations under the Act. Pursuant to section 552.301(b), a governmental body that receives a request for information that it wishes to withhold must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). In addition, pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). In this instance, you did not raise section 552.101 in conjunction with common-law privacy or the Medical Practices Act (the "MPA") until well after the ten day deadline. Thus, with respect to your arguments under common-law privacy and the MPA, we find that the commission failed to comply with the requirements of section 552.301.

Generally, if a governmental body fails to timely raise an exception, then that exception is waived. However, mandatory exceptions, such as common-law privacy and the MPA, cannot be waived by a governmental body. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions). Thus, because the arguments you raised after the ten day deadline constitute mandatory exceptions, we will address your arguments under these provisions, along with the remaining arguments that were timely raised. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302).

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 the FOIA." The commission claims that because the EEOC would withhold the information at issue 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 information at issue pursuant to 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 protected by statutes. Pursuant to section 21.204 of the Labor Code, the commission may 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), 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 a complaint 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 confidential under section 21.304 of the Labor Code. However, we note that the requestors in this instance are an attorney

representing the respondent in the underlying charge and an attorney for the charging 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.

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. 32 Tex. Reg. 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 rule making powers, a 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* Labor 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* Labor 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 the grant of authority in section 21.305 to promulgate rules regarding reasonable access permits the commission to deny party access entirely. Being unable to resolve this 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 requestors have 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

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.*

(1990), 378 (1983), 161 (1977), 146 (1976). You contend, however, that the information at issue is excepted from disclosure under section 552.111 of the Government Code. 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 ORD 534 at 7. 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 the information at issue may not be withheld by the commission under section 552.111.

Section 552.101 also encompasses section 21.207(b) of the Labor Code, which provides in part as follows:

(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 state that the information you have marked consists of information regarding efforts at mediation or conciliation between the parties to the dispute, and you inform us that the commission has not received the written consent of both parties to release this information. Based on your representations and our review, we determine that the information you have marked in your September 8, 2008 submission to this office concerning efforts at mediation or conciliation is confidential under section 21.207(b) of the Labor Code and must be withheld under section 552.101 of the Government Code on that basis.

Next, we address your arguments under section 552.101 in conjunction with the MPA. Section 159.002 of the MPA provides in part the following:

(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). Thus, medical records are confidential except as provided by the MPA. Open Records Decision No. 598 (1991). You argue that the marked information contained in the original commission charge of discrimination form is medical information of a third party that is confidential under the MPA. However, as stated above, section 21.305 of the Labor Code grants the requestors in this instance a right of access to the charge of discrimination form. Ordinarily, where a statutory access provision conflicts with another statute, this office must resolve that conflict by determining which provision prevails. *See* Gov't Code § 311.025. However, the charge of discrimination form is not a medical record nor was the marked information, which consists only of an individual's name, taken directly from a medical record. Accordingly, because the MPA is not applicable to the information at issue, we need not address the conflict between the provisions of the MPA and section 21.305 of the Labor Code.

You also assert that individual's name is excepted from disclosure under the doctrine of common-law privacy. However, because the requestor in this instance has a statutory right of access to the information at issue, the commission may not withhold any of this information from the requestor pursuant to the doctrine of common-law privacy. *See* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act).

In summary, you must withhold the information you have marked under section 552.101 in conjunction with section 21.207(b) of the Labor Code. The remaining information must be released to the requestor.

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 file suit in

Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

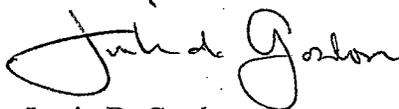
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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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Assistant Attorney General
Open Records Division

JDG/eg

Ref: ID# 321798

Enc. Submitted documents

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