ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 26, 2009

Ms. Lona Chastain
Public Information Coordinator
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2009-08853

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# 347246 (TWC Tracking No. 090407-001).

The Texas Workforce Commission (the "commission") received a request for information relating to a housing discrimination complaint filed by the requestor. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code.[1] We have considered the exception you claim and reviewed the submitted representative sample of information.[2] We have also considered comments received from 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 must address the commission's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow

[1]Although you initially raised section 552.111 of the Government Code, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume that you have withdrawn this exception. *See* Gov't Code §§ 552.301, .302.

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

in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *Id.* § 552.301(b). Additionally, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e)(1)(D). You inform us that the commission received the request at issue on April 3, 2009. However, you did not request a ruling from this office until April 22, 2009, and did not submit the information at issue until April 28, 2009. Further, the commission has provided no evidence that its request for a ruling was deposited into interagency mail within the ten business-day deadline or that the information at issue was deposited into interagency mail within the fifteen business-day deadline. *See id.* § 552.308(b) (state agency can meet the ten- and fifteen-day requirements if the request, notice, or other writing is sent by interagency mail and the agency provides evidence sufficient to establish that the request was deposited in interagency mail within that period). Consequently, we find that the commission failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake, or when information is confidential by law. Open Records Decision No. 150 (1977). You raise section 552.101 of the Government Code in conjunction with the informer's privilege as an exception to disclosure of the submitted information. However, because the purpose of the informer's privilege is to protect the flow of information to a governmental body, rather than to protect a third person, the informer's privilege, unlike other claims under section 552.101 of the Government Code, can be waived. *See* Open Records Decision No. 549 at 6 (1990). Accordingly, the informer's privilege is not a compelling reason to overcome the presumption of openness under section 552.302. *See* Open Records Decisions Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 549 at 6 (1990) (governmental body may waive informer's privilege). Consequently, the commission may not withhold the submitted information pursuant to section 552.101 in conjunction with the informer's privilege. However, because your remaining claims under section 552.101 of the Government Code can provide compelling reasons for non-disclosure, we will address your arguments under this exception.

Section 3616 of title 42 of the United States Code states that the commission is authorized by statute to utilize the services of state and local fair housing agencies to assist in meeting

its statutory mandate to enforce laws prohibiting discrimination. *See* 42 U.S.C. § 3616. You state that, pursuant to this authorization, the commission's Civil Rights Division ("CRD") is currently operating under a cooperative agreement with the U.S. Department of Housing and Urban Development ("HUD") in the investigation and resolution of complaints of housing discrimination. Section 301.036 of the Property Code details that the CRD shall receive, investigate, seek to conciliate, and act on complaints alleging violations of the Texas Fair Housing Act. *See* Prop. Code § 301.036. Then, upon the filing of a complaint, both federal and state law mirror each other in language and encourage conciliation to the extent feasible. *See* 42 U.S.C. § 3610(b) (providing that during the period beginning with the filing of a complaint and ending with the filing of a charge or a dismissal the commission shall engage in conciliation, to the extent feasible); Prop. Code § 301.085 (providing that the commission shall, during the period beginning with the filing of a complaint and ending with the filing of a charge or a dismissal by the commission, to the extent feasible, engage in conciliation with respect to the complaint).

You indicate the CRD handled a discrimination complaint filed with the commission under its cooperative agreement. You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. 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. Section 552.101 encompasses information protected by section 301.085 of the Property Code, which provides in pertinent part:

> (e) Statements made or actions taken in the conciliation may not be made public or used as evidence in a subsequent proceeding under this chapter without the written consent of the persons concerned.
>
> (f) After completion of the commission's investigation, the commission shall make available to the aggrieved person and the respondent, at any time, information derived from the investigation and the final investigative report relating to that investigation.

Prop. Code § 301.085(e), (f). Section 301.085(f) mandates release of the final investigative report upon request of a party to the complaint. In this instance, the requestor is the complainant in the discrimination claim. *See id.* § 301.003 (aggrieved person is person claimed to be injured by discriminatory housing practice). Thus, pursuant to section 301.085(f) the submitted final investigative report must generally be released to this requestor. However, section 301.085(e) prohibits release of statements made or actions taken during conciliation efforts without written consent from all concerned persons. *See id.* § 301.085(e). Thus, we find the release provision in subsection 301.085(f) is limited by subsection 301.085(e). You state you have not received the written consent of all concerned persons. Accordingly, we find the commission must withhold the information it has marked, in addition to the information we have marked, that relates to conciliation efforts under

section 552.101 of the Government Code in conjunction with section 301.085(e), but must release the remainder of the final investigative report under section 301.085(f).

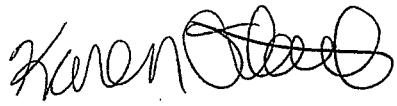
You assert that some of the remaining information is excepted under section 552.101 in conjunction with common-law privacy.[3] However, because the requestor in this instance has a statutory right of access to the information at issue, the commission may not withhold any of this information from the requestor pursuant to section 552.101 in conjunction with common-law privacy. *See* Open Records Decision Nos. 623 at 3 (1994) (exceptions in the Act generally inapplicable to information that statutes expressly make public), 613 at 4 (1993) (exceptions in Act cannot impinge in statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act).

In summary, the marked information relating to conciliation attempts is confidential under section 301.085(e) of the Property Code and must be withheld under section 552.101 of the Government Code. The remaining information must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Karen E. Stack
Assistant Attorney General
Open Records Division

KES/rl

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[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.2d668 (Tex. 1976).

Ref: ID# 347246

Enc. Submitted documents

c: Requestor
(w/o enclosures)