



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 18, 2009

Mr. Robert N. Jones, Jr.
Assistant General Counsel
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2009-13178

Dear Mr. Jones:

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# 355764 (TWC Tracking No. 090701-011).

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 sections 552.101, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments received from the requestor. *See* Gov't Code § 552.304 (providing that an interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor asserts that the commission failed to comply with its procedural obligations under the Act. The requestor claims that the requested information encompasses two cases pertaining to the same complaint. He contends that the commission did not submit a representative sample of one of the cases, and that the commission failed

¹We 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.

to submit its arguments against disclosure of the submitted information. Pursuant to section 552.301(e) of the Government Code, a governmental body must 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. The commission received the request for information on July 1, 2009, and the commission submitted arguments against disclosure along with a representative sample of the information responsive to the request on July 22, 2009. We note that the submitted representative sample includes information pertaining to both cases listed by the requestor. Upon consideration of the requestor's comments and review of the submitted documents, we conclude that the commission complied with section 552.301 of the Government Code.

~~Next, we note that this office recently issued a ruling that may have involved some of the submitted information. In Open Records Letter No. 2009-08853 (2009), this office concluded that with the exception of the information relating to conciliation efforts which the commission must withhold under 552.101 of the Government Code in conjunction with section 301.085(e) of the Property Code, the commission must release the submitted final investigative report pursuant to section 301.085(f) of the Property Code. We have no indication that the law, facts, and circumstances have changed since the issuance of the prior ruling. Thus, with regard to the submitted information that is identical to the information previously requested and ruled on by this office, we conclude the commission must continue to rely on our ruling in Open Records Letter No. 2009-08853 as a previous determination and withhold or release the information at issue in accordance with that decision. See Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information was not the subject of the previous ruling, we will address your arguments.~~

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 information derived from the investigation and 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 and information derived from the investigation 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 that relates to conciliation efforts under section 552.101 of the Government Code in conjunction with section 301.085(e), but must generally release the remainder of the submitted information under section 301.085(f).

You also assert that portions of the submitted information are excepted from disclosure under section 552.101 in conjunction with common-law privacy, section 552.111, and

section 552.137 of the Government Code.² 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, section 552.111, or section 552.137 of the Government Code. *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 on statutory right of access to information), 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act).

Section 552.101 also encompasses section 6103(a) of title 26 of the United States Code. The submitted information contains the requestor's tax return. Section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). However, section 6103(e) is an exception to the confidentiality provisions of section 6103(a) and it provides for disclosure of tax information to the taxpayer. *See* 26 U.S.C. § 6103(e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); *see also Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual's right of access under FOIA). Therefore, pursuant to section 6103(e)(7) of title 26 of the United States Code, the commission must release the requestor's tax return if such disclosure would not seriously impair federal tax administration. If such disclosure would seriously impair federal tax administration, then the commission must withhold the tax return under section 552.101 in conjunction with section 6103.

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation,

²Section 552.101 also encompasses the doctrine of common-law privacy.

contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5; see *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). Upon review, we find that you have failed to demonstrate how any portion of the remaining information falls within the zones of privacy or implicates an individual's interests for the purposes of constitutional privacy. Therefore, the commission may not withhold any of the remaining information under section 552.101 on the basis of constitutional privacy.

Section 552.101 also encompasses the federal Family and Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). You indicate that some of the submitted information should be withheld in compliance with the FMLA. However, you have not demonstrated, and we are unable to determine, which of the remaining information was created for purposes of the FMLA. See Gov't Code § 552.301(e)(1) (requiring governmental body to explain the applicability of the raised exception). Therefore, we are unable to conclude that the FMLA is applicable to any of the remaining information, and none of it may be withheld under section 552.101 on that basis.

Finally, we note that the submitted information contains medical records subject to the Medical Practices Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in part:

(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.

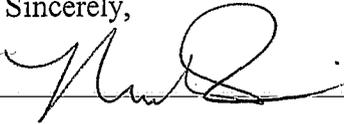
Occ. Code § 159.002(b), (c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Accordingly, the submitted medical records are generally confidential under the MPA and may only be released in accordance with its access provisions. The requestor in this instance may have a right of access to the submitted medical records. Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, 159.005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the medical records we have marked may be released only as provided under the MPA.

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2009-08853, the commission may continue to rely on that ruling as a previous determination for the identical submitted information. 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 commission must release the requestor's tax return pursuant to section 6103(e)(7) of title 26 of the United States Code if such disclosure would not seriously impair federal tax administration; however, if such disclosure would seriously impair federal tax administration, then the commission must withhold the tax forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. The commission may release the marked medical records only in accordance with the MPA. 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, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/eeg

Ref: ID# 355764

Enc. Submitted documents

cc: Requestor
(w/o enclosures)