



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2009

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

OR2009-16202

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# 361470 (TWC Tracking No. 090827-057).

The Texas Workforce Commission (the "commission") received a request for specified documents related to the requestor's discrimination complaint. You state the commission will provide some of the requested information to the requestor. You claim portions of the submitted discrimination complaint information are excepted from disclosure under sections 552.101, 552.111, 552.122, 552.130, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit written comments regarding availability of requested information).

The commission claims the requested 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:

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 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 requested 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, 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 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 requested information 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 protected by other 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), .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 the requested 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 the submitted information is confidential under section 21.304 of the Labor Code. However, we note the requestor is 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:

(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:

(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. § 819.92.¹ The commission states 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 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* 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, including investigator notes, 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 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 conflict, we cannot find 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 the complaint was resolved through a voluntary settlement or conciliation agreement. Thus, pursuant to section 21.305, the requestor has a right of access to the

¹The commission states 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 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 section 21.201 reasonable access to [c]ommission records relating to the complaint.” Labor Code § 21.305.

commission's records relating to the complaint and the requested information may not be withheld by the commission under section 552.101 in conjunction with section 21.304.

Turning to your section 552.111 claim, we note 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, the requested information is excepted under section 552.111 of the Government Code. In support of your contention, you claim, 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. 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 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's investigative files into discrimination charges filed with the EEOC. We stated, while the statutory predecessor to section 21.304 of the Labor Code made all information collected or created by the Commission on Human Rights during its investigation of a complaint confidential, "[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 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 are governed by sections 21.305 and 819.92, we determine the requested information may not be withheld by the commission under section 552.111 of the Government Code.

You seek to withhold portions of the submitted information under section 552.101 in conjunction with constitutional privacy and common-law privacy, as well as sections 552.122, 552.137, and 552.147 of the Government Code. However, these sections are general exceptions to disclosure under the Act. A specific statutory right of access prevails over the common law and general exceptions to disclosure under the Act. *See Gallagher Headquarters Ranch Dev., Ltd. v. City of San Antonio*, 269 S.W.3d 628, 637 (Tex. App.—San Antonio 2008, pet. filed) (when statute directly conflicts with common law principle or claim, statutory provision controls and preempts common law; legislature may enact legislation that preempts or supersedes common law principle); *see also* Open Records Decision Nos. 613 at 4 (1993) (exceptions in Act cannot impinge on statutory right of access to information), 451 at 4 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Because the requestor, in this instance, has a statutory right of access to the requested information, the commission may not withhold

the information you have marked under section 552.101 in conjunction with constitutional privacy or common-law privacy, section 552.122, section 552.137, or section 552.147.

You contend certain Texas driver's license numbers in the submitted information are excepted from disclosure under section 552.130 of the Government Code, which excepts from disclosure information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130(1), (2). Although we agree the submitted information contains Texas driver's license information that is generally excepted from disclosure under section 552.130, we again note, in this instance, the requestor has a statutory right of access to the requested information.

As previously noted, a specific statutory right of access prevails over general exceptions to disclosure under the Act. ORD 451 at 4. However, because section 552.130 has its own access provisions, we conclude section 552.130 is not a general exception under the Act. Accordingly, we must address the conflict between the access provided under section 21.305 of the Labor Code and the confidentiality provided under section 552.130 of the Government Code. Where information falls within both a general and a specific provision of law, the specific provision prevails over the general. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000) ("more specific statute controls over the more general"); *Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App. 1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451. In this instance, section 21.305 generally applies to any type of record contained in commission complaint records, while section 552.130 specifically protects Texas motor vehicle record information. Thus, we conclude the confidentiality provided under section 552.130 is more specific than the general right of access provided under section 21.305. Accordingly, the commission must withhold the Texas driver's license numbers you have marked, and the additional Texas driver's license information we have marked, under section 552.130 of the Government Code.

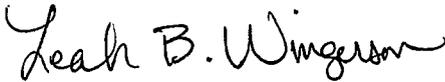
You assert some of the remaining information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Accordingly, the remaining information must be released to the requestor in accordance with copyright law.

In summary, the commission must withhold the marked Texas driver's license information under section 552.130 of the Government Code. The remaining information must be released in accordance with copyright law.²

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 361470

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²You indicate the commission has redacted portions of the remaining information regarding efforts at mediation and conciliation under section 552.101 of the Government Code in conjunction with section 21.207(b) of the Labor Code pursuant to a previous determination issued to the commission in Open Records Letter No. 2009-10954 (2009).