



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 16, 2010

Ms. Elizabeth J. Ossenfort
Assistant General Counsel
Texas Workforce Commission
101 E. 15th Street
Austin, Texas 78778-0001

OR2010-14101

Dear Ms. Ossenfort:

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# 393910 (TWC Tracking No. 100629-013).

The Texas Workforce Commission (the "commission") received a request for a specified discrimination file. You state some information has been or will be released. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we note the information at issue pertains to a complaint of unlawful employment discrimination that was investigated by the commission under section 21.204 Labor Code and on behalf of the Equal Employment Opportunity Commission. 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 that other statutes make confidential. Pursuant to

¹We assume that the "representative sample" of information 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.

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. Thus, the information at issue is generally confidential under section 21.304 of the Labor Code. However, in this instance, the requestor is the attorney of a party to the complaint. Section 21.305 of the Labor Code addresses the release of commission records to a party to a complaint filed under section 21.201 of the Labor Code and provides as follows:

(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 as follows:

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

You assert the submitted information is excepted under section 552.101 of the Government Code in conjunction with common-law privacy. However, a specific statutory right of access generally prevails over the common law. *See Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000) (statute abrogates common-law principle only when its express terms or necessary implications clearly indicate Legislature's intent to do so and requires clear repugnance between common-law and statutory causes of action); *CenterPoint Energy Houston Elec. LLC v. Harris County Toll Road*, 436 F.3d 541, 544 (5th Cir. 2006) (common-law controls only where there is no conflicting or controlling statutory law). Because the requestor in this instance has a statutory right of access to the information at

issue, the commission may not withhold this information from the requestor pursuant to section 552.101 in conjunction with common-law privacy.

You also assert the submitted information is excepted under section 552.101 of the Government Code in conjunction with the doctrine of constitutional privacy, which is also encompassed by section 552.101. Under the Supremacy Clause of the United States Constitution, the United States Constitution and duly-enacted federal statutes are "the supreme law of the Land," and states have a responsibility to enforce federal law. *See* U.S. Const., art. VI, cl. 2; *Howlett v. Rose*, 496 U.S. 356, 367-69, 110 S.Ct. 2430, 2438-39, 110 L.Ed.2d 332 (1990). As a federal law, constitutional privacy preempts any conflicting state provisions, including section 21.305 of the Labor Code. *See Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law). Thus, we will address your argument under section 552.101 in conjunction with constitutional privacy.

The constitutional right to privacy protects two types of interests. *See* Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. *Id.* The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.* The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common-law right to privacy; the material must concern the "most intimate aspects of human affairs." *See id.* at 5 (citing *Ramie*, 765 F.2d at 492). Upon review, we find that no portion of the submitted information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. We therefore conclude the commission may not withhold any of the submitted information under section 552.101 in conjunction with constitutional privacy.

Next, we note the submitted information contains F-5 ("Report of Separation of Licensee") reports. Such reports are subject to section 1701.454 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code and provides as follows:

- (a) A report or statement submitted to the [Texas Commission on Law Enforcement Officer Standards and Education] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated

incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a [Texas Commission on Law Enforcement Officer Standards and Education] member or other person may not release the contents of a report or statement submitted under this subchapter.

Occ. Code § 1701.454. The submitted F-5 reports do not indicate the officers at issue resigned or were terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Accordingly, we find the F-5 reports we have marked are generally confidential under section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Although the F-5 reports are generally confidential under section 1701.454 of the Occupations Code, section 21.305 of the Labor Code provides the requestor with a right of access to the entirety of the submitted complaint records. Therefore, there is a conflict between section 1701.454 and section 21.305. Where general and specific statutes are in irreconcilable conflict, the specific provision typically prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence that the legislature intended the general provision to prevail. *See* Gov't Code § 311.026(b); *City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.). In this instance, section 21.305 generally applies to any type of record contained in commission complaint records, while section 1701.454 specifically protects the F-5 reports at issue. Additionally, section 21.305 of the Labor Code was enacted prior to section 1701.454 of the Occupations Code.² Thus, we conclude the confidentiality provided under section 1701.454 is more specific than the general right of access provided under section 21.305 of the Labor Code. We therefore conclude, notwithstanding section 21.305, the commission must withhold the F-5 reports we marked pursuant to section 552.101 in conjunction with section 1701.454 of the Occupations Code. As you raise no further exceptions to disclosure, the commission must release the remaining information pursuant to section 21.305 of the Labor Code.³

²See Act of May 17, 1999, 76th Leg., R.S., ch. 388, § 1, amended by Act of May 30, 2005, 79th Leg., R.S., ch. 1298, § 4 (codified as Occ. Code § 1701.454); Act of May 13, 1993, 73rd Leg., R.S., ch. 269, § 1 (codified as Labor Code § 21.305).

³Because this requestor has a special right of access to the information being released, if the commission receives another request for this particular information from a different requestor, then the commission should again seek a decision from this office.

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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 393910

Enc. Submitted documents

c: Requestor
(w/o enclosures)