



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 6, 2010

Ms. Margo Kaiser
Staff Attorney
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2010-15220

Dear Ms. Kaiser:

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# 395981 (TWC Tracking No. 100609-025).

The Texas Workforce Commission (the "commission") received a request for the requestor's Civil Rights Division records. You state you will release a portion of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You state you have redacted education records under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(g). The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ See 34 C.F.R. § 99.3 (defining "personally identifiable information"). Although the commission is not an education authority, you inform us that the commission obtained the education records during the course of its investigation. See 34 C.F.R. 99.33(a)(2). Because our office is prohibited from reviewing the education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to the submitted records. Such determinations under FERPA must be made by the educational authority from which the education records were obtained. Thus, the commission must contact the educational institution from which the education records at

¹A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

issue were obtained, as well as the DOE, regarding the applicability of FERPA to the education records.

Next, 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 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 not later than the tenth business day after the date of receiving the written request. *See* Gov't Code § 552.301(b). Within fifteen days of receiving the request, the governmental body must submit to this office (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). In this instance, the commission received the request for information on June 9, 2010. Thus, the commission's fifteen-business-day deadline was June 30, 2010. However, you did not submit arguments stating why your claimed exceptions would apply and a copy of the specific information requested until August 13, 2010. Thus, we conclude that the commission failed to comply with the procedural requirements of sections 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of the Act results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Because sections 552.101, 552.137, and 552.147 of the Government Code can provide compelling reasons to withhold information, we will consider whether or not any of the submitted information is excepted from disclosure under these sections.

We note the information at issue pertains to a complaint of unlawful employment discrimination that was investigated by the commission under section 21.204 of the 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 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 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 sections 552.101 in conjunction with common-law privacy, 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 submitted information under section 552.101 in conjunction with common-law privacy, section 552.137, or section 552.147.

You also assert some of the submitted information is excepted under section 552.101 in conjunction with section 611.092 of the Health and Safety Code. Section 611.092 makes

confidential “communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional[.]” Health & Safety Code § 611.002(a), (b); *see also id.* § 611.001 (defining “patient” and “professional”). Upon review, we find none of the submitted information is a mental health record for purposes of section 611.002. Thus, the commission may not withhold any of the submitted information under section 611.002(a) of the Health and Safety Code. As no further exceptions to disclosure are raised, the commission must release the submitted information to this requestor.

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,



Andrea L. Caldwell
Assistant Attorney General
Open Records Division

ALC/eeg

Ref: ID# 395981

Enc. Submitted documents

c: Requestor
(w/o enclosures)