ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 22, 2010

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

OR2010-17607

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# 401819 (TWC Tracking Number 100913-009).

The Texas Workforce Commission (the "commission") received a request for a specified file pertaining to the requestor's client. You state the commission has released or will release some of the requested information. You claim portions of the submitted information are 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]

The commission claims the information it has marked 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:

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

> 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 ("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 that it has a contract with the EEOC to investigate claims of employment discrimination allegations. The commission asserts that under the terms of this contract, FOIA governs access to charge and complaint files. The commission claims that because the EEOC would withhold the information at issue 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, that 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 that 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); ORD 124 (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 information at issue pursuant to FOIA.

We next turn to the commission's claims under section 552.101 of the Government Code, which 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. You indicate the information at issue pertains to a complaint of unlawful employment discrimination that was investigated by the commission under section 21.204 and on behalf of the Equal Employment Opportunity Commission. Thus, this information 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:
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> > (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:
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> (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, as previously noted, 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 some of 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 information at issue 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. As you make no further arguments against disclosure, the submitted 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,

Christina Alvarado
Assistant Attorney General
Open Records Division

CA/tp

Ref: ID# 401819

Enc. Submitted documents

c: Requestor
(w/o enclosures)