



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 18, 2012

Ms. Annalisa Davila
Deputy Director
West Texas Community Supervision and Corrections Department
800 East Overland, Suite 100
El Paso, Texas 79901

OR2012-11142

Dear Ms. Davila:

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# 459257.

The West Texas Community Supervision and Corrections Department (the "department") received a request for copies of settlement agreements between the department and current or former employees of the department involving allegations of age discrimination during a specified time period, including a specified settlement agreement with a named former employee. You claim the requested information is excepted from disclosure under section 552.101 of the Government Code and privileged pursuant to rule 503 of the Texas Rules of Evidence and rules 408 and 501 of the Federal Rules of Civil Procedure.¹ We have considered your arguments and reviewed the submitted information.

Initially, we must address the department's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). In addition, pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of

¹Although you also raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under the Act or other law. *See* Gov't Code § 552.022.

receiving an open records request: (1) 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)(1)(A)-(D). In this instance, you state the department received the request for information on April 24, 2012. Accordingly, the department's ten-business-day deadline was May 8, 2012, and its fifteen-business-day deadline was May 15, 2012. However, the envelope in which you requested a ruling from this office bears a meter mark of May 9, 2012. Further, our office received the information required by subsection 552.301(e) on May 18, 2012. The envelope in which you submitted the information required by subsection 552.301(e) does not bear a postmark or meter mark, and we are otherwise unable to determine whether the department mailed this information on or before May 15, 2012. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Consequently, we find the department failed to comply with the requirements of section 552.301 of the Government Code in requesting this decision from our office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists 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); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the department seeks to withhold the submitted information under rule 503 of the Texas Rules of Evidence, this rule is discretionary in nature and does not demonstrate a compelling reason to withhold information from the public. *See* Open Records Decision No. 676 at 11 (2002) (assertion of rule 503 does not demonstrate "compelling reason" under section 552.302 to prohibit governmental body's release of information). Further, we note rules 408 and 501 of the Federal Rules of Civil Procedure do not make information confidential. *See* Open Records Decision Nos. 658 at 4 (1998), 648 at 3 (1996), 478 at 2 (1987). Thus, rules 408 and 501 do not provide compelling reasons to withhold information from the public. Because the department failed to comply with the procedural requirements of the Act, the department has waived its claims under rule 503 of the Texas Rules of Evidence, rule 408 of the Federal Rules of Civil Procedure, and rule 501 of the Federal Rules of Civil Procedure. Accordingly, the submitted information may not be withheld on the basis of rule 503 of the Texas Rules of Evidence, rule 408 of the Federal Rules of Civil Procedure, or rule 501 of the Federal Rules of Civil Procedure. However, because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will consider the applicability of this exception to the submitted information.

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. The department asserts the submitted information is confidential under section 552(b)(7)(c) of title 5 of the United States Code, the Freedom of Information Act (“FOIA”). *See* 5 U.S.C. § 552. We note, however, FOIA is applicable to information held by an agency of the federal government. In this instance, the information at issue consists of a final settlement agreement between the department and a former employee and is maintained by the department, 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) (noting that 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). Accordingly, the department may not withhold the submitted information under section 552.101 in conjunction with FOIA.

Section 552.101 also encompasses section 1610.17 of title 29 of the Code of Federal Regulations. Section 1610.17 states in part:

Section 706(b) of title VII provides that the [Equal Employment Opportunity Commission (the “EEOC”)] shall not make public charges which have been filed. It also provides that (subsequent to the filing of a charge, an investigation, and a finding that there is reasonable cause to believe that the charge is true) nothing said or done during and as a part of the [EEOC]’s endeavors to eliminate any alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion may be made public by the [EEOC] without the written consent of the parties concerned; nor may it be used as evidence in a subsequent proceeding. Any officer or employee of the EEOC who shall make public in any manner whatever any information in violation of section 706(b) shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or imprisoned not more than 1 year.

29 C.F.R. § 1610.17(b). You assert the submitted information is confidential pursuant to section 1610.17. We note, however, section 1610.17 is applicable to records maintained by the EEOC, rather than to any records held by or on behalf of the department. *See id.*; *see also* Open Records Decision Nos. 245 (1980), 155 (1977). *See generally* *Whitaker v. Carney*, 778 F. 2d 216 (1985) (title VII proscribes release of information only when held by

EEOC or EEOC employees, and not when held by employer). Therefore, none of the submitted information is excepted from disclosure under section 552.101 of the Government Code on the basis of section 1610.17.

Section 552.101 also encompasses section 154.053 of the Civil Practice and Remedies Code, which lays out the standards and duties of impartial third parties. Section 154.053 provides in relevant part:

(b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.

(c) Unless the parties agree otherwise, all matters, including the conduct and the demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.

Civ. Prac. & Rem. Code § 154.053(b)-(c). Section 154.053 applies only to the impartial third parties such as mediators, and its applicability is restricted to those matters occurring during the settlement process. *See In re Daley*, 29 S.W.3d 915 (Tex. App.—Beaumont 2000); *Hur v. City of Mesquite* 893 S.W.2d 227 (Tex. App.—Amarillo 1995, writ denied). Accordingly, as the department is not the third-party mediator in the matter at issue, we find section 154.053 does not apply to the submitted information. Thus, the department may not withhold the submitted information under section 552.101 of the Government Code in conjunction with section 154.053 of the Civil Practice and Remedies Code.

Section 552.101 also encompasses section 154.073 of the Civil Practice and Remedies Code, which provides in part:

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

...

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

Civ. Prac. & Rem. Code § 154.073(a), (b), (d). You state the “settlement was negotiated through the use of EEOC’s mediation and conciliation services.” However, you have not demonstrated the submitted information consists of a communication relating to the subject matter of the dispute made by a participant in an alternative dispute resolution procedure or a record made at such a procedure. Furthermore, the submitted information constitutes a final settlement agreement. Section 154.073 of the Civil Practice and Remedies Code does not except from required public disclosure a governmental body’s mediated final settlement agreement. *See id.* § 154.073(d). Thus, the submitted settlement agreement is not confidential under section 154.073 of the of the Civil Practice and Remedies Code, and may not be withheld under section 552.101 of the Government Code on that ground.

You also raise section 552.101 in conjunction with rule CV-88 of the Local Rules for the United States District Court for the Western District of Texas. The Federal Rules of Civil Procedure were adopted pursuant to the Rules Enabling Act, section 2072 of title 28 of the United States Code, which authorizes the United States Supreme Court to promulgate rules of practice and procedure for the federal courts. *See* 28 U.S.C. § 2072(a) (Supreme Court has power to prescribe general rules of practice and procedure for cases in district courts). Pursuant to rule 83 of the Federal Rules of Civil Procedure, a district court “may adopt and amend [local] rules governing its practice.” FED. R. CIV. P. 83(a)(1). A district court rule adopted pursuant to rule 83 has “the force of law.” *Weil v. Neary*, 278 U.S. 160, 169 (1929); *see also U.S. v. Hvass*, 355 U.S. 570, 575 (1958) (local rules are regarded as “law[s] of the United States” for purposes of perjury statute). Rule CV-88 provides in pertinent part:

(c) Referral to ADR. The court may refer a case to ADR on the motion of a party, on the agreement of the parties, or on its own motion; however, the court may refer a case to arbitration only with the consent of the parties (including but not limited to their consent by contract to arbitration). If the parties agree upon an ADR method or provider, the court will respect the parties’ agreement unless the court determines that another ADR method or provider is better suited to the case and parties. If the parties are unable to agree on an ADR provider, the court will select a provider.

...

(i) Confidentiality. Except as otherwise provided herein, or as agreed by the participants, a communication relating to the subject matter of any civil or

criminal dispute made by any participant during an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, may not be disclosed, may not be used as evidence against the participant in any judicial or administrative proceeding, and does not constitute a waiver of any existing privileges or immunities.

(1) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute[.]

(2) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

W. D. Tex. Loc. R. CV-88(c), (i)(1)-(2). You generally assert the submitted information is confidential pursuant to rule CV-88. Upon review, we find you have not demonstrated the submitted final settlement agreement was the result of an alternative dispute resolution procedure under rule CV-88. Further, you have not demonstrated the submitted final settlement agreement consists of a communication made by a participant during an alternative dispute resolution procedure or a record made at such a procedure. Accordingly, you have failed to demonstrate rule CV-88 is applicable to the submitted information, and it may not be withheld under section 552.101 on that basis.

Section 552.101 also encompasses the constitutional right to privacy. Constitutional privacy protects two kinds of interests. See *Whalen v. Roe*, 429 U.S.589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4, 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, that have been recognized by the United States Supreme Court. See *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); ORD 455 at 3-7. The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. See *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir.1985); ORD 455 at 6-7. This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. See ORD 455 at 7. Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie*, 765 F.2d at 492). As for the right to privacy under the Texas Constitution, which the department also argues for the information at issue, we have interpreted the right of privacy under the Texas Constitution is consistent with that under the federal Constitution. See *City of Sherman v. Henry*, 928 S.W.2d 464, 473 (Tex. 1996) (“While the Texas Constitution has been recognized to possess independent vitality, separate and apart from the guarantees provided by the United States Constitution, there is no reason to expand Texas constitutional protections...” (citations omitted)).

The submitted information pertains to the circumstances surrounding the former employee's resignation. Upon review, we find you have not demonstrated how any portion of the submitted information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Accordingly, none of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with constitutional privacy. As you have not claimed any other exceptions to 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 459257

Enc. Submitted documents

c: Requestor
(w/o enclosures)