



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 2, 2012

Ms. Cheryl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2012-12095

Dear Ms. Byles:

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# 460858 (PIR No. W017132).

The City of Fort Worth (the "city") received a request for a file maintained by the city's Human Relations Unit (the "unit") involving the requestor. You claim some of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the information you submitted. We also have considered the comments we received from the requestor.¹

You state the submitted information was compiled by the unit in the course of its investigation of an employment discrimination claim filed under section 21.201 of the Labor Code. *See* Labor Code § 21.201 (person claiming to be aggrieved by unlawful employment practice or person's agent may file complaint with Texas Workforce Commission ("TWC")). You explain the unit was created under chapter 21 of the Labor Code. *See id.* § 21.152 (providing for creation of local commissions). We understand the federal Equal Employment Opportunity Commission and the TWC have deferred jurisdiction to the unit to hear complaints pursuant to chapter 21. *See id.* § 21.154 (authorizing deferral of jurisdiction to local commissions); *see also* 40 T.A.C. § 819.76 (authorizing workshare agreements between

¹*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

the TWC and local commissions). Thus, under section 21.152 of the Labor Code, the unit is a local agency authorized to investigate and resolve complaints of employment discrimination. See Labor Code §§ 21.154 (authorizing local commission to which complaint is referred or jurisdiction is deferred to receive, investigate, conciliate, or rule on complaint), .204 (relating to investigation of complaints by the TWC).

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 other statutes make confidential. Section 21.304 of the Labor Code, which pertains to public release of information obtained by the TWC, provides as follows:

An officer or employee of the [TWC] may not disclose to the public information obtained by the [TWC] under Section 21.204 except in compliance with section 21.305 and as necessary to the conduct of a proceeding under this chapter.

Labor Code § 21.304. We note the submitted information pertains to a complaint of unlawful employment discrimination filed with the unit. Thus, the submitted information is generally confidential under section 21.304 of the Labor Code. As you acknowledge, however, the requestor was a party to the complaint. Section 21.305 of the Labor Code pertains to the release of records to a party to a complaint filed under section 21.201 of the Labor Code and provides as follows:

(a) Except as provided by Subsection (c), the [TWC] shall adopt rules allowing a party to a complaint filed under Section 21.201 reasonable access to [TWC] records relating to the complaint.

(b) Except as provided by Subsection (c), 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 [TWC] records:

(1) after the final action of the [TWC]; or

(2) if a civil action relating to the complaint is filed in federal court alleging a violation of federal law.

(c) Notwithstanding Section 552.023, Government Code, the following information is not considered public information for the purposes of [the Act] and may not be disclosed to a party to a complaint filed under Section 21.201:

(1) identifying information of persons other than the parties and witnesses to the complaint;

(2) identifying information about confidential witnesses, including any confidential statement given by the witness;

(3) sensitive medical information about the charging party or a witness to the complaint that is:

(A) provided by a person other than the person requesting the information; and

(B) not relevant to issues raised in the complaint, including information that identifies injuries, impairments, pregnancies, disabilities, or other medical conditions that are not obviously apparent or visible;

(4) identifying information about a person other than the charging party that is found in sensitive medical information regardless of whether the information is relevant to the complaint;

(5) nonsensitive medical information that is relevant to the complaint if the disclosure would result in an invasion of personal privacy, unless the information is generally known or has been previously reported to the public;

(6) identifying information about other respondents or employers not a party to the complaint;

(7) information relating to settlement offers or conciliation agreements received from one party that was not conveyed to the other and information contained in a separate alternative dispute resolution file prepared for mediation purposes; and

(8) identifying information about a person on whose behalf a complaint was filed if the person has requested that the person's identity as a complaining party remain confidential.

(d) In this section, "identifying information" has the meaning assigned by Section 32.51, Penal Code.

Id. § 21.305. You state the unit has taken final action on the complaint to which the submitted information pertains. We note the complaint was not resolved through a voluntary

settlement or conciliation agreement. Therefore, the requestor, as a party to the complaint, generally has a right of access to the unit's records related to the complaint pursuant to section 21.305 of the Labor Code. Section 21.305(c) provides, however, that eight categories of information are not considered public information for purposes of the Act and may not be disclosed to a party to a complaint filed under section 21.201 of the Labor Code. Therefore, the unit must withhold any information encompassed by section 21.305(c) under section 552.101 of the Government Code in conjunction with section 21.305(a).

Section 552.101 of the Government Code also encompasses section 21.207(b) of the Labor Code, which provides as follows:

(b) Without the written consent of the complainant and respondent, the [TWC], its executive director, or its other officers or employees may not disclose to the public information about the efforts in a particular case to resolve an alleged discriminatory practice by conference, conciliation, or persuasion, regardless of whether there is a determination of reasonable cause.

Id. § 21.207(b). As previously noted, the unit is a local agency authorized to investigate and resolve complaints of employment discrimination under chapter 21 of the Labor Code. We have marked information related to the unit's efforts to resolve a complaint by conference, conciliation, or persuasion. You do not indicate the unit has received the required written consent of both the complainant and the respondent to release the information in question. We therefore conclude the unit must withhold the marked information under section 552.101 of the Government Code in conjunction with section 21.207(b) of the Labor Code.

We note the remaining information includes the requestor's medical records, which are confidential under section 552.101 of the Government Code in conjunction with the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See*

Open Records Decision No. 598 (1991). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked medical records and information obtained from a medical record that are generally confidential under section 159.002 of the MPA but may be released if the city receives the required written consent under sections 159.004 and 159.005 of the MPA.

As previously noted, the requestor generally has a statutory right of access to the information related to her complaint under section 21.305(b) of the Labor Code. Therefore, we must address the conflict between the access afforded to the requestor under section 21.305(b) and the confidentiality provided to medical records under the MPA. Where information falls within both a general and a specific provision of law, the specific provision typically prevails over the general provision. *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(b) is generally applicable to information contained in the unit's complaint file, while the MPA specifically protects medical records. Thus, we find the confidentiality provided by the MPA is more specific than the general right of access afforded by section 21.305(b). Therefore, the marked medical records may only be released in accordance with the MPA.

You claim section 552.101 of the Government Code in conjunction with the federal Family and Medical Leave Act (the "FMLA"). *See* 29 U.S.C. § 2801 *et seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 provides that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). We conclude the information we have marked is confidential under the FMLA. We find none of the release provisions of the FMLA apply to the marked information. Thus, because the marked information is confidential under the FMLA, there is a conflict between the FMLA and the requestor's right of access under section 21.305(b) of the Labor Code. As a federal law, however, the FMLA preempts any conflicting provision of state law. *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). Therefore, notwithstanding the applicability of section 21.305(b), the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA.

Although you also claim section 552.101 of the Government Code in conjunction with common-law privacy, we note a specific statutory right of access prevails over the common law.² *See Collins v. Tex Mall, L.P.*, 297 S.W.3d 409, 415 (Tex. App.—Fort Worth 2009, no pet.) (statutory provision controls and preempts common-law when statute directly conflicts with common-law principle); *CenterPoint Energy Houston Elec. LLC v. Harris County Toll Rd.*, 436 F.3d 541, 544 (5th Cir. 2006) (common law controls where there is no conflicting or controlling statutory law); *see also* Open Records Decision No. 613 at 4 (1993) (Act's exceptions cannot impinge on statutory right of access to information). Thus, because the requestor has a statutory right of access under section 21.305(b) of the Labor Code, the city may not withhold any of the remaining information on privacy grounds under section 552.101 of the Government Code.

In summary, the city must withhold (1) the information we have marked under section 552.101 of the Government Code in conjunction with section 21.207(b) of the Labor Code; (2) the medical records and information obtained from a medical record we have marked under section 159.002 of the MPA, unless the city receives the required consent for release under sections 159.004 and 159.005 of the MPA; and (3) the information we have marked under section 552.101 of the Government Code in conjunction with the FMLA. Except as provided by section 21.305(c) of the Labor Code, the city must release the rest of the submitted information.³

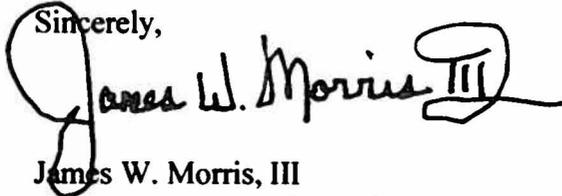
²Common-law privacy under section 552.101 protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

³Because the requestor has a special right of access to information the city would be required to withhold from the general public, the city must request another ruling if it receives a request for this same information from a different requestor. *See Gov't Code* §§ 552.301(a), .302.

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,

A handwritten signature in black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and a stylized "III" at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bhf

Ref: ID# 460858

Enc: Submitted information

c: Requestor
(w/o enclosures)