



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 5, 2012

Mr. Robert N. Jones, Jr.
Assistant General Counsel
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2012-14024

Dear Mr. Jones:

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# 464471 (TWC Tracking No. 120618-038).

The Texas Workforce Commission (the "commission") received a request for a specified final investigative report. 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 you state the commission has withheld any mediation and conciliation information under section 21.207(b) of the Labor Code pursuant to the previous determination issued to the commission in Open Records Letter No. 2009-10954 (2009). In Open Records Letter No. 2009-10954, this office determined the commission may withhold, without seeking an opinion from this office, information about the efforts to resolve an alleged discriminatory practice by conference, conciliation, or persuasions, that must be withheld under section 552.101 of the Government Code in conjunction with section 21.207(b) of the Labor Code, unless the commission receives the written consent of both parties to release this information. However, we note the protection of section 21.207(b) of the Labor Code applies to employment discrimination, and the previous

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

determination in Open Records Letter No. 2009-10954 applies to efforts at conciliation in an employment discrimination case. The current request involves an allegation of housing discrimination. Thus, we find the circumstances in this instance differ from those in Open Records Letter No. 2009-10954, and the commission may not rely on that ruling as a previous determination in this instance. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, we will address your arguments against the disclosure of the information at issue.

Section 3616 of title 42 of the United States Code authorizes the commission to utilize the services of state and local fair housing agencies to assist in meeting its statutory mandate to enforce laws prohibiting discrimination. *See* 42 U.S.C. § 3616. You state that, pursuant to this authorization, the commission's Civil Rights Division ("CRD") is currently operating under a cooperative agreement with the U.S. Department of Housing and Urban Development ("HUD") in the investigation and resolution of complaints of housing discrimination. Section 301.036 of the Property Code details that the CRD shall receive, investigate, seek to conciliate, and act on complaints alleging violations of the Texas Fair Housing Act. *See* Prop. Code § 301.036. Then, upon the filing of a complaint, both federal and state law mirror each other in language and encourage conciliation to the extent feasible. *See* 42 U.S.C. § 3610(b) (providing that during the period beginning with the filing of a complaint and ending with the filing of a charge or a dismissal the commission shall engage in conciliation, to the extent feasible); Prop. Code § 301.085 (providing that the commission shall, during the period beginning with the filing of a complaint and ending with the filing of a charge or a dismissal by the commission, to the extent feasible, engage in conciliation with respect to the complaint).

You state the submitted information relates to a discrimination complaint filed with the commission under its cooperative agreement. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with state law. 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. Section 552.101 encompasses section 301.085 of the Property Code, which provides in pertinent part:

(e) Statements made or actions taken in the conciliation may not be made public or used as evidence in a subsequent proceeding under this chapter without the written consent of the persons concerned.

(f) After completion of the commission's investigation, the commission shall make available to the aggrieved person and the respondent, at any time, information derived from the investigation and the final investigative report relating to that investigation.

Prop. Code § 301.085(e), (f). You state the submitted information is excepted from disclosure because the CRD's efforts at conciliation are confidential pursuant to section 301.085(e). We note, however, section 301.085(e) does not protect "conciliation efforts;" it protects "statements made or actions taken in the conciliation[.]" *Id.* § 301.085(e). Upon review, we find the submitted information consists of neither statements made nor actions taken in a conciliation. Accordingly, we find the commission may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 301.085(e). Further, we note 301.085(f) mandates release of the final investigative report upon request of a party to the complaint. In this instance, the requestor is the respondent in the discrimination claim. *See id.* § 301.003(10) (respondent is person accused of violation in complaint). Accordingly, pursuant to section 301.085(f) the submitted final investigative report must generally be released to this requestor.

You also assert portions of the submitted information are excepted from disclosure under section 552.101 in conjunction with common-law privacy.² However, because the requestor in this instance has a statutory right of access to the information at issue, the commission may not withhold any of this information from the requestor pursuant to section 552.101 in conjunction with common-law privacy. *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 only 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 only where there is no conflicting or controlling statutory law).

You also claim the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law. Section 552.101 also encompasses section 3610 of title 42 of the United States Code, which provides:

(d) Prohibitions and requirements with respect to disclosure of information

(1) Nothing said or done in the course of conciliation under this subchapter may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned.

42 U.S.C. § 3610(d)(1). The submitted information consists of a final investigative report. You state the report is excepted from disclosure because the CRD's efforts at conciliation are confidential under section 552.101 of the Government Code in conjunction with section 3610(d)(1) of title 42 of the United States Code. We note, however, that section 3610(d)(1) does not protect "conciliation efforts;" it protects things "said or done in the course of conciliation[.]" *Id.* Upon review, we find none of the submitted information

²Common-law privacy protects information if: (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976).

consists of things said or done in the course of a conciliation. Accordingly, we find the commission may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 3610(d)(1) of title 42 of the United States Code.

Section 552.101 of the Government Code also encompasses the constitutional right to privacy, which protects two kinds of interests. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *see also* Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first is the interest in independence in making certain important decisions related to the “zones of privacy,” which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *See Fajjo v. Coon*, 633 F.2d 1172 (5th Cir. 1981); *see also* 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); *see also* 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). Upon review, we find no portion of the submitted information falls within the zones of privacy or implicates an individual’s privacy interests for purposes of constitutional privacy. Consequently, the commission may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with constitutional privacy.

Section 552.101 of the Government Code also encompasses information protected by the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which provides in relevant part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (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(a)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has determined that the protection

afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). The medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Medical records may be released only as provided under the MPA. ORD 598. Upon review, we find the information we have marked constitutes medical records subject to MPA. Accordingly, the marked medical records may only be released in accordance with the MPA. However, we find none of the remaining information constitutes medical records subject to the MPA, and therefore, none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

However, as noted above, the requestor in this instance is the respondent to the complaint and thus, has a statutory right of access under section 301.085(f) of the Property Code to the information at issue. Thus, the instant situation presents a conflict between the protection of the MPA and the release provision of section 301.085(f) of the Property Code. Where information falls within both a general and a specific statutory provision, the specific statutory provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail. See Gov't Code § 311.026; *Cuellar v. State*, 521 S.W.2d 277 (Tex. Crim. App. 1975) (under well-established rule of statutory construction, specific statutory provisions prevail over general ones); Open Records Decision Nos. 598 (1991), 583 (1990), 451 (1986).

The MPA specifically makes medical records confidential, while section 301.085(f) gives a general right of access to the final investigative report upon request of a party to the complaint. See Occ. Code § 159.002(a), (b); Prop. Code § 301.085(f). Therefore, we find that the confidentiality provisions of the MPA are more specific than the access provision of section 301.085. Although the provisions of the MPA at issue here were enacted prior to the enactment of section 301.085, because the MPA is the more specific statute, we find the MPA prevails over section 301.085 and the commission may only release the marked medical record information in accordance with the MPA. In summary, the marked medical records may only be released in accordance with the MPA. The remaining information must be released.³

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.

³We note this requestor has a special right of access to the information being released. Therefore, if the commission receives another request for this information from a different requestor, the commission must again seek a ruling from this office.

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 cursive script that reads "Kathryn R. Mattingly". The signature is written in black ink and is positioned above the typed name and title.

Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 464471

Enc. Submitted documents

c: Requestor
(w/o enclosures)