

TEXAS ETHICS COMMISSION

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December 15, 2016

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RQ-0145-KP

The Honorable Ken Paxton
Attorney General of Texas
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

By e-mail: opinion.committee@oag.texas.gov

Dear General Paxton:

The Texas Ethics Commission (commission) requests a written opinion on the application of section 552.140 of the Government Code, which makes confidential any sworn complaint matters before the commission.

Background

The commission administers and enforces certain laws identified in its enabling legislation. Gov't Code § 571.061. The commission may hold hearings, on its own motion adopted by an affirmative vote of at least six commission members or on a sworn complaint, and render decisions on complaints or reports of violations as provided by chapter 571 of the Government Code. *Id.* § 571.121. Certain individuals may file with the commission a sworn complaint alleging that a person subject to a law administered and enforced by the commission has violated a rule adopted by or a law administered and enforced by the commission. *Id.* § 571.122(a). On a motion adopted by an affirmative vote of at least six commission members, the commission, without a sworn complaint, may initiate a preliminary review of the matter that is the subject of the motion. *Id.* § 571.124(b).

After the commission accepts jurisdiction over a complaint under section 571.124 of the Government Code, the complaint may proceed through various steps of review, including the holding of a preliminary review hearing. *Id.* § 571.125. During a preliminary review hearing, the commission may consider all submitted evidence related to the complaint, may review any documents or material related to the complaint, and shall determine whether there is credible evidence that provides cause for the commission to conclude that a violation within the jurisdiction of the commission has occurred. *Id.* § 571.125(d). If the commission determines that there is credible evidence for the commission to determine

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that a violation has occurred, the commission shall resolve and settle the complaint or motion to the extent possible. *Id.* § 571.126(b). If the commission is unsuccessful in resolving and settling the complaint or motion, the commission shall order a formal hearing to be held in accordance with sections 571.129 through 571.132 of the Government Code. *Id.* If the commission determines that there is insufficient credible evidence for the commission to determine that a violation within the jurisdiction of the commission has occurred, the commission may dismiss the complaint or motion or promptly conduct a formal hearing under sections 571.129 through 571.132. *Id.* § 571.126(d). Subchapters C-H of Chapter 2001 of the Government Code apply to a formal hearing, the resolution of a formal hearing, and the appeal of a final order of the commission, and only to the extent consistent with chapter 571 of the Government Code. *Id.* § 571.139(c).

In connection with a formal hearing, the commission, as authorized by chapter 571 of the Government Code, may subpoena and examine witnesses and documents that directly relate to a sworn complaint. *Id.* § 571.137(a). If a person to whom a subpoena is directed refuses to appear, refuses to answer inquiries, or fails or refuses to produce books, records, or other documents that were under the person's control when the demand was made, the commission shall report that fact to a district court in Travis County. The district court shall enforce the subpoena by attachment proceedings for contempt in the same manner as the court enforces a subpoena issued by the court. *Id.* § 571.137(c).

The sworn complaint process is governed by a strict confidentiality statute, which states in full:

(a) Except as provided by Subsection (b) or (b-1) or by Section 571.171, proceedings at a preliminary review hearing performed by the commission, a sworn complaint, and documents and any additional evidence relating to the processing, preliminary review, preliminary review hearing, or resolution of a sworn complaint or motion are confidential and may not be disclosed unless entered into the record of a formal hearing or a judicial proceeding, except that a document or statement that was previously public information remains public information.

(b) An order issued by the commission after the completion of a preliminary review or hearing determining that a violation other than a technical or de minimis violation has occurred is not confidential.

(b-1) A commission employee may, for the purpose of investigating a sworn complaint or motion, disclose to the complainant, the respondent, or a witness information that is otherwise confidential and relates to the sworn complaint if:

(1) the employee makes a good faith determination that the disclosure is necessary to conduct the investigation;

(2) the employee's determination under Subdivision (1) is objectively reasonable;

(3) the executive director authorizes the disclosure; and

(4) the employee discloses only the information necessary to conduct the investigation.

(c) A person commits an offense if the person discloses information made confidential by this section. An offense under this subsection is a Class C misdemeanor.

(d) In addition to other penalties, a person who discloses information made confidential by this section is civilly liable to the respondent in an amount equal to the greater of \$10,000 or the amount of actual damages incurred by the respondent, including court costs and attorney fees.

(e) The commission shall terminate the employment of a commission employee who violates Subsection (a).

(f) A commission employee who discloses confidential information in compliance with Subsection (b-1) is not subject to Subsections (c), (d), and (e).

Gov't Code § 571.140. Under that section, commission members and staff are permitted to disclose information related to a sworn complaint only as permitted by law. Disclosure of confidential information is a criminal offense and subject to additional penalties. *Id.* § 571.140(c)-(e). Commission members and staff have always held sworn complaint information strictly confidential and have understood the law to prohibit the commission from confirming or denying the existence of any particular complaint. Ethics Advisory Opinion No. 8, n.5 (1992).

Facts Presented

During the course of investigating sworn complaints filed with the commission against a respondent, the commission held a preliminary review and preliminary review hearing to consider the sworn complaints and then ordered a formal hearing on the sworn complaints. The commission voted to issue subpoenas requiring the respondent to produce records for the formal hearing and, after the respondent failed to comply, referred the noncompliance to district court. Subsequently, the respondent sued the commission members in their official capacity and individually for allegedly violating the respondent's constitutional rights during the confidential sworn complaint process. The commission then dismissed the sworn complaints. Commission members are now being asked by third parties for information about the respondent's allegations in their petition, but the proceedings appear to be confidential by statute.

Questions Presented

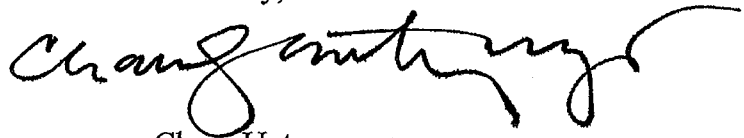
Based on the foregoing, the commission asks whether section 571.140 of the Government Code prohibits a commission member from disclosing information related to sworn complaints that are filed with the commission, and which have been resolved by the commission, when the respondent to the sworn complaints has sued the member, in the member's official and individual capacity, for his or her conduct as a commission member during the sworn complaint process. May the commission member, for example, disclose information to an attorney (including outside counsel) representing the member in the lawsuit, to an insurer from which the member has obtained a policy covering litigation costs or damages awarded in

litigation, the member's business partners, members of the press, or other parties to whom the member believes disclosure is necessary to properly defend against the lawsuit and minimize damages or personal liability?

It is unclear whether the confidentiality provided by section 571.140 of the Government Code regarding a particular sworn complaint persists in such circumstances when the sworn complaint before the commission has been resolved¹ and the member's ability to defend against the lawsuit may be severely restricted by the statute's criminal penalty provision. The commission has previously held that the confidentiality applies to commission members and staff, but there are constitutional limitations on its application to a complainant or respondent.² However, some disclosure prohibitions regarding state enforcement agencies have been upheld.³ If a commission member is permitted to disclose sworn complaint information in the circumstances described, to what extent may such disclosure be made?

If you have any questions about this opinion request, please contact our General Counsel, Ian M. Steusloff, at 512-463-5800.

Sincerely,



Chase Untermeyer
Chair
Texas Ethics Commission

¹ Courts have held in some instances that government interests in maintaining confidentiality of enforcement or investigation proceedings may be considerably lessened after the proceedings have concluded. *See, e.g., Butterworth v. Smith*, 494 U.S. 624, 635-36 (1990) (holding unconstitutional a ban on a witness's testimony before a state grand jury after the grand jury's term has ended); *Lind v. Grimmer*, 30 F.3d 1115, 1122-23 (9th Cir. 1994) (confidentiality restrictions on complainants and third parties regarding enforcement proceedings by campaign finance agency are unconstitutional once the agency has made its determinations); *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conf. of the United States*, 83 F. Supp. 2d 135, 177-78 (D.D.C. 1999), *vacated on other grounds, McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conf. of the United States*, 264 F.3d 52 (D.C. Cir. 2001) (confidentiality statute unjustifiably prohibited a judge from discussing and publicly challenging censure proceedings after proceedings had concluded).

² Ethics Advisory Opinion Nos. 8 (1992) (citing multiple cases), 505 (2012) (the statute does not prohibit a complainant or respondent from publicly disclosing or discussing a commission order in certain circumstances).

³ *See, e.g., First Amendment Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467 (3d Cir. 1986) (holding that witnesses cannot be prohibited from disclosing their own testimony before a judiciary oversight agency but stating in dicta that confidentiality restrictions applicable to a board member are reasonable); *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2d Cir. 1994) (holding that a state may prohibit complainant's disclosure of filing a complaint with a judiciary oversight agency).