



# TEXAS ETHICS COMMISSION



## ETHICS ADVISORY OPINION NO. 8

*April 23, 1992*

*Interpretation of confidentiality provision set out in section 1.21 of article 6252-9d.1, V.T.C.S.  
(AOR-10)*

The Texas Ethics Commission has been asked to consider a number of questions about the confidentiality provision set out in section 1.21 of article 6252-9d.1. That confidentiality provision applies to certain information and proceedings in regard to sworn complaints filed with the commission.

Any individual may file a sworn complaint with the commission alleging that a person has violated a statutory provision or rule administered by the commission.<sup>1</sup> V.T.C.S. art. 6252-9d.1, § 1.15. Within 14 business days of the receipt of a complaint, the commission must "send written notice to the complainant and the respondent." *Id.* § 1.16(b). The notice shall state whether the complaint complies with the form requirements of article 6252-9d.1. *Id.* If the sworn complaint meets the statutory form requirements, the commission must determine by record vote whether the commission has jurisdiction over the alleged violation. *Id.* § 1.17(c). Within five days of that vote, the commission shall send written notice to the complainant and the respondent as to whether the commission has jurisdiction. *Id.* § 1.17(d). If the commission determines that it has jurisdiction, the notice shall include a copy of the complaint as well as other specified information. *Id.* Other provisions of the statute set out procedures for preliminary review of a sworn complaint, an informal hearing, and a formal hearing. *Id.* §§ 1.18, 1.19, 1.20, 1.22, 1.23. The confidentiality provision, section 1.21, provides in part:

(a) Except as provided by Subsection (c) of this section, proceedings at a preliminary review or informal hearing performed by the commission, a sworn complaint, and documents relating to and any additional evidence relating to the processing, preliminary review, informal 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.

The commission may impose a civil penalty of not more than \$10,000 or the amount of damages incurred by the respondent, whichever is greater, for a violation of section 1.21. V.T.C.S. art. 6252-9d.1, § 1.21(e).<sup>2</sup>

The requestor's first question about the confidentiality provision is whether a person intending to file a sworn complaint with the Ethics Commission may discuss the matter with the press or public. The confidentiality provision makes the following confidential: (1) preliminary review or informal hearing proceedings, (2) a sworn complaint, (3) documents relating to the processing, preliminary review, informal hearing, or resolution of a sworn complaint, and (4) evidence relating to the processing, preliminary review, informal hearing, or resolution of a sworn complaint. The question, then, is whether discussion of a proposed sworn complaint fits in one of those four categories. A discussion of a proposed sworn complaint does not fit in any one of the first three categories since it is not a proceeding, it is not a sworn complaint, and it is not a document. The fourth category of confidential information is evidence relating to the "processing, preliminary review, informal hearing, or resolution of a sworn complaint." Those activities can occur only after the filing of a sworn complaint. It follows that a discussion of the proposed complaint would not constitute evidence relating to those activities. Therefore, section 1.21 does not prohibit a person from discussing with the press or public the substance of a complaint the person intends to file with the Ethics Commission or the fact that the person intends to file the complaint.

The second question is whether a person who has filed a complaint may reveal to the press the fact that he filed a complaint and the factual basis of the complaint. Section 1.21 is susceptible of different interpretations in this regard. Section 1.21 provides that a sworn complaint "may not be disclosed." This could simply mean that the Ethics Commission may not disclose the document that is filed with the Ethics Commission, or it could mean that the Ethics Commission may not disclose the document or the fact that such a document exists. A broad interpretation of the same language, on the other hand, would be that the fact that a sworn complaint has been filed and the factual basis of the complaint cannot be disclosed by anyone, including the complainant. Although the statutory language may permit such a broad interpretation, the federal courts have made clear that the confidentiality provision, if so interpreted, would violate the First Amendment to the United States Constitution.

In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), the United States Supreme Court considered the constitutionality of confidentiality provisions applicable to proceedings before a Virginia commission that handled complaints about judges. The Virginia constitution said that proceedings before the commission were confidential, and a Virginia statute made it a crime for any person to divulge the identity of the subject of the proceedings or any evidence from the proceedings. *Id.* at 830-31 n.1. The Virginia Supreme Court had held that those provisions permitted the criminal prosecution of a newspaper for printing information about a proceeding before the Virginia commission. *Id.* at 831-32. The United States Supreme Court held that the First Amendment did not permit such prosecution. The specific holding was that the First Amendment did not permit criminal punishment of persons who were "strangers to the inquiry" for divulging truthful information about the proceedings. *Id.* at 837-38.

Although the decision in *Landmark Communications* is relevant to the question at hand, it may not be directly applicable since a complainant may not be a "stranger" to a proceeding before the Ethics Commission. *But see* V.T.C.S. art. 6252-9d.1, § 1.25(c) (complainant is not a party to a preliminary review, informal hearing, or formal hearing before the commission). Other federal cases, however, have established that a statute prohibiting a person from disclosing the fact that he filed a complaint with a body such as the Ethics Commission would be unconstitutional. *See Baugh v. Judicial Inquiry & Review Comm'n*, 907 F.2d 440 (4th Cir. 1990) (considering constitutionality of Virginia disclosure provisions applicable to participants in commission proceedings and remanding for further consideration).

*Doe v. Gonzalez*, 723 F. Supp. 690 (S.D. Fla. 1988), *aff'd* 886 F.2d 1323 (11th Cir. Fla. 1989), involved a Florida statute that prohibited a person from disclosing his intention to file a complaint before Florida's State Ethics Commission, the existence or contents of a complaint, or any documents connected to a complaint. The court noted that *Landmark Communications* had not considered the constitutionality of a provision prohibiting a complainant from discussing an ethics complaint. The court concluded, however, that the analysis in *Landmark Communications* extended to the case before it and that the Florida statute violated the First Amendment. *See also Doe v. Florida Judicial Qualifications Comm'n*, 748 F. Supp. 1520 (S.D. Fla. 1990) (striking down Florida statute that prohibited disclosure of fact that complaint had been filed with Judicial Qualifications Commission). In *Providence Journal Co. v. Newton*, 723 F. Supp. 846 (D.R.I. 1989), the court considered the constitutionality of a Rhode Island ethics law that prohibited all public discussion of the existence and content of ethics complaints against public officials.<sup>3</sup> Again, the court found that the First Amendment did not permit such a restriction. In a 1991 case, *Roe v. Akamine*, No. 91-00252 DAE (U.S. Dist. Ct. of Haw., Sept. 26, 1991), a federal district court considered the constitutionality of a confidentiality provision in the Hawaii state ethics law. The Hawaii provision prohibited an individual who made a complaint to the state ethics commission from divulging information about the complaint. The court entered an order approving a stipulated agreement that the provision was unconstitutional and unenforceable. *Id.*

These cases establish that the First Amendment prohibits the state from preventing a person who files an ethics complaint from stating to a member of the press that he has filed a complaint.<sup>4</sup> Thus, because a statute is to be construed in a manner that renders it constitutional, we construe the prohibition on disclosure of a sworn complaint to apply to the Ethics Commission and its staff, not to the person who filed the sworn complaint.<sup>5</sup> *See State v. Shoppers World, Inc.*, 380 S.W.2d 107, 111 (Tex. 1964); *Earle v. Program Centers of Grace Union Presbytery, Inc.*, 670 S.W.2d 777, 779-80 (Tex. App.--Fort Worth 1984, no writ); *see also White v. City of*

*Norwalk*, 900 F.2d 1421 (9th Cir. 1990) (city's narrow construction of ordinance adopted by federal court and constitutionality of ordinance therefore upheld).

The third question is whether a person who is the subject of the complaint may discuss the complaint. We have already determined that the confidentiality provision applies to the commission and its staff, not to the complainant. The statute is not susceptible of a construction that would extend the provision to the respondent and not the complainant. Also, although none of the cases discussed above considered the right of a respondent to discuss the contents of a complaint, we do not think the First Amendment would permit the construction of a statute that would allow the expression of one viewpoint--in this case, that the respondent has violated the law--but not permit the respondent, who is likely to have a different viewpoint, from speaking. *See City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (First Amendment forbids government to regulate speech in ways that favor some viewpoints or ideas at the expense of others).

In the context of this question, the commission would like to clarify a related issue. The question has arisen as to the point at which the commission may provide a copy of the sworn complaint to the respondent. As we discussed above, within 14 business days after a complaint is filed, the commission must "send written notice to the complainant and the respondent." V.T.C.S. art. 6252-9d.1, § 1.16. The notice "must state whether the complaint complies with the form requirements" of article 6252-9d.1. *Id.* Later, after the commission has made a determination about jurisdiction, the commission must again send notice to the complainant and the respondent. *Id.* § 1.17(d). If the commission determines that it has jurisdiction, the notice shall include a copy of the sworn complaint and other information. *Id.* Because this notice must include a copy of the sworn complaint, it will, of course, reveal the identity of the complainant and the specifics of the complaint. The statute does not require, however, that the initial 14-day notice contain a copy of the sworn complaint; it merely states that the commission must send "notice" to the respondent.<sup>6</sup> We think, however, that a common-sense understanding of the word "notice" in this context would require that the respondent be notified not only of the fact of the complaint but also of the source and the specifics of the complaint. Such a conclusion does not disserve any interest of the complainant since the statute makes clear that the commission cannot act on a complaint without revealing the identity of the complainant to the respondent, and presumably a complainant would file a complaint hoping that the commission would act on it. Accordingly, the commission will include a copy of the complaint in the 14-day notice to the respondent.

The fourth question is whether the name and address of a person filing a complaint is ever subject to public disclosure. A sworn complaint, which would include the name and address of the complainant, is confidential "unless entered into the record of a formal hearing or a judicial proceeding." *Id.* § 1.21(a). Thus, if the name or address of the complainant is entered into the record of a formal hearing or a judicial proceeding, the confidentiality provision would no longer apply and the information would be subject to public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S.

## SUMMARY

A person who intends to file a sworn complaint with the Ethics Commission may discuss with the press or the public the fact the he intends to file a complaint and the contents of the proposed complaint. A person who has filed a sworn complaint with the commission may discuss with the press or the public the fact that he has filed a complaint and the contents of the complaint.

The commission must give notice of a sworn complaint to the respondent within 14 days after the commission receives the complaint, and as part of that notice, the commission must identify the complainant and the nature of the complaint.

The respondent to a sworn complaint filed with the commission may discuss the fact that the complaint has been filed and the contents of the complaint.

The Ethics Commission may release to the public the contents of a sworn complaint, including the name and address of the complainant, if that information is entered into the record of a formal hearing or a judicial proceeding.

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- <sup>1</sup> The statutes administered and enforced by the Ethics Commission are article 6252-9b, V.T.C.S., chapters 302 and 305 of the Government Code, and title 15 of the Election Code. V.T.C.S. art. 6252-9d.1, § 1.11.
- <sup>2</sup> A violation of section 1.21(a) is a Class A misdemeanor. *Id.* § 1.21(d). The commission, however, does not have any authority to bring criminal prosecutions.
- <sup>3</sup> The court did note that the plaintiff was not challenging the state's right to restrict participants from speaking publicly about information gleaned from commission hearings. *Providence Journal Co. v. Newton*, 723 F. Supp. 846, 858 (D.R.I. 1989).
- <sup>4</sup> The cases discussed above all deal with governmental bodies that handled complaints about public officers or employees. The Texas Ethics Commission has authority to consider complaints alleging violations of four statutes. The subjects of the complaints will not necessarily be public officers or employers. For example, the subject could be a lobbyist, *see* Gov't Code ch. 305, or a person making an expenditure to support a certain outcome in an election, *see* Elec. Code § 253.061. Even if the First Amendment analysis would be different in cases in which the subjects of the complaints were not public officers or employees, however, nothing in the language of section 1.21 would support an interpretation that the confidentiality provision applied differently to different classes of respondents. *See generally Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990) (holding unconstitutional a Florida provision that prohibited a complainant from disclosing information about disciplinary proceedings against lawyers).
- <sup>5</sup> Further, we construe the confidentiality provision as prohibiting the commission and its staff from disclosing not just a sworn complaint or a copy of a sworn complaint, but also the fact that a sworn complaint has been filed. We reject the possible interpretation that the prohibition applies only to the document and not to the fact of the document's existence, since the confidentiality provision would serve no purpose if it did not extend to the fact of the document's existence.
- <sup>6</sup> Also, the statute does not make clear whether a notice stating that the commission has found that it has no jurisdiction is to identify the complainant. Because we find that the 14-day notice must identify the complainant and state the specific nature of the complaint, however, the "no jurisdiction" notice need not repeat that information.