



# TEXAS ETHICS COMMISSION



## ETHICS ADVISORY OPINION NO. 505

*April 18, 2012*

*Whether a complainant or respondent to a sworn complaint filed with the Texas Ethics Commission may disclose a dismissal order issued by the commission. (AOR-569)*

The Texas Ethics Commission (commission) has been asked about the applicability of the confidentiality provision set out in section 571.140 of the Government Code to a person who files a sworn complaint (complainant) and a person against whom a complaint is filed (respondent). That confidentiality provision applies to certain information and proceedings in regard to sworn complaints filed with the commission. Specifically, the requestor asks whether a complainant or respondent may disclose a dismissal order issued by the commission that dismisses the complaint.

An individual who is a resident of Texas or who owns real property in Texas 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. Gov't Code § 571.122. When a complaint is dismissed, the commission must send written notice of the dismissal and the grounds for the dismissal to the complainant and the respondent. Gov't Code §§ 571.123(c); 571.124(f); 571.126(c), (d).

The confidentiality provision applies to a sworn complaint, in addition to documents and any additional evidence relating to a sworn complaint. Section 571.140 of the Government Code states:

(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.

In a previous advisory opinion, we considered whether the confidentiality provision<sup>1</sup> prohibits a complainant from revealing to the press that he filed a complaint and the factual basis of the complaint. Ethics Advisory Opinion No. 8 (1992) (EAO-8). As noted in the opinion, federal courts and other state courts have generally ruled that a complainant or a third party, such as a member of the press, cannot be prohibited from disclosing the fact that he filed a complaint with a body such as the commission. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (ruling that the First Amendment of the U.S. Constitution did not permit criminal punishment of persons who were “strangers to the inquiry” for divulging truthful information about complaint proceedings before the Virginia Judicial Inquiry and Review Commission); *Doe v. Gonzalez*, 723 F. Supp. 690 (S.D. Fla. 1988), *aff'd* 886 F.2d 1323 (11th Cir. Fla. 1989) (finding unconstitutional a state law that prohibited a complainant from disclosing that the person filed or will file a complaint with the Florida Commission on Ethics); *Doe v. Florida Judicial Qualifications Comm'n*, 748 F. Supp. 1520 (S.D. Fla. 1990) (finding that a provision in the Florida constitution could not be enforced to prohibit a person from disclosing that the person filed a complaint with the Florida Judicial Qualifications Commission); *Providence Journal Co. v. Newton*, 723 F. Supp. 846 (D.R.I. 1989) (finding that a state law prohibiting a complainant from publicly disclosing and discussing a complaint that the complainant filed with the Rhode Island Ethics Commission violated the First Amendment). *See also, Baugh v. Judicial Inquiry and Review Comm'n*, No. 88-0867, 1991 U.S. Dist. LEXIS 15810, at 1 (E.D. Va. Jan 31, 1991) (declaring, with consent of parties, that a state law prohibiting complainants or witnesses from disclosing their own complaints, testimony, or results of enforcement proceedings violated the First Amendment); *Roe v. Akamine*, No. 91-00252 DAE (U.S. Dist. Ct. of Haw., Sept. 26, 1991) (issuing an order that approved a stipulated agreement between plaintiff and the Hawaii attorney general and ethics commission that a state law prohibiting a complainant from divulging information about the complaint was unconstitutional and unenforceable).

In EAO-8, the commission stated that, as a matter of statutory construction, a statute must be construed in a manner that renders it constitutional. Ethics Advisory Opinion No. 8 (1992).

Based on earlier court decisions, we determined that the confidentiality provision governing a sworn complaint filed with the commission applies to the commission and its staff and does not apply to the person who files the complaint. *Id.* Furthermore, we stated:

[W]e 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).

*Id.*

Since EAO-8 was adopted, other federal courts have issued opinions that considered prohibitions on the disclosure of a sworn complaint by a complainant or third party. *See, e.g., Lind v. Grimmer*, 30 F.3d 1115, 1122 (9th Cir. Haw. 1994), *pet. denied* (ruling that a state law that prohibited a person from disclosing the filing of a complaint with the Hawaii Campaign Spending Commission violated the First Amendment and could not be enforced to prohibit complainants from disclosing that they filed a complaint or to prohibit third parties from disclosing lawfully obtained information about a complaint); *Stilp v. Contino*, 613 F.3d 405, 415 (3rd Cir. Pa. 2010) (declaring that a state law prohibiting a complainant from disclosing the fact that a complaint had been, or will be, filed with the Pennsylvania Ethics Commission was unconstitutional).

We are aware of no court opinion finding that a state may prohibit a complainant or respondent from publicly disclosing the results of a complaint filed with a state agency similar to the commission. Such a prohibition would be inconsistent with court opinions and EAO-8. In light of previous opinions, we do not think section 571.140 prohibits a complainant or respondent from publicly disclosing or discussing an order that dismisses a complaint filed by the complainant.

The requestor of this opinion also asks whether various third parties could receive a copy of a dismissal order from a complainant or respondent and subsequently possess or discuss copies of the order with other third parties. In such circumstances, section 571.140 of the Government Code would not prohibit a third party who thus obtains a copy of the dismissal order from the complainant or respondent from possessing or discussing the dismissal order with other third parties.

### SUMMARY

Section 571.140 of the Government Code does not prohibit a complainant or respondent from publicly disclosing or discussing a commission order that dismisses a complaint filed by the complainant. If a third party receives a copy of such a dismissal order from a complainant or respondent, the confidentiality provision does not prohibit the third party from possessing or discussing the order with other third parties.

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<sup>1</sup> The statute under consideration was section 1.21(a), article 6252-9d.1 of the Vernon's Texas Civil Statutes. The statute has been amended and recodified since the opinion was adopted, but remains identical in substance to section 571.140(a) of the Government Code.