OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

August 15, 2000

Mr. Pete M. Schenkkan
Graves, Dougherty, Hearon & Moody
515 Congress Avenue, Suite 2300
Austin, Texas 78701

OR2000-3103

Dear Mr. Schenkkan:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 138012.

Representative Dianne White Delisi and your law firm, Graves, Dougherty, Hearon & Moody ("GDHM"), which represents a group of state legislators that includes Representative Delisi, received requests for 15 categories of information relating to the several Texas tobacco litigation matters ("Tobacco Litigation") (*In re: Private Counsel*, No. 5:98-CV-270, and *State of Texas v. American Tobacco Co., et al.*, No. 5:96-CV0091).[1] You claim that the information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You also seek a decision from this office as to whether the Public Information Act (the "Act") applies at all to the information requested.[2]

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[1]You inform this office that the requestor is not seeking the release of any publicly filed court documents or materials that are in the public domain due to previous publication.

[2]As a threshold issue, you seek a determination of whether Representative Delisi, in her capacity as an individual legislator, is a "governmental body" subject to the Act. Section 552.003(1)(A)(i) of the Government Code defines a "governmental body" to mean, among other things:

> a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members.

We believe that Representative Delisi's office clearly falls within the meaning of "governmental body," as defined in section 552.003(1)(A)(i), as an office that is within the legislative branch of state government and that is directed by an elected member, Representative Delisi. However, Representative Delisi, as an individual person, is not a governmental body subject to the Act. *But see* Open Records Decision No. 648 (1996) (information falling within the scope of chapter 306 of the Government Code may be released only as that chapter provides and does not fall within the scope of chapter 552 of the Government Code).

We have considered the arguments submitted by both GDHM and the requestor, and have reviewed the submitted representative sample of the information requested.[3]

We note that although the requestor submitted requests to both Representative Delisi and GDHM, this ruling addresses only the request to the representative. Although GDHM is acting as the representative's agent with respect to the Tobacco Litigation, it is not the representative's agent for the purposes of receiving public information requests under the Act. *See* Open Records Decision No. 576 (1990). Therefore, the request sent to GDHM does not constitute a valid request for the purposes of the Act.

Representative Delisi also asserts that the request for documents in her possession does not require that she seek documents owned by her or to which she has a right of access but that are in the possession of GDHM. The Act does not ordinarily require a governmental body to obtain information from another entity, so long as the entity does not hold the information on behalf of the governmental body. Open Records Decision No. 534 (1989). Additionally, prior decisions of this office have determined that a governmental body's information held by outside counsel is subject to required public disclosure. Open Records Decision Nos. 663 (1999), 499 (1988), 462 (1987). If, as in Open Records Decision Nos. 499 and 462, the requestor has specified that he is seeking information collected or maintained by the outside counsel for the governmental body, and the governmental body has a right of access to that information, the requested information held by outside counsel is subject to the Act. In this instance, we do not believe that the request, which did not specify information held by Representative Delisi's outside counsel, served to notify Representative Delisi that the requestor was seeking information held not only by her office, but also by GDHM. *See* Open Records Decision No. 663 (1999). Because the request does not specifically seek information held by GDHM for Representative Delisi, we do not address whether documents owned by the representative or to which she has a right of access but that are in the possession of GDHM are subject to required public disclosure under the Act.

As a final threshold issue, we address whether documents in GDHM's possession that were collected, assembled, or maintained by GDHM on behalf of Texans for Reasonable Legal Fees and Texans for Lawsuit Reform, and any other non-governmental organizations or individuals represented by GDHM, are subject to required public disclosure under the Act. We agree with Representative Delisi that the existence of a joint defense agreement between GDHM, a law firm representing an individual legislator in her official capacity, and the Office of the Attorney General, representing the State of Texas and the Governor, does not make GDHM an agent of the State with respect to the non-governmental entities. Therefore, GDHM's representation of Representative Delisi does not make the documents of other private, non-governmental clients of GDHM subject to the Act.

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[3]In reaching our conclusion here, we assume that 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 that those records contain substantially different types of information from that submitted to this office.

We next examine your claimed exceptions to required public disclosure under the Act. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Representative Delisi claims that some of the documents submitted are excepted from required public disclosure under section 552.101 in conjunction with Article I, Sections 8 and 27 of the Texas Constitution, and the First Amendment of the United States Constitution. In order to "ensure the rights of citizens of this state to petition state government," the Texas Legislature enacted chapter 306 of the Government Code. Gov't Code § 306.004(a). This chapter provides that records of a member of the legislature that are composed exclusively of memoranda of communications with residents of this state and of personal information concerning the person communicating with the member are confidential. Gov't Code § 306.003. Additionally, the public disclosure of all or part of a written or otherwise recorded communication from a citizen of this state received by a member of the legislature in her official capacity is prohibited unless the citizen expressly or by clear implication authorizes the disclosure, the communication is of the type expressly authorized by statute to be disclosed, or the official determines that disclosure does not constitute an unwarranted invasion of privacy. Gov't Code § 306.004(a). However, section 306.004 does not apply to a communication to a member of the legislature from a public official or public employee acting in an official capacity. Gov't Code § 306.004(b). We have marked examples of the types of communications that must be withheld as confidential under chapter 306.

Representative Delisi also argues that by the very language of the request for documents "related in any way" to the Tobacco Litigation, all documents requested "relate to litigation" and are, as such, excepted from required public disclosure under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Representative Delisi must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform this office that Representative Delisi is a party to both *In re: Senator Troy Fraser*, No. 5:98-CV-0045, and *In re: Private Counsel*, No. 5:98-CV-270, two matters pending in the United States Court of Appeals for the Fifth Circuit. You also inform us that additional litigation is anticipated as a result of ongoing investigations related to the current litigation. Thus, Representative Delisi has met the first prong of the test for the applicability of section 552.103(a). After reviewing the submitted information, we find that Representative Delisi has also established the relatedness of most of the responsive

documents to both the pending and anticipated litigation. Therefore, you may withhold most of the requested information pursuant to section 552.103. We have marked examples of the types of documents that Representative Delisi may withhold under section 552.103.

We note that generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all opposing parties in both the pending and anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the pending and anticipated litigation have concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Should you receive another request for this information, and the status of the litigation has materially changed, you should request another decision from this office.

In summary, legislative communications from citizens of this state must be withheld under section 552.101 and chapter 306 of the Government Code. Representative Delisi and GDHM may withhold the rest of the submitted information under section 552.103 of the Government Code. Because sections 552.101 and 552.103 are dispositive, we do not address your other claimed exceptions.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one

of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/er

Ref: ID# 138012

Encl. Submitted documents

cc: Mr. Louis DuBose
Texas Observer
307 West 7th Street
Austin, Texas 78701
(w/o enclosures)