



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 7, 2003

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2003-5528

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185588.

The Texas Department of Criminal Justice (the "department") received a written request for all paper or electronic records that the department has received since January 1, 2000 from any of the following persons or entities or their representatives: The National Correctional Industries Association, Service House, Inc., State Representative Ray Allen, and Scott E. Gilmore. You indicate that some of the responsive information will be released to the requestor. You contend, however, that the remaining information coming within the scope of the request is excepted from required disclosure pursuant to sections 552.101, 552.106, 552.111, and 552.134 of the Government Code.

Because your section 552.106 claim is the most inclusive, we will address it first. Section 552.106 of the Government Code protects drafts and working papers involved in the preparation of proposed legislation. The purpose of the exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body; it protects the internal "deliberative" or policy-making processes of a governmental body.¹ Open Records Decision No. 460 (1987); *see also* Open Records

¹We note that sections 552.106 and 552.111 of the Government Code are similar in that they both protect advice, opinion, and recommendation on policy matters in order to encourage frank discussion during the policymaking process. Open Records Decision No. 460 at 3 (1987). However, section 552.106 is narrower than section 552.111 in that it applies specifically to the legislative process. *Id.* In this instance, section 552.111 would not protect any information that is not otherwise protected by section 552.106. *See, e.g., id.*

Decision No. 367 (1983) (legislative material prepared by state agency protected by statutory predecessor of section 552.106). Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). Section 552.106 does not except purely factual material; rather, it excepts only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation. *Id.*

After reviewing the submitted information, we agree that some of these materials may be withheld from the public pursuant to section 552.106. However, you have not explained, nor is it apparent to this office, how some of the materials you seek to withhold under section 552.106 were prepared by persons with an official responsibility to prepare the materials for the legislature. *See* Open Records Decision Nos. 460 (1987), Open Records Decision No. 429 (1985) (exception not applicable to materials prepared by person or agency who has no official responsibility to do so but only acts as interested party who wishes to influence legislative process). We have marked the information the department may withhold pursuant to section 552.106.

You next contend that certain communications that concern prison inmates are excepted from public disclosure pursuant to section 552.134(a) of the Government Code, which provides as follows:

Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

After reviewing the correspondence, we agree that these records contain information about inmates who are in a "facility operated by or under a contract with the department." The department therefore must withhold the documents that we have marked as coming with the protection of section 552.134 of the Government Code.²

You also contend that a letter from Representative Allen to the department's executive director summarizing a communication received by Representative Allen from the Mexican Consulate is confidential under sections 306.003 and 306.004 of the Government Code. In the alternative, you contend that the letter is excepted from required public disclosure pursuant to section 552.111 of the Government Code. In Open Records Decision No. 648 (1996), this office addressed the application of sections 306.003 and 306.004, and concluded that these two provisions work together to provide a measure of confidentiality for records of communications between citizens and members of the legislature. *Id.* at 1-2. Section 306.003 provides as follows:

²Because we resolve this aspect of your request under section 552.134, we need not address your other arguments for withholding these documents.

- (a) Records of a member of the legislature or the lieutenant governor that are composed exclusively of memoranda of communications with residents of this state and of personal information concerning the person communicating with the member or lieutenant governor are confidential. However, the member or the lieutenant governor may disclose all or a part of a record to which this subsection applies, and that disclosure does not violate the law of this state.
- (b) The method used to store or maintain a record covered by Subsection (a) does not affect the confidentiality of the record.

Section 306.004 provides as follows:

- (a) To ensure the right of the citizens of this state to petition state government, as guaranteed by Article I, Section 27, of the Texas Constitution, by protecting the confidentiality of communications of citizens with a member of the legislature or the lieutenant governor, the public disclosure of all or part of a written or otherwise recorded communication from a citizen of this state received by a member or the lieutenant governor in his official capacity is prohibited unless:
 - (1) the citizen expressly or by clear implication authorizes the disclosure;
 - (2) the communication is of a type that is expressly authorized by statute to be disclosed; or
 - (3) the official determines that the disclosure does not constitute an unwarranted invasion of personal privacy of the communicator or another person.
- (b) This section does not apply to a communication to a member of the legislature or the lieutenant governor from a public official or public employee acting in an official capacity.
- (c) A member or the lieutenant governor may elect to disclose all or part of a communication to which this section applies, and that disclosure does not violate the law of this state.

Gov't Code § 306.004.

The confidentiality provision in section 306.003(a) applies to the records of a member of the legislature or of the lieutenant governor consisting of two kinds of information: 1) records

of memoranda of communications with Texas residents and 2) records of personal information about the person communicating with the legislator or lieutenant governor. Open Records Decision No. 648 at 2. On the other hand, section 306.004 provides that the communications themselves may be held as confidential. *Id.*

The letter you seek to withhold, in the hands of the department, cannot be said to constitute “[r]ecords of a member of the legislature” for purposes of section 306.003(a); rather, it is merely correspondence the department received from Representative Allen regarding certain concerns expressed by the Mexican Consulate, and is therefore a record of the department subject to the Act. Furthermore, because the letter merely summarizes the original communication received by Representative Allen, we conclude that section 306.004 is inapplicable to this letter. We therefore conclude that no portion of the letter is made confidential under either section 306.003 or 306.004 of the Government Code.

As noted above, however, you also contend that the correspondence is excepted from required public disclosure pursuant to section 552.111 of the Government Code. Section 552.111 excepts from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity’s policymaking process. Open Records Decision No. 615 at 5 (1993). The purpose of this section is “to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes.” *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, *writ ref’d n.r.e.*) (emphasis added); *see also City of Garland v. Dallas Morning News*, 969 S.W.2d 548 (Tex. App.—Dallas 1998), *aff’d*, 22 S.W.3d 351 (Tex. 2000). Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982). Section 552.111 is not applicable, however, to communications with a party with which the governmental body has no privity of interest or common deliberative process. *See* Open Records Decision No. 561 at 9 (1990).

After reviewing the contents of the correspondence, we conclude that only a very small portion of the correspondence consists of advice, opinion, or recommendation that may be withheld pursuant to section 552.111 of the Government Code. We have marked the correspondence accordingly. However, the remaining information contained in the correspondence must be released.

Finally, we note that some of the submitted documents contain private e-mail addresses. Section 552.137 of the Government Code makes certain e-mail addresses confidential and provides in relevant part:

(a) An e-mail address *of a member of the public* that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release. [Emphasis added.]

We have marked the types of e-mail addresses that consist of private e-mail addresses that must be withheld pursuant to section 552.137 unless the department receives an affirmative consent to release from the person to whom an e-mail address belongs. We note that section 552.137 does not apply to a public employee's governmental e-mail address.

In summary, the department may withhold the information we have marked as coming within the protection of sections 552.106 and 552.111. The department must also withhold the information we have marked as coming under the protection of sections 552.134 and 552.137. The remaining submitted information must be released to the requestor.

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 Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/RWP/sdk

Ref: ID# 185588

Enc: Submitted documents

c: Mr. Andrew Wheat
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(w/o enclosures)