ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 4, 2008

Mr. Joe Straus III
State Representative
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

OR2008-01581

Dear Mr. Straus:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 301247.

Representative Straus (the "representative") received a request for the following categories of information: 1) any documents that refer to House Bill 3367; 2) any documents that refer to a named company within the last three years; 3) any documents between the representative's office and the City of San Antonio pertaining to economic development in the city of Windcrest, Texas within the last three years; 4) any documents between the representative's office and the City of Windcrest pertaining to economic development in Windcrest, Texas within the last three years; and 5) any documents pertaining to the award of a grant through the Texas Enterprise Fund to the City of Windcrest or any other entity involved in economic development in Windcrest, Texas. You state that you have provided some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.106, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert that the submitted information is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be

confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. The legislative privilege, also known as legislative immunity, generally shields legislative actors from being required to testify about their legislative activities.[1] *Perry*, 60 S.W.3d 857, 860; *see, e.g.*, *Gravel v. U.S.*, 408 U.S. 606, 615-16 (1972) (senator not required to answer questions about events that occurred in senate subcommittee meeting); *see also Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (legislators "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves"). As such, it is a privilege against testifying in discovery or trial. In Open Records Decision No. 575 at 1 (1990), this office determined that discovery privileges are not covered under the statutory predecessor of the Act. Thus, the representative may not withhold any of the submitted information under section 552.101 in conjunction with legislative immunity.

You also seek to withhold the submitted information under section 552.106 of the Government Code, which excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation[.]" Gov't Code § 552.106(a). Section 552.106 protects advice, opinion, and recommendation on policy matters in order to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 460 at 3 (1987). Therefore, section 552.106 is applicable only to the policy judgments, recommendations, and proposals of persons who are involved in the preparation of proposed legislation and who have an official responsibility to provide such information to members of the legislative body. *Id.* at 1. Section 552.106 does not protect purely factual information from public disclosure. *See id.* 460 at 2; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. ORD 460 at 2.

You state that the submitted information in Documents A, B, C, and D, as well as the handwritten notes in Documents E and F, "were prepared directly and entirely for the legislative purpose of enacting [proposed] legislation." You also state that this information was "created to assist [the representative] at critical stages in the legislative process in preparing or promoting [House Bill3367]." Based on these representations and our review, we conclude that most of the submitted information constitutes advice, opinion, analysis, and recommendation regarding proposed legislation. Therefore, the representative may withhold the information we have marked in Document A, the information in Documents B, C, and

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[1] The legislative privilege also refers to a legislator's immunity from civil liability, immunity from arrest, and legislative continuances. *E.g.*, Tex. Const. art. III, § 14 (senators and representatives generally privileged from arrest while traveling to or attending legislative sessions); Civ. Prac. & Rem. Code § 30.003 (court must grant continuance if attorney is a legislative member and will be attending legislative session); *In re Perry*, 60 S.W.3d at 859 (2001) (immunity from civil liability).

D in its entirety, and the handwritten notes in Documents E and F under section 552.106. You have not demonstrated, however, how the remaining information constitutes drafts or working papers involved in the preparation of proposed legislation; therefore, the remaining information may not be withheld on this basis.

You assert that the remaining information is excepted under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD No. 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You assert that the remaining information provides "opinions as to policy choices behind [House Bill] 3367 and makes specific recommendations for action regarding the bill." We find, however, that the remaining information consists of only factual information. Thus, you have not demonstrated how the remaining information consists of advice, opinion, or recommendation about a policymaking decision; therefore, the representative may not withhold the remaining information under section 552.111.

In summary, the representative may withhold the information we have marked in Document A, the information in Documents B, C, and D in its entirety, and the handwritten notes in Documents E and F under section 552.106 of the Government Code. The remaining information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

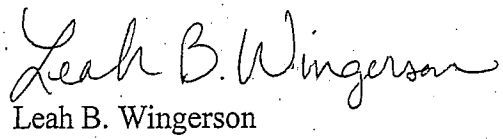
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath* , 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General 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. 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 301247

Enc. Submitted documents

c: Mr. Scott M. Tschirhart
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(w/o enclosures)