



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 30, 2009

Ms. Mary Salluce
Open Government Attorney
Texas Department of Family and Protective Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2009-01252

Dear Ms. Salluce:

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# 333693 (DFPS Tracking No. 2008-0685).

The Texas Department of Family and Protective Services ("DFPS") received a request for "all legislative inquiries" pertaining to the requestor and a named individual. You believe that the requested information may implicate the interests of State Representative Armando Martinez. See Gov't Code § 552.304 (providing interested party may submit comments stating why information should or should not be released). We have received comments from Representative Martinez. We have considered Representative Martinez's arguments and reviewed the submitted information.

Representative Martinez asserts that the submitted information may be subject to chapter 306 of the Government Code. Section 306.003 of the Government Code provides as follows:

- (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.

Gov't Code § 306.003. We note the submitted information consists of DFPS records, rather than those of Representative Martinez. Section 306.003 only pertains to records of a member of the legislature or the lieutenant governor. *See id*; Open Records Decision No. 648 (1996). Representative Martinez has not demonstrated that the information submitted by DFPS consists of “[r]ecords of a member of the legislature or the lieutenant governor[.]” *Id.* § 306.003(a). We therefore conclude that section 306.003 does not apply to the submitted information.

While section 306.003 applies to records of memoranda of communications and records of personal information of a legislator or the lieutenant governor, section 306.004 refers to the communications themselves and 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.

Id. § 306.004. For the purposes of section 306.004, a “communication” includes “conversation, correspondence, and electronic communication.” *Id.* § 306.001. The communication is not subject to public disclosure unless one of the three conditions stated in section 306.004(a) applies. *See id.* § 306.004(a)(1)-(3). We note that a legislator has the discretion to disclose all or part of records that are subject to section 306.004(a). *Id.* § 306.004(c).

In Open Records Decision No. 648 (1996), this office addressed the applicability of chapter 306 to information held by a state representative. In construing these provisions, we stated:

As we have seen, chapter 306 contains provisions for the disclosure of the information it covers. Thus, the chapter is not merely a confidentiality statute, but a statute that sets the parameters for public access to the information to which it applies. Accordingly, we believe chapter 306, rather than the [Act], governs the release of information within section 306.003(a) or section 306.004. *See* Open Records Decision No. 598 (1991) (statutes governing specific subset of information prevail over general applicability of [Act]). Thus, we need not consider whether information covered by chapter 306 is excepted from public disclosure pursuant to an [Act] exception. . . . 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 the [Act], chapter 552 of the Government Code. A member of the legislature or the lieutenant governor may elect to disclose all or part of the information within sections 306.003(a) and 306.004 of the Government Code, but is not required to do so.

Open Records Decision No. 648 at 3, 7. We further found that the statute’s legislative history affirmed this construction of chapter 306 of the Government Code. In a footnote, we explained that the House Study Group report of the legislation that enacted the statutory predecessor to chapter 306 demonstrated “that the effect of the statute is to give legislators the discretion to release their communications with state residents and to exempt the legislature in this regard from the ordinary disclosural requirements set forth in the [Act].” *Id.* at 3-4 n.3.

Representative Martinez argues that the submitted information, in part, is subject to section 306.004(a), as it consists of communications from a citizen of the state received by his office in his official capacity as a member of the legislature. To the extent the submitted information consists of all or part of a written or otherwise recorded communication from a citizen of this state to Representative Martinez in his official capacity, its release is governed by chapter 306 of the Government Code, not the Act, and it is within the discretion of Representative Martinez to either withhold or release such information. DFPS should confer with Representative Martinez to determine which specific portions of the submitted

information represent communications subject to section 306.004(a), as this office cannot make such a determination. To the extent the submitted information does not consist of all or part of a written or otherwise recorded communication from a citizen of this state to Representative Martinez in his official capacity, the information is subject to the Act and we address Representative Martinez's remaining arguments.

Section 552.106 excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation[.]" Gov't Code § 552.106(a). Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). The purpose of section 552.106 is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *Id.* at 2. 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 does not except purely factual information from disclosure. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the scope of section 552.106. *See* ORD 460 at 2.

Representative Martinez argues the submitted information is subject to section 552.106. He states that legislative inquiries "are inherently related to the possible development of public policy and ultimately legislation." Further, he asserts that any substantive communication between his office and DFPS regarding the particular facts and individuals involved in those communications relate directly to his "legislative policy-making role." Upon review, we find that Representative Martinez has not demonstrated that the submitted information consists of policy judgments, recommendations, and proposals relating to the preparation of proposed legislation. Therefore, because Representative Martinez has failed to demonstrate that section 552.106 is applicable to the submitted information, we conclude that none of the information may be withheld on this basis.

Section 552.111 of the Government Code 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 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). We also note that section 552.111 encompasses external communications with a third party with which a governmental body shares a privity of interest or a common deliberative process with respect to the policy matter at issue. See Open Records Decision No. 561 at 9 (1990) (addressing statutory predecessor).

Upon review, we find Representative Martinez has not demonstrated that any of the submitted information consists of advice, opinions, or recommendations that implicate policymaking processes. We therefore conclude that DFPS may not withhold any of the submitted information under section 552.111.

In summary, to the extent the submitted information consists of all or part of a written or otherwise recorded communication from a citizen of this state to Representative Martinez in his official capacity, its release is governed by chapter 306 of the Government Code, not the Act, and it is within the discretion of Representative Martinez to either withhold or release such information. As DFPS claims no exception to disclosure of the remaining information, it must be released to the requestor.¹

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free,

¹We note that the requestor in this instance has a special right of access to some of the information being released. Gov't Code § 552.023 (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if DFPS receives another request for this information from an individual other than this requestor or the requestor's representative, DFPS should again seek our decision.

at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/jb

Ref: ID# 333693

Enc. Submitted documents

cc: Requestor
(w/o enclosures)