



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 29, 2011

Mr. Jesse Ancira, Jr.  
General Counsel  
Office of the Speaker  
Texas House of Representatives  
P.O. Box 2910  
Austin, Texas 78768-2910

OR2011-19162

Dear Mr. Ancira:

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# 439046.

The Office of the Speaker (the "speaker's office") of the Texas House of Representatives received a request for all e-mail communications, some containing certain key words, during specified time periods between the speaker's office or the speaker's office staff and any third party or various named individuals.<sup>1</sup> You state the speaker's office has provided some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, 552.111, and 552.146

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<sup>1</sup>You state the speaker's office received clarification from the requestor regarding parts of the request. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). You inform us the speaker's office provided the requestor with an estimate of charges and a request for a deposit for payment of those charges on September 23, 2011. See Gov't Code §§ 552.2615, .263(a). You state the speaker's office received a deposit for payment of the anticipated costs on September 26, 2011. Thus, September 26, 2011 is the date on which the speaker's office is deemed to have received the request. See *id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that the governmental body receives deposit or bond).

of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.<sup>2</sup>

Initially, you state some of the submitted information may be subject to chapter 306 of the Government Code. Section 306.003 provides:

(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. The confidentiality provision in section 306.003(a) applies to the records of a member of the legislature or of the lieutenant governor 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. *Id.* Thus, "personal information" about a person communicating with a legislator or the lieutenant governor is within section 306.003(a) even if it is not recorded in a memorandum prepared by the legislator or lieutenant governor. *Id.* Although section 306.003(a) deems confidential the records that are subject to the provision, it gives a member of the legislature the discretion to disclose all or part of such record. *See id.* § 306.003(a).

While section 306.003 applies to records consisting of memoranda of communications and records of a correspondent's personal information, section 306.004 refers to the communications themselves and provides:

(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

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<sup>2</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

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 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). As is also true of records that are subject to section 306.003(a), a legislator has the discretion to disclose all or part of records that are subject to section 306.004(a).

In Open Records Decision No. 648 (1996), this office addressed the applicability of sections 306.003 and 306.004 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.

ORD 648 at 3, 7. We further found the statute's legislative history affirmed this construction of chapter 306 of the Government Code. In a footnote, we explained the House Study Group report of the legislation that enacted the statutory predecessor to chapter 306 demonstrated "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. Therefore, the release of information that is subject to section 306.003(a) or section 306.004(a) is governed by chapter 306 of the Government Code, not the Act, and it is within the discretion of a legislator to either withhold or release such information.

You do not indicate whether you believe the information at issue is subject to section 306.003(a) or section 306.004(a) of the Government Code. Nevertheless, to the extent you determine the information at issue is subject to section 306.003(a) or section 306.004(a), it is within the discretion of the speaker's office to either withhold the information or release it to the requestor. If you determine the information at issue is not subject to section 306.003(a) or section 306.004(a), then the information is subject to the Act and must be released unless it falls within an exception to disclosure. In the event the information is subject to the Act, we will consider the applicability of the exceptions you claim to the submitted information.

Section 552.101 of the Government Code 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 that other statutes make confidential. You assert the information you have submitted as Category D is excepted from disclosure under section 552.101 in conjunction with section 323.017 of the Government Code, which provides:

Communications, including conversations, correspondence, and electronic communications, between a member of the legislature or the lieutenant governor and an assistant or employee of the [Texas Legislative Council (the "council")] that relate to a request by the official for information, advice, or opinions from an assistant or employee of the council are confidential. Information, advice and opinions given privately by an assistant or employee of the council to a member of the legislature, or the lieutenant governor, acting in the person's official capacity, are confidential. However, the member or lieutenant governor may choose to disclose all or a part of the communications, information, advice, or opinions to which this section applies, and such a disclosure does not violate the law of this state.

*Id.* § 323.017. You inform us the information in Category D consists of communications between speaker's office staff members, as representatives of the speaker's office, and employees of the council. You state these communications relate to requests from speaker's office staff members for information, advice, or opinions from council employees regarding specific redistricting issues. Based on your representations and our review, we find the information submitted as Category D is confidential under section 323.017 of the Government Code, and the speaker's office must withhold that information under section 552.101 of the Government Code.

You claim the information submitted as Categories B and C is excepted from disclosure under section 552.103 of the Government Code, which provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

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(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

*Id.* § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You claim a portion of the information in Category C is excepted from disclosure under section 552.103 because it relates to a lawsuit involving the Texas Department of Family and Protective Services ("DFPS") that was pending in federal court before the speaker's office received the request for information. We note, however, the speaker's office is not a party to that litigation and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating predecessor to section 552.103 only applies when governmental body is party

to litigation). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. In this instance, we have received such a representation from DFPS. Thus, we find litigation involving DFPS was pending when the speaker's office received the request. DFPS indicates the information at issue relates to the pending litigation. Based on the submitted representations and our review, we find section 552.103 is applicable to the information in Category C pertaining to the DFPS lawsuit.

For the information in Category B and the remaining information in Category C, you state, and provide documentation showing, the speaker's office received the request for information after multiple lawsuits involving the speaker's office were filed in state and federal court. Based on your representation and our review, we conclude litigation involving the speaker's office was pending when the speaker's office received the request. You also state the information at issue is related to the pending litigation because it pertains to the issues that help form the bases of the lawsuits. Based on your representations and our review, we find the information at issue is related to the pending litigation for purposes of section 552.103. Therefore, we conclude the speaker's office may withhold the information in Categories B and C under section 552.103 of the Government Code.<sup>3</sup>

We note, however, once information has been obtained by all parties to all of the pending lawsuits 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 of the opposing parties in the 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 litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

You claim the information submitted as Category E is excepted from disclosure under section 552.146 of the Government Code, which provides, in relevant part:

- (a) All written or otherwise recorded communications, including conversations, correspondence, and electronic communications, between a member of the legislature or the lieutenant governor and an assistant or employee of the Legislative Budget Board [(the "board")] are excepted from [required public disclosure].

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<sup>3</sup>As our ruling for this information is dispositive, we need not address your claim under section 552.107 of the Government Code.

(c) This section does not except from required disclosure a record or memoranda of a communication that occurs in public during an open meeting or public hearing conducted by the [board].

Gov't Code § 552.146. You state the information submitted as Category E consists of communications between the speaker's office and employees of the board. You also state the information at issue is held in confidence and indicate the information does not pertain to communications that occurred in open meetings or public hearings. Based on your representations and our review, we conclude the speaker's office may withhold the information submitted as Category E under section 552.146 of the Government Code.<sup>4</sup>

You assert some of the remaining information is protected under section 552.106 of the Government Code, which excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation[.]” *Id.* § 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.* 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 have marked the information you seek to withhold in the information submitted as Categories A and F under section 552.106. You state the information was “prepared directly and entirely for the legislative purpose of enacting [proposed] legislation.” You contend the information contains speaker's office staff members' advice, opinions, recommendations, and analyses regarding various legislative proposals. You also state this information was taken into consideration by key members of the speaker's office staff as they advised the speaker's office and legislators on pending legislation. Based on your representations and our review, we conclude the information at issue constitutes advice, opinion, recommendation, and analysis regarding proposed legislation. Therefore, the speaker's

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<sup>4</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure for this information.

office may withhold the information you have marked in Categories A and F under section 552.106 of the Government Code.<sup>5</sup>

You claim some of the remaining information in Category F is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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 section 552.111 excepts from disclosure only those internal communications consisting 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). Additionally, section 552.111 does not generally except from disclosure purely factual information severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5.

We note section 552.111 can encompass a governmental body's communications with a third-party, including a consultant or other party with which the governmental body shares a common deliberative process or privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 of the Government Code encompasses communications with party with which governmental body has privity of interest or common deliberative process). In order for section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

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<sup>5</sup>As our ruling for this information is dispositive, we need not address your remaining argument against disclosure for this information.

You contend the information you have marked in Category F falls within the scope of section 552.111. You state the information at issue relates to communications among members of the speaker's office staff, as well as between members of the speaker's office staff and employees of state agencies with which the speaker's office shares a privity of interest that were involved in providing information necessary for proper review and analysis of pending legislation. You explain the communications pertain to various policymaking matters pertaining to pending legislation. Based on your representations and our review of the information at issue, we conclude the speaker's office may withhold the information you have marked in Category F under section 552.111 of the Government Code.

In summary, to the extent you determine the information at issue is subject to section 306.003(a) or section 306.004(a) of the Government Code, it is within the discretion of the speaker's office to either withhold the information or release it to the requestor. If you determine the information at issue is not subject to section 306.003(a) or section 306.004(a) of the Government Code, then the speaker's office (1) must withhold the information in Category D under section 552.101 of the Government Code in conjunction with section 323.017 of the Government Code; (2) may withhold the information in Categories B and C under section 552.103 of the Government Code; (3) may withhold the information in Category E under section 552.146 of the Government Code; (4) may withhold the information you have marked in Categories A and F under section 552.106 of the Government Code; and (5) may withhold the information you have marked in Category F under section 552.111 of the Government Code. The speaker's office must release the remaining information.

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](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, 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, toll free, at (888) 672-6787.

Sincerely,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 439046

Enc. Submitted documents

c: Requestor  
(w/o enclosures)