



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 21, 2012

Mr. Frank Battle
General Counsel
Office of the Lieutenant Governor
The Capitol
Austin, Texas 78711-2068

OR2012-02679

Dear Mr. Battle:

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# 447775.

The Office of the Lieutenant Governor (the "lieutenant governor's office") received a request for records pertaining to voter identification during a specified time period.¹ You state some information has been released to the requestor. You state that, as permitted by section 552.024(c) of the Government Code, you will redact information subject to section 552.117(a)(1) of the Government Code.² You claim the public availability of portions of the submitted information is governed by sections 306.003 and 306.004 of the

¹You state the lieutenant governor's office sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request).

²Section 552.117(a)(1) of the Government Code exempts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. Gov't Code § 552.117(a); *see also* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 applies to personal cellular telephone number of current or former official or employee provided the cellular telephone service is not paid for by governmental body). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117(a)(1) without requesting a decision from this office if the employee or official or former employee or official timely elected not to allow public access to the information. *See* Gov't Code 552.024(c).

Government Code. You claim the remaining submitted information is excepted from disclosure under sections 552.101, 552.106, 552.107, and 552.111 of the Government Code.³

We have considered your arguments and reviewed the submitted information.

We first address your argument Exhibits B and C are not governed by the Act. 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. 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's office 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 or the lieutenant governor 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 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:

³You state you withdraw your assertion under section 552.103 of the Government Code.

- (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 subject to section 306.003(a), a legislator or the lieutenant governor has the discretion to disclose all or part of records 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 "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. Therefore, the release of information 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 or the lieutenant governor to either withhold or release such information.

You state Exhibit B contains information governed by section 306.004(c) and Exhibit C contains information governed by section 306.003(a). Therefore, as the lieutenant governor's office has determined Exhibit B is subject to section 306.004 and Exhibit C is subject to section 306.003, release of Exhibits B and C is governed by chapter 306 of the Government Code, not the Act, and it is within the discretion of the lieutenant governor's office to either withhold or release such 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 other statutes make confidential. You assert the e-mails you have submitted as Exhibit D are 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 Exhibit D consists of communications between lieutenant governor's office attorneys and an employee of the council. You state these communications relate to a request from the lieutenant governor's office for information, advice, or opinions from the council employee. Based on your representations and our review, we find the

lieutenant governor's office must withhold Exhibit D under section 552.101 of the Government Code in conjunction with section 323.017 of the Government Code.⁴

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege, unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the e-mails submitted as Exhibit E constitute communications between attorneys and other identified staff of the lieutenant governor's office that were made for the purpose of providing legal analysis and advice to the lieutenant governor's office on the issue of voter identification. You state the communications at issue were made in confidence and their

⁴As our ruling for Exhibit D is dispositive, we need not address your remaining argument against release of a portion of Exhibit D.

confidentiality has been maintained. Based on your representations and our review, we agree the e-mails submitted as Exhibit E constitute privileged attorney-client communications. Accordingly, the lieutenant governor's office may withhold Exhibit E under section 552.107(1) of the Government Code.⁵

You claim the information you have marked in Exhibits F through L 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.

⁵As our ruling for Exhibit E is dispositive, we need not address your remaining argument against its release.

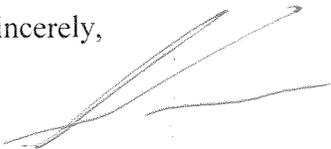
You contend the information you have marked in Exhibits F through L falls within the scope of section 552.111. You state the information at issue relates to communications and documents shared among members of the lieutenant governor's office staff, as well as between members of the senate and employees of state agencies with which the lieutenant governor's office shares a privity of interest. You explain the information at issue relates to policymaking matters pertaining to voter identification. Based on your representations and our review of the information at issue, we conclude the lieutenant governor's office may withhold the information you have marked in Exhibits F through L under section 552.111 of the Government Code.⁶

In summary, the release of information that is subject to sections 306.003 and 306.004 of the Government Code is governed by chapter 306 of the Government Code, not the Act, and it is within the discretion of the lieutenant governor's office to either withhold or release such information. The lieutenant governor's office must withhold Exhibit D under section 552.101 of the Government Code in conjunction with section 323.017 of the Government Code. The lieutenant governor's office may withhold Exhibit E under section 552.107 of the Government Code and the information you have marked in Exhibits F through L under section 552.111 of the Government Code. The remaining information must be released.

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, 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/agn

⁶As our ruling for Exhibits F through L is dispositive, we need not address your remaining argument against the release of Exhibits G and K.

Ref: ID# 447775

Enc. Submitted documents

c: Requestor
(w/o enclosures)