ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 19, 2012

The Honorable Dennis Bonnen
State Representative, District 25
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

OR2012-04018

Dear Representative Bonnen:

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# 448051.

State Representative Bonnen's Office (the "representative's office") received a request for all information related to the issue of voter identification and related laws or proposals. You state some information has been released to the requestor. You also inform us that portions of the responsive information are confidential constituent correspondence subject to chapter 306 of the Government Code.[1] You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, 552.111, and 552.137 of the Government Code.[2] We have considered the claimed exceptions and reviewed the submitted representative sample of information.[3]

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[1]Release of constituent communications under section 306.003(a) or 306.004(a) of the Government Code is governed by chapter 306, not the Act, and it is within the discretion of a legislator to either withhold or release such information.

[2]Although you do not explicitly raise section 552.137 in your brief, we note you have redacted information under that section. Therefore, we will address the applicability of section 552.137.

[3]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.

Initially, we must address the procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving the request, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. *See* Gov't Code § 552.301(b). While you raised sections 552.101 and 552.107 in your letter dated January 9, 2012, within the ten-business-day time period as required by subsection 552.301(b), you did not raise sections 552.103, 552.106, 552.111, and 552.137 until January 17, 2012. Consequently, as to your arguments under sections 552.103, 552.106, 552.111, and 552.137, we find you did not comply with section 552.301 of the Government Code.

A governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Sections 552.103, 552.106, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect only a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (governmental body may waive section 552.111), 663 at 5 (1999) (waiver of discretionary exceptions), 473 (1987) (section 552.103 may be waived). As such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. Therefore, in failing to comply with the requirements of section 552.301, you have waived your claims under sections 552.103, 552.106, and 552.111. However, we note section 552.137 can provide a compelling reason to withhold information. Therefore, we will address the applicability of section 552.137, along with your timely raised arguments under sections 552.101 and 552.107 for the remaining 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 B 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 B consists of communications between staff members of the state representative's office and employees of the council. You state these communications relate to requests from the staff members for information, advice, or opinions from council employees regarding voter identification matters. Based on your representations and our review, we find the information submitted as Category B, which we have marked, is confidential under section 323.017 of the Government Code and must be withheld under section 552.101 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 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 Tex. 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). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. 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

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[4]Because our ruling as to this information is dispositive, we do not address your remaining argument against its disclosure.

the privilege at any time, a governmental body must explain 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 portion of the remaining information you have labeled as Category A consists of communications between individuals you have identified as office staff of the state representative's office, an attorney at the Office of the Attorney General (the "attorney general's office"), and another individual we understand to be a privileged party. You state the representative's office requested advice from the attorney general's office regarding voter identification legislation. Thus, you state these communications were made for the purpose of facilitating the rendition of legal services, and were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information in Category A. Accordingly, the state representative's office may withhold this information, which we have marked, under section 552.107 of the Government Code.

We note you have redacted e-mail addresses in the remaining information. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. However, section 552.137 does not apply to, and Open Records Decision No. 684 does not authorize the withholding of, an e-mail address that a governmental entity maintains for one of its officials or employees. We cannot determine whether the e-mail addresses you have marked are those of members of the public or e-mail addresses maintained by a governmental body for its employees. If they are e-mail addresses of members of the public, the state representative's office must withhold the marked e-mail addresses under section 552.137, unless their owners affirmatively consent to disclosure. However, if they are e-mail addresses maintained by a governmental body for its employees, they may not be withheld under section 552.137 and must be released.

In summary, the state representative's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 323.017 of the Government Code. The state representative's office may withhold the information we have marked under section 552.107 of the Government Code. If the e-mail addresses you have marked are e-mail addresses of members of the public, they must be withheld under section 552.137 of the Government Code. The remaining information must be released to the requestor.

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,

Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/som

Ref: ID# 448051

Enc. Submitted documents

c: Requestor
(w/o enclosures)