ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 1, 2012

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

OR2012-06238

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# 452903.

The Office of the Lieutenant Governor (the "lieutenant governor's office") received a request for any correspondence between the lieutenant governor or a specified person and a second specified person and any vetting material regarding the appointment of the second specified person to any board or commission. You state you have released some of the requested information. You also state some of the submitted information is not public information subject to the Act. You claim the public availability of portions of the submitted information is governed by section 306.004 of the Government Code and the remaining submitted information is excepted from disclosure under section 552.111 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we address your claim that a portion of Exhibit B is not public information subject to the Act. The Act is only applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You assert the second

letter in Exhibit B is not subject to the Act because it falls outside the definition of public information. *See* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Upon review of the letter at issue, we agree it does not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the lieutenant governor's office. *See* Gov't Code § 552.021. Thus, we conclude the letter at issue, which we have marked, is not subject to the Act and need not be released in response to this request.

Next, we address your argument that the remaining information in Exhibit B is not governed by the Act. Section 306.004 of the Government Code 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 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). 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 section 306.004 to information held by a state representative. In construing that provision, 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 306.004(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 the remaining information in Exhibit B consists of information governed by section 306.004(a). Therefore, as the lieutenant governor's office has determined the information at issue is subject to section 306.004, release of the remaining information in Exhibit B 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.

You assert the remaining submitted information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 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); *see also* 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 only those internal communications that consist of advice, opinions, recommendations 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. *See id.*; *see also City of Garland v. The 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).

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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.

You assert the submitted information in Exhibit C consists of a communication regarding the lieutenant governor's potential appointment of an individual to a certain committee. You explain the individual with whom the lieutenant governor communicated is a member of the committee, provided advice regarding the appointment, and has privity of interest with the lieutenant governor. You further state the communication is part of a deliberative process regarding potential changes to the committee's membership, was not intended for release, and has not been shared with a party who does not share privity of interest. Based on your

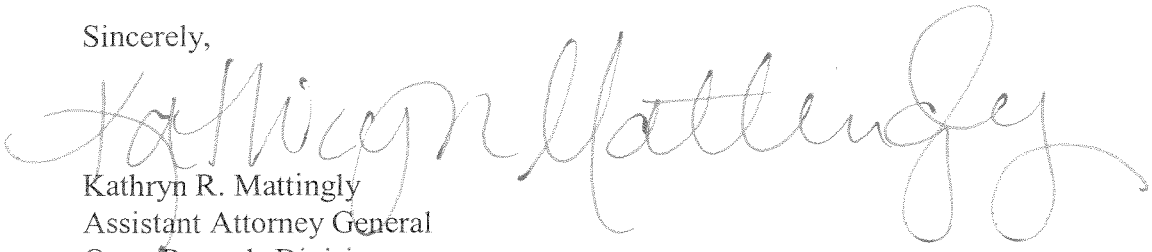
representations and our review, we find the lieutenant governor's office may withhold the information you have marked in Exhibit C under section 552.111 of the Government Code.

In summary, the letter we have marked is not subject to the Act and need not be released in response to this request. The release of information subject to section 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 may withhold the information you have marked in Exhibit C 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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/dls

Ref: ID# 452903

Enc. Submitted documents

c: Requestor
(w/o enclosures)