



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 30, 2012

Ms. Patsy Spaw
Secretary of the Senate
The Senate of the State of Texas
P.O. Box 12068
Austin, Texas 78711

OR2012-11880

Dear Ms. Spaw:

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# 460393.

The Office of Senator Royce West (the "senator's office") received a request for information (1) mentioning the terms "Sons of Confederate Veterans (SCV)," "Supreme Court Building," "Confederate Pension Fund," and "Texas Building Fund" from July 1, 2011 to the date of the request and (2) relating to the Sons of Confederate Veterans' application to the Texas Historical Commission (the "commission") or Travis County Historical Commission for a historical marker during the same time period. You state the senator's office has released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, we address your argument under section 552.103 of the Government Code, as it is potentially the most encompassing exception you raise. Section 552.103 provides, in relevant part:

(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.

...

(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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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). The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551.

You contend the submitted information is excepted from disclosure under section 552.103 because it relates to a pending lawsuit filed by the Texas Division of the Sons of Confederate Veterans (the “division”) against the Texas Department of Motor Vehicles (the “department”) regarding the denial of a specialty license plate and reasonably anticipated litigation between the division and the commission regarding the division’s request for a historical marker. We note, however, the senator’s office is not a party to either the pending or anticipated litigation and, therefore, does not have a litigation interest in the matters 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, you have not provided us with an affirmative representation from the department or the commission explaining either agency seeks to withhold the information at issue pursuant to section 552.103. Accordingly, the senator’s office may not withhold any of the submitted information under section 552.103 of the Government Code.

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 memorandum you have labeled as Item 8 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 Item 8 constitutes a communication between the senator's office and the council. You state this communication relates to a request from the senator's office for information, advice, or opinions from council employees regarding the legal issues surrounding the Sons of Confederate Veterans' application for a specialty license plate. Based on your representations and our review, we find Item 8 is confidential under section 323.017 of the Government Code. Accordingly, the senator's office must withhold Item 8 under section 552.101 of the Government Code on that basis.¹

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

¹As our ruling is dispositive for this information, we do not address your remaining arguments against its disclosure.

(Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive 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 information you have labeled as Item 3 constitutes communications between an outside attorney and a staff attorney of the senator's office. You explain these communications were made for the purpose of providing legal advice to the senator's office. We understand the communications 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 Item 3. Accordingly, the senator's office may withhold Item 3 under section 552.107 of the Government Code.²

Next, we address your remaining claims under sections 552.111 and 552.106 of the Government Code for the rest of the submitted information. 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 this privilege 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 that consist of advice, recommendations, and opinions that reflect 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. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 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)*. Moreover, 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

²As our ruling is dispositive for this information, we do not address your remaining arguments against its disclosure.

section 552.111. *See* Open Records Decision No. 313 at 3 (1982). We note section 552.111 can encompass communications between or among parties who share a privity of interest or common deliberative process. *See* ORD 561 at 9.

We also have concluded a preliminary draft of a document intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

Section 552.106 of the Government Code excepts from disclosure "[a] draft or working paper involved in the preparation of proposed legislation[.]" Gov't Code § 552.106(a). Section 552.106 resembles section 552.111 in that both exceptions protect advice, opinion, and recommendation on policy matters, in order to encourage frank discussion during the policymaking process. *See* Open Records Decision No. 460 at 3 (1987). However, section 552.106 applies specifically to the legislative process and thus is narrower than section 552.111. *Id.* 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 who have an official responsibility to provide such information to members of the legislative body. *Id.* at 1; *see also* Open Records Decision Nos. 429 at 5 (1985) (statutory predecessor to Gov't Code § 552.106 not applicable to information relating to governmental entity's efforts to persuade other governmental entities to enact particular ordinances), 367 at 2 (1983) (statutory predecessor applicable to recommendations of executive committee of State Board of Public Accountancy for possible amendments to Public Accountancy Act). As section 552.111, section 552.106 does not protect purely factual information from public disclosure. *See* ORD 460 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 falls within the scope of section 552.106. *See* ORD 460 at 2.

You seek to withhold the remaining information under sections 552.111 and 552.106 of the Government Code. You contend the information at issue consists of analysis, advice, opinions, and recommendations concerning policy-related matters. Having considered your arguments and reviewed the information at issue, we conclude the senator's office may

withhold the information we have marked under section 552.111 of the Government Code.³ We conclude the remaining information at issue is factual and, as such, may not be withheld under either section 552.111 or section 552.106.

In summary, the senator's office must withhold Item 8 under section 552.101 of the Government Code in conjunction with section 323.017 of the Government Code. The senator's office may withhold Item 3 under section 552.107(1) of the Government Code. The senator's office may also withhold the information we have marked 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/ag

Ref: ID# 460393

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the marked information includes a draft document, which we understand has been released in its final form.