



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 30, 2012

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

OR2012-11881

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# 460394.

The Office of Senator Rodney Ellis (the "senator's office") received a request for information (1) mentioning the terms "Sons of Confederate Veterans," "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 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 either governed by section 306.004 of the Government Code or excepted from disclosure under sections 552.101, 552.103, 552.106, 552.107, and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, we note some of the information you have submitted to us for review is not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the senator's office is not required to release this information, which we have marked, in response to this request.

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.

Gov't Code § 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]. 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 disclosure 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 some of the submitted documents contain information governed by section 306.004(a). Therefore, to the extent the senator's office determines the information at issue is subject to section 306.004(a), the senator's office has the discretion to either withhold the information or release it to the requestor. If the senator's office determines the information at issue is not subject to section 306.004(a), then the information is subject to the Act, and the senator's office must release it, unless the information falls within an exception to disclosure. To the extent the information is subject to the Act, we will consider the applicability of the exceptions you claim to this information, as well as the remaining submitted information.

You claim section 552.101 of the Government Code, which 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 Item 12 is excepted from disclosure under section 552.101 in conjunction with section 323.017 of the Government Code, which provides as follows:

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 12 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 this information is confidential under section 323.017 of the Government Code. Accordingly, the senator's office must withhold Item 12 under section 552.101 of the Government Code on that basis.¹

You assert the remaining information at issue is excepted from disclosure under section 552.103 of the Government Code, which provides in 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 sufficient to demonstrate section 552.103 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.). The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See Open Records Decision No. 551 at 4 (1990).*

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

You contend the remaining 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 Texas Historical Commission (the "commission") regarding the division's request for a historical marker. However, you do not inform us the senator's office is or would be a party to either the pending or the anticipated litigation. Therefore, the senator's office 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 Gov't Code § 552.103 only applies when governmental body is party to litigation). In such a situation, we require an affirmative representation from a governmental body with a 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 that 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 552.107(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. *See 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. *See 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 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 Items 6 and 9 constitute communications between the Office of the Attorney General and 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 remain confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to this information. Accordingly, the senator's office may withhold Items 6 and 9 under section 552.107(1) of the Government Code.

Next, we address your claims under sections 552.111 and 552.106 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 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 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.

We also have concluded section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (1995) (Gov't Code § 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). In order for section 552.111 to protect communications with a third party, the governmental body must identify the third party and explain the nature of the party's relationship with the governmental body. Section 552.111 is not applicable to a governmental body's communications with 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.

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. 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 sections 552.111 and 552.106 of the Government Code.² As we find you have not established that any of the remaining information at issue falls within the scope of these exceptions, the senator's office may not withhold any of the remaining information under section 552.111 or section 552.106.

We note the remaining information includes e-mail addresses of members of the public. 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 owner of the e-mail address consents to its release or the e-mail address falls within the scope of section 552.137(c).³ *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the senator's office must withhold the e-mail addresses we have marked under section 552.137.⁴

In summary, to the extent the senator's office determines the information at issue is subject to section 306.004(a), the senator's office has the discretion to either withhold the information or release it to the requestor. The senator's office must withhold Item 12 under section 552.101 of the Government Code in conjunction with section 323.017 of the Government Code and the e-mail addresses we have marked under section 552.137 of the Government Code. The senator's office may withhold Items 6 and 9 under section 552.107(1) of the Government Code and the information we have marked under

²We note the marked information includes a draft document, which we understand has been released in its final form.

³This office will raise section 552.137(c) on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

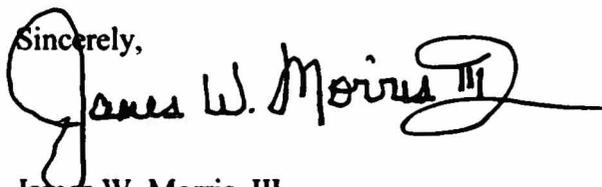
⁴This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion.

sections 552.111 and 552.106 of the Government Code. The senator'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, 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,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large, looped initial "J" and a long horizontal flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 460394

Enc. Submitted documents

c: Requestor
(w/o enclosures)