



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 20, 2009

Mr. Chris McGhee
Chief of Staff
State Representative Todd Smith
P.O. Box 2910
Austin, Texas 78768-2910

OR2009-10044

Dear Mr. McGhee:

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# 347972.

State Representative Todd Smith ("Representative Smith") received a request for the following five categories of information pertaining to voter identification: (1) internal documents produced by Representative Smith over a specified time period; (2) correspondence between or among Representative Smith, eleven named individuals and the Legislative Budget Board; (3) a schedule of all meetings held by Representative Smith; (4) information regarding the use of state funds for research, briefing, and deliberation; and (5) documents referring to the Texas Democratic Party over a specified time period. You state Representative Smith will release some of the requested information. You also inform us that Representative Smith has withheld from the requestor certain confidential constituent correspondence pursuant to sections 306.003 and 306.004 of the Government Code.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.106, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹Release of information subject to 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.

You claim the 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); 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 from disclosure only those internal communications that consist 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).

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).

We note that section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (section 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) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). When determining if an interagency memorandum is excepted under section 552.111, we must also consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* ORD 561 at 9. For section 552.111 to apply in such instances, 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 (1990).

You state that the submitted information contains advice, opinions, and recommendations pertaining to the proposed voter identification legislation, a policymaking matter. You also inform us that the information in the communications between Representative Smith and the Texas Legislative Council (the "council"), "subject matter resources from other states[,] and the Texas Secretary of State relates to "the formulation of the scope and policy of the voter [identification] legislation." You represent these parties shared a privity of interest and common deliberative process in this effort. Based on your representations and our review of the information at issue, we find that you have established that the deliberative process privilege is applicable to some of the submitted information. Therefore, Representative Smith may withhold the information we have marked under section 552.111 of the Government Code.² However, the remaining information appears to consist either of general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, you have failed to demonstrate, and the information does not reflect on its face, that this information consists of advice, recommendations, or opinions that pertain to policymaking. Accordingly, we find that the remaining information is not excepted from disclosure under section 552.111, and it may not be withheld on that basis.

Next, we address your claim of section 552.106 of the Government Code. Section 552.106(a) excepts from required public 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.* Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. *See* Open Records Decision No. 460 at 1 (1987). The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, section 552.106 encompasses only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation and does not except purely factual information from public disclosure. *Id.* at 2. However, a comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.*

After reviewing the remaining information at issue, we find that you have not established that this information consists of a draft or working paper involved in the preparation of proposed

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

legislation for purposes of section 552.106. Therefore, we conclude that none of the remaining information is excepted from disclosure under section 552.106.

You assert that portions of the remaining information are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 323.017 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by statute. Section 323.017 of the Government Code provides:

Communications, including conversations, correspondence, electronic communications, between a member of the legislature or the lieutenant governor and an assistant or employee of 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 that portions of the submitted documents consist of communications between Representative Smith in his official capacity and employees of the council. You indicate these communications relate to and contain specific research prepared for Representative Smith, upon his request, by staff and attorneys from the council. Based on your representations and our review of the records at issue, we find that the information we have marked is confidential under section 323.017 and must therefore be withheld under section 552.101.

We note some of the remaining information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code.³ *Id.* § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Representative Smith may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

prior to the date on which the request for this information was made. You have not informed us whether or not the employee whose information is at issue chose to withhold his personal information prior to Representative Smith's receipt of the request for information. Therefore, if the employee whose information is at issue timely elected to withhold his personal information, Representative Smith must withhold this information, which we have marked, pursuant to section 552.117(a)(1) of the Government Code. If the employee did not timely elect to withhold his personal information, then Representative Smith may not withhold any of the marked personal information under section 552.117(a)(1) of the Government Code.

Finally, we note that some of the remaining information consists of personal e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 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). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c). Accordingly, Representative Smith must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.

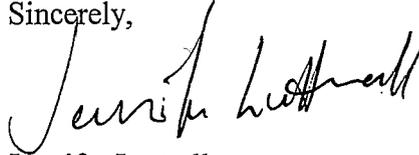
In summary, Representative Smith may withhold the information we have marked under section 552.111 of the Government Code. Representative Smith must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 323.017 of the Government Code. If the employee whose information is at issue timely elected to withhold his personal information, Representative Smith must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. If the employee did not timely elect to withhold his personal information, then Representative Smith may not withhold any of the marked personal information under section 552.117(a)(1) of the Government Code. Representative Smith must withhold the information we have marked under section 552.137 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 at (512) 475-2497.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jennifer Luttrall".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 347972

Enc. Submitted documents

c: Requestor
(w/o enclosures)