



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 17, 2010

The Honorable Edmund Kuempel
State Representative, District 44
P.O. Box 2910
Austin, Texas 78768-2910

OR2010-02392

Dear Representative Kuempel:

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# 369346.

The Honorable Edmund Kuempel, State Representative, District 44, received a request for files related to horseracing, dog racing, poker, casinos, and other gambling-related matters. You claim that a portion of the submitted information is excepted from disclosure under section 552.106 of the Government Code, and that a portion of the submitted information is subject to sections 306.003 and 306.004 of the Government Code. We have considered the exception you claim and reviewed your arguments and the submitted information.

Section 306.003 of the Government Code provides as follows:

(a) Records of a member of the legislature or the lieutenant governor that are composed exclusively of memoranda of communications with residents of this state and of personal information concerning the person communicating with the member or lieutenant governor are confidential. However, the member or the lieutenant governor may disclose all or a part of a record to which this subsection applies, and that disclosure does not violate the law of this state.

(b) The method used to store or maintain a record covered by Subsection (a) does not affect the confidentiality of the record.

Gov't Code § 306.003. The confidentiality provision in section 306.003(a) applies to the records of a member of the legislature or of the lieutenant governor of two kinds of information: (1) records of memoranda of communications with Texas residents and (2) records of personal information about the person communicating with the legislator or lieutenant governor. *Id.* Thus, "personal information" about a person communicating with a legislator or the lieutenant governor is within section 306.003(a) even if it is not recorded in a memorandum prepared by the legislator or lieutenant governor. *Id.* Although section 306.003(a) deems confidential the records that are subject to the provision, it gives a member of the legislature the discretion to disclose all or part of such record. *See id.* § 306.003(a).

While section 306.003 applies to records consisting of memoranda of communications and records of a correspondent's personal information, section 306.004 refers to the communications themselves and 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). As is also true of records that are subject to section 306.003(a), a legislator has the discretion to disclose all or part of records that are subject to section 306.004(a).

In Open Records Decision No. 648 (1996), this office addressed the applicability of sections 306.003 and 306.004 to information held by a state representative. In construing these provisions, 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 that the statute’s legislative history affirmed this construction of chapter 306 of the Government Code. In a footnote, we explained that 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 that is subject to sections 306.003(a) or 306.004(a) is governed by chapter 306 of the Government Code, not the Act, and it is within the discretion of a legislator to either withhold or release such information.

You have submitted information you have designated “Category 2” information that you claim falls under section 306.003(a) or section 306.004(c). Therefore, to the extent you determine that the information in question is subject to section 306.003(a) or section 306.004(a), it is within your discretion to either withhold this information or release it to the requestor. To the extent you determine that the Category 2 information is not subject

to section 306.003(a) or section 306.004(a), such information is subject to the Act and must be released, as you have raised no other exceptions to disclosure for this information.

You seek to withhold the information you have identified as Category 1 under section 552.106 of the Government Code, which excepts from disclosure “[a] draft or working paper involved in the preparation of proposed legislation [.]” Gov’t Code § 552.106(a). Section 552.106 protects advice, opinion, and recommendation on policy matters in order to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body. *See* Open Records Decision No. 460 at 3 (1987). 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; Open Records Decision No. 429 (1985) (exception not applicable to materials prepared by person or agency who has no official responsibility to do so but only acts as interested party who wishes to influence legislative process). Section 552.106 does not protect purely factual information from public disclosure. *See id.* 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 is within the scope of section 552.106. ORD 460 at 2.

You state the submitted information consists of notes, communications, and analysis concerning proposed gaming legislation and was prepared by staff of the Chairman of the House Committee on Licensing and Administrative Procedures. Based on these representations and our review, we conclude a portion of the Category 1 information constitutes advice, opinion, analysis, and recommendation regarding proposed legislation. Therefore, you may withhold this information, which we have marked, under section 552.106 of the Government Code. However, the remaining Category 1 information is either factual in nature, does not reveal advice, opinion, analysis, or recommendation regarding proposed legislation, or was prepared by someone who you have not demonstrated has an official responsibility to provide such information to the legislature. Therefore, the remaining information may not be withheld pursuant to section 552.106 of the Government Code.

We note that a portion of the remaining information is subject to section 552.137 of the Government Code.¹ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purposes 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). Gov’t Code § 552.137 (a)-(c).

¹The 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).

We have marked an e-mail address in the remaining information that is not of a type specifically excluded by subsection (c). Accordingly, the marked e-mail address must be withheld under section 552.137 of the Government Code, unless the owner affirmatively consents to its disclosure.

In summary, to the extent you determine that the information you have submitted as Category 2 information is subject to section 306.003(a) or section 306.004(a) of the Government Code, it is within your discretion to either withhold that information or release it to the requestor. Any remaining Category 2 information that you determine is not subject to section 306.003(a) or section 306.004(a) must be released to the requestor. You may withhold the Category 1 information we have marked pursuant to section 552.106 of the Government Code. The marked e-mail address must be withheld under section 552.137 of the Government Code, unless the owner affirmatively consents to its disclosure. The remaining Category 1 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 369346

Enc. Submitted documents

c: Requestor
(w/o enclosures)