



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 4, 2014

Mr. Jeff Archer
Chief Legislative Counsel
Texas Legislative Council
P.O. Box 12128
Austin, Texas 78711-2128

OR2014-03708

Dear Mr. Archer:

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# 514518.

The Office of Representative Carol Alvarado (the "representative's office") received a request for any correspondence between Representative Alvarado and other members of the House Select Committee on Transparency in State Agency Operations (the "committee") or a named individual regarding a specified investigation over a specified period of time. You state the representative'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.

Initially, we note you have marked a portion of an e-mail chain as not responsive. This ruling does not address the public availability of nonresponsive information, and the representative's office is not required to release nonresponsive information in response to this request.

Section 552.103 provides in relevant part as follows:

- (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 that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

This office has held that "litigation" within the meaning of section 552.103 includes contested cases conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991).

You explain the committee is a select committee of the house of representatives created by proclamation of the speaker of the house on January 31, 2013, pursuant to Rule 1, Section 16, Rules of the House of Representatives, 83rd Legislature. *See* Tex. H.R. Rule 1, § 16(b), Tex. H.R. 4, 83d Leg., R.S., 2013 H.J. of Tex. 51, 57. You state the jurisdiction and duties of the committee include "monitoring the conduct of individuals appointed to offices of the executive branch of state government, investigating matters relating to certain conduct of those individuals, and proposing articles of impeachment against those officers if the committee determines that grounds for impeachment exists." You inform us the house of representatives is given sole jurisdiction on the presentment of articles of impeachment to the senate. *See* Gov't Code §§ 665.001-665.081 (procedures for impeachment and removal). You state on June 25, 2013, the committee initiated an investigation into the possible

impeachment of a named individual. Pursuant to section 665.005 of the Government Code, during an impeachment proceeding, the committee may “send for persons or papers[,] compel the giving of testimony[,] and punish for contempt to the same extent as a district court of [Texas].” *Id.* § 665.005. You state if the committee determines there are sufficient grounds to justify the charges, a decision is made to adopt articles of impeachment, the articles of impeachment are presented to the senate, and the senate must meet as a court of impeachment to determine whether the officer in question is to be removed from office.

While the impeachment process may have some judicial characteristics, we conclude an impeachment hearing is not litigation of a civil or criminal nature as required by the express language of section 552.103. *See id.* § 552.103; *see also Ferguson v. Maddox*, 263 S.W. 888 (1924) (concluding impeachment is judicial in character). As noted above, factors considered by our office in determining whether a proceeding is judicial in nature include whether the proceeding provides for discovery and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision. *See* ORD 588. You explain the committee may compel the production of papers or the giving of testimony; however, you do not explain how an impeachment proceeding allows for dual-sided discovery or appellate review of the resulting decision. While this office has previously found contested cases held in an administrative forum to be judicial in nature, those contested cases, unlike an impeachment proceeding conducted by the Legislature, are ultimately subject to review by the judiciary and are in essence the first step in an adversarial judicial process that is ultimately resolved in the courts. Here, the judicial branch is never involved in the impeachment proceeding. Rather, an impeachment proceeding is a purely legislative process outside of the judicial branch of government. In light of these facts, and following the Act’s mandate to liberally construe its provisions in favor of implementing its policy of openness, we cannot conclude an impeachment proceeding constitutes civil or criminal litigation for purposes of section 552.103(a). Accordingly, none of the submitted information may be withheld under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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 capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a

communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. See 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 Exhibits A, C through F, and H consist of communications between the committee’s legal counsel and committee members and their supporting legislative staff. You state these communications were made in furtherance of the rendition of professional legal services to the committee. You further state these communications have been kept confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the representative’s office may withhold Exhibits A, C through F, and H under section 552.107(1) of the Government Code.¹

Section 552.111 of the Government Code excepts from disclosure “[a]n 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, writ ref’d n.r.e.); 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, opinions, and other material

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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, as 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) (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). 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).

You state the remaining information consists of communications among committee members considering "strategies with regard to its investigation and related legislative functions." Upon review, we find the information we have marked in Exhibit B consists of advice, opinions, and recommendations on the policymaking matters of the committee. Therefore, the representative's office may withhold the information we have marked in Exhibit B under section 552.111 of the Government Code.² However, we find the remaining information at issue to be general administrative information that does not relate to policymaking or information that is purely factual in nature. You have not explained how this information constitutes internal advice, recommendations, or opinions regarding policymaking issues. Therefore, we find you have failed to establish the applicability of section 552.111 to the remaining information at issue. Accordingly, the representative's office may not withhold any of the remaining information under section 552.111 of the Government Code.

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 2 (1987). However, section 552.106 applies specifically to the legislative process and is narrower than section 552.111. *Id.* 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.* Section 552.106 does not protect purely factual information from public disclosure. *See id.*; *see also* Open Records Decision No. 344 at 3-4 (1982) (for purposes of statutory predecessor, factual information prepared by State Property Tax Board

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

did not reflect policy judgments, recommendations, or proposals concerning drafting of legislation). Upon review of your arguments, we find you have not demonstrated how any of the remaining information at issue constitutes advice, opinion, analysis, or recommendations for purposes of section 552.106. Accordingly, the representative's office may not withhold any of the remaining information under section 552.106 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. You contend the remaining information is confidential under section 552.101 in conjunction with the legislative privilege, also known as legislative immunity, which generally shields legislative actors from being required to testify about their legislative activities.³ See *In re Perry*, 60 S.W.3d 857, 860 (Tex. 2001); see also *Gravel v. United States*, 408 U.S. 606, 615-16 (1972) (senator not required to answer questions about events that occurred in senate subcommittee meeting); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (legislators "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves"). As such, the legislative privilege is a privilege against testifying in discovery or trial. In Open Records Decision No. 575 (1990), this office determined discovery privileges are not covered under the statutory predecessor of the Act. Therefore, you may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of legislative immunity.

We note some of the remaining information is subject to section 552.137 of the Government Code.⁴ 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). The e-mail address at issue is not excluded by subsection (c). Therefore, the representative's office must

³The legislative privilege also refers to a legislator's immunity from civil liability, immunity from arrest, and legislative continuances. See, e.g., TEX. CONST. art. III, § 14 (senators and representatives generally privileged from arrest while traveling to or attending legislative sessions); Civ. Prac. & Rem. Code § 30.003 (court must grant continuance if attorney is a legislative member and will be attending legislative session); *In re Perry*, 60 S.W.3d at 859 (immunity from civil liability).

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withhold the personal e-mail address we have marked in Exhibit G under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.⁵

In summary, the representative's office may withhold Exhibits A, C through F, and H under section 552.107(1) of the Government Code. The representative's office may withhold the information we have marked in Exhibit B under section 552.111 of the Government Code. The representative's office must withhold the e-mail address we have marked in Exhibit G under section 552.137 of the Government Code, unless the owner affirmatively consents to its disclosure. The representative'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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Thana Hussaini
Assistant Attorney General
Open Records Division

TH/som

Ref: ID# 514518

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.