



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 17, 2015

Ms. Dorothy Browne
Chief of Staff
Office of State Representative Elliott Naishtat
District 49
P.O. Box 2910
Austin, Texas 78768-2910

OR2015-16915

Dear Ms. Browne:

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# 575801.

The Office of State Representative Elliott Naishtat (the "representative's office") received a request for thirteen categories of information pertaining to communications between named or specified individuals, certain documents pertaining to House Bill 1438, the House Rules and Senate Rules for the 83rd and 84th legislative sessions, and certain documents pertaining to guardianship bills. You state the representative's office has provided some of the requested information to the requestor. You claim the public availability of some of the submitted information is governed by sections 306.003 and 306.004 of the Government Code. You claim portions of the remaining submitted information are excepted from disclosure under section 552.111 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you claim the information you have marked in Exhibit D is not subject to the Act, but is instead governed by sections 306.003 and 306.004 of the Government Code. Section 306.003 of the Government Code provides, in part:

- (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(a)-(b). 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) memoranda of communications with Texas residents and (2) personal information about the person communicating with the legislator or lieutenant governor. *Id.* § 306.003(a).

While section 306.003 applies to records that are composed of memoranda of communications and records of personal information of a legislator or the lieutenant governor, section 306.004 refers to the communications themselves and provides:

(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(a)-(c). For the purposes of section 306.004, a “communication” includes “conversation, correspondence, and electronic communication.” *Id.* § 306.001. We note a legislator or the lieutenant governor has the discretion to disclose all or part of records that are subject to section 306.004(a). *Id.* § 306.004(c). However, section 306.004 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. *Id.* § 306.004(b).

You state the information you have marked in Exhibit D consists of information governed by section 306.003 or section 306.004 of the Government Code. Therefore, as the representative’s office has determined the information at issue in Exhibit D is subject to section 306.003 or section 306.004, release of the information at issue in Exhibit D is governed by chapter 306 of the Government Code, not the Act, and it is within the discretion of the representative’s office to either withhold or release such information.

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 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. *Arlington Indep. Sch.*

Dist. v. Tex. Attorney Gen., 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); 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).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. 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). For section 552.111 to apply, 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.

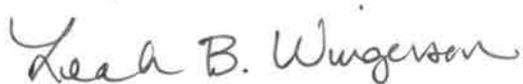
You contend the information you have marked in Exhibit B is excepted under the deliberative process privilege because it consists of advice, opinions, and recommendations regarding proposed legislation. You inform us the communications at issue were between legislative members, Travis County officials, and El Paso county officials. You explain county officials and employees occasionally assist legislators in the development of proposed legislation. You represent "[a]ll parties to the communications have privity of interest." Based on your representations and our review, we find the information at issue consists of advice, opinions, and recommendations pertaining to the representative's office's policy mission. Accordingly, the representative's office may withhold the information you have marked in Exhibit B under section 552.111 of the Government Code.

In summary, release of the information you have marked in Exhibit D is governed by chapter 306 of the Government Code, not the Act, and it is within the discretion of the representative's office to either withhold or release such information. The representative's office may withhold the information you have marked in Exhibit B under section 552.111 of the Government Code. 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,

A handwritten signature in cursive script that reads "Leah B. Wingerson".

Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/bhf

Ref: ID# 575801

Enc. Submitted documents

c: Requestor
(w/o enclosures)