



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 7, 2015

Mr. Jon Schnautz  
Deputy General Counsel  
Office of Speaker Joe Straus  
Texas House of Representatives  
P.O. Box 2910  
Austin, Texas 78768

OR2015-21071

Dear Mr. Schnautz:

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# 582301.

The Office of the Speaker (the "speaker's office") received a request for all correspondence between specified entities during a specified time period related to budget veto powers. You state you have released some information. We understand you will redact certain information pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.146 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.146 of the Government Code provides in relevant part:

- (a) All written or otherwise recorded communications, including conversations, correspondence, and electronic communications, between a

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<sup>1</sup>This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold certain 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 decision.

member of the legislature or the lieutenant governor and an assistant or employee of the Legislative Budget Board [(the “board”)] are excepted from [required public disclosure].

...

(c) This section does not except from required disclosure a record or memoranda of a communication that occurs in public during an open meeting or public hearing conducted by the [board].

Gov’t Code § 552.146(a), (c). You state the information you marked consists of communications between employees of the board and staff of the speaker’s office. You also state the information at issue is held in confidence and does not pertain to communications that occurred in open meetings or public hearings. Upon review, we conclude the speaker’s office may withhold the information you have marked in Exhibits B and C under section 552.146 of the Government Code.<sup>2</sup>

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses section 323.017 of the Government Code, which provides:

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 state portions of the remaining information consist of communications between the speaker’s office and employees of the council that relate to a request for advice. Upon review, we agree portions of the remaining information consist of communications between a member of the legislature and employees of the council that relate to a request for information, advice, or opinion from council employees. Accordingly, the speaker’s office must withhold the information we marked under section 552.101 of the Government Code

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<sup>2</sup>As our ruling is dispositive as to this information, we need not address your remaining arguments against disclosure.

in conjunction with section 323.017 of the Government Code.<sup>3</sup> However, none of the remaining information you marked consists of communications between a member of the legislature or lieutenant governor and an employee or assistant of the council, and thus the speaker's office may not withhold the remaining information you have marked on this basis.

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 that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate 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. *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). 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, 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.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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. *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 that 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 portions of the remaining information in Exhibit C constitute notes and communications between the speaker's office attorneys and employees in their capacity as clients that were made for the purpose of providing legal services to the speaker's office.

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information at issue consists of privileged attorney-client communications and the speaker's office may withhold the information we have marked under section 552.107(1) of the Government Code.<sup>4</sup>

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. Section 552.111 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. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). 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). However, 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. ORD 615 at 5-6; *see also Dallas Morning News*, 22 S.W.3d at 364 (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; 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 assert portions of the remaining information consist of advice, opinions, and recommendations relating to policy matters of the speaker’s office. Upon review, we find

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<sup>4</sup>As our ruling is dispositive as to this information, we need not address your remaining argument against disclosure.

the speaker's office may withhold the information we have marked in Exhibits B and C under section 552.111. However, we find the remaining information you have marked does not consist of advice, opinion, or recommendations, and thus may not be withheld under section 552.111 of the Government Code.

In summary, the speaker's office may withhold the information you have marked under section 552.146 of the Government Code. The speaker's office 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. The speaker's office may withhold the information we have marked under sections 552.107(1) and 552.111 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](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,



Mili Gosar  
Assistant Attorney General  
Open Records Division

MG/akg

Ref: ID# 582301

Enc. Submitted documents

c: Requestor  
(w/o enclosures)