ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 4, 2011

Open Records Decision No. 687

Re: Whether the Public Information Act grants the Attorney General authority to issue a decision under section 552.306 when, prior to the issuance of the decision, a party has brought an action before a Texas court posing the same open records question (ORQ-72)

We consider whether the Public Information Act (the "PIA"), chapter 552 of the Government Code, grants the Attorney General authority to issue a decision under section 552.306 of the Government Code when, prior to the issuance of the decision, a party has brought an action before a Texas court posing the same open records question.[1]

The PIA generally requires all governmental bodies to release requested public information promptly upon request. *See* TEX. GOV'T CODE ANN. §§ 552.001 (West 2004) (proclaiming state policy that each person is entitled to "complete information about the affairs of government and the official acts of public officials and employees"), .002 (defining "public information"), .003 (defining "governmental body"), .221(a) (requiring public information officer to "promptly produce public information for inspection, duplication, or both on application by any person to the officer"). However, when a governmental body seeks to withhold requested information, it must first seek a ruling from the Attorney General and, in that submission, articulate why the requested information falls within one the PIA's

[1]We issue this decision under section 552.011 of the Government Code, which authorizes the Attorney General to "prepare, distribute, and publish any materials, including detailed and comprehensive written decisions and opinions, that relate to or are based on" the PIA. TEX. GOV'T CODE ANN. § 552.011 (West 2004).

exceptions to disclosure, absent a previous determination confirming that the requested information is subject to a PIA exception.[2] *Id.* § 552.301(a) (West Supp. 2010).

Section 552.306 governs the request for a ruling from the Attorney General and provides:

> (a) Except as provided by [s]ection 552.011, the attorney general shall promptly render a decision requested under this subchapter, consistent with the standards of due process, determining whether the requested information is within one of the exceptions of [s]ubchapter C. The attorney general shall render the decision not later than the 45th business day after the date the attorney general received the request for a decision. If the attorney general is unable to issue the decision within the 45-day period, the attorney general may extend the period for issuing the decision by an additional 10 business days by informing the governmental body and the requestor, during the original 45-day period, of the reason for the delay.
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> (b) The attorney general shall issue a written opinion of the determination and shall provide a copy of the opinion to the requestor.

Id. § 552.306 (West Supp. 2010).

The open records ruling process is specific to the exact information responsive to the underlying request. To facilitate efficiency and eliminate the need for unnecessary repetitive requests, PIA section 552.011 authorizes the Attorney General to issue opinions and decisions on PIA issues of general applicability. *Id.* § 552.011 (West 2004). However, if a previous determination does not apply to information that a governmental body wants to withhold from disclosure, section 552.306 calls for the Attorney General to render a decision within the specified deadline when asked to do so by a governmental body. *Id.* § 552.306 (West Supp. 2010); *Houston Chronicle Publ'g Co. v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989) ("The Attorney General has a mandatory duty [under the PIA] to 'forthwith render a decision' if requested by a governmental body."). As decision-maker in the open records ruling process, the Attorney General must maintain "uniformity in the application, operation, and interpretation" of the PIA. TEX. GOV'T CODE ANN. § 552.011 (West 2004).

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[2]If a court or this office has previously determined the governmental body may or must withhold the requested information under an exception to disclosure, the governmental body may rely on that previous determination to withhold the requested information without the necessity of seeking a ruling from this office. *See id.* § 552.301(a) (West Supp.2010); *Dominguez v. Gilbert*, 48 S.W. 3d 789, 793 (Tex. App.—Austin 2001, no pet.). The meaning of the term "previous determination" under section 552.301(a) of the Government Code means only one of two types of Attorney General decisions and is discussed at length in Open Records Decision No. 673 (2001). Tex. Att'y Gen. ORD-673 (2001).

However, for many years, this office has declined to issue an opinion when the same question is pending before a court regardless of whether this office has opined on the issue in the past. *See, e.g.*, Tex. Att'y Gen. Op. Nos. JM-287 (1984) at 2, MW-205 (1980) at 1, V-291 (1947) at 5-6. In accordance with this policy, this office has not ruled when asked to do so by a governmental body under section 552.306 or its predecessor in order to allow the court to resolve a pending disclosure question. *See, e.g.*, Tex. Att'y Gen. ORD-560 (1990) at 3 (determining Attorney General will not rule under PIA on disclosure by Texas Department of Criminal Justice of use of force reports subject to jurisdiction of federal court in ongoing litigation); *see also A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 671 (Tex. 1995) (noting in dicta Attorney General withdrew opinion pending litigation on PIA questions). Based on the following legal analysis and the statutory requirements of the PIA, this litigation policy is withdrawn and is no longer applicable to the PIA ruling process.[3]

Section 552.306 does not authorize the Attorney General to refuse to perform the duty to issue an open records ruling simply because the same disclosure question is pending before a Texas court. Under section 552.306, unless this office has already ruled on the precise question to that governmental body, the Attorney General is directed in mandatory language to rule whenever a governmental body seeks an open records ruling. *See Houston Chronicle Publ'g Co. v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989) (holding Attorney General may not refuse to fulfill his duty to render open records decision). While the historic policy of withholding a decision in deference to the courts serves comity interests among the coordinate branches, that policy makes less sense under the current structure of the PIA than it did at the outset. The PIA originally said little about the scope of the Attorney General's

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[3]This change in our policy under the PIA does not affect the litigation policy of this office in issuing opinions on general law pursuant to sections 402.042 and 402.043 of the Government Code. TEX. GOV'T CODE ANN. §§ 402.042, .043 (West 2005). Section 402.042(c) specifically permits the Attorney General to notify the requesting person in writing that the opinion will be delayed or not rendered and state the reason for the delay or refusal. *Id.* § 402.042(c)(2). In addition, Attorney General opinions and open records rulings differ in several important ways. First, sections 402.042 and 402.043 permit, rather than require, an authorized requestor to seek the Attorney General's opinion. *Id.* §§ 402.042, .043. Furthermore, Attorney General opinions issued under section 402.042 and 402.043 are merely advisory and need not be followed by the requesting entity or the courts. *See Comm'rs Court of Titus County v. Agan*, 940 S.W.2d 77, 82 (Tex. 1997) ("While Attorney General's opinions are persuasive, they are not controlling on the courts."). Moreover, Attorney General opinions do not require the requesting entity to take any action or impose a criminal penalty if the requesting entity chooses not to follow the opinion. TEX. GOV'T CODE ANN. §§ 402.042, .043. In contrast, the PIA requires a governmental body to seek an open records rulings whenever it seeks to withhold requested public information unless there is a previous determination. *Id.* § 552.301(a). If a governmental body refuses to seek an open records ruling, a requestor or the Attorney General may file suit for a writ of mandamus to compel a governmental body to request an open records ruling. *Id.* § 552.321(a). In addition, an open records ruling has significant legal implications: a ruling orders a governmental body to take action by requiring the governmental body to either release or withhold requested public information. *Id.* § 552.306(a). The governmental body must release or withhold requested information in accordance with the ruling or challenge the ruling in court. *Id.* §§ 552.324, .325. In addition, if an open records ruling is not followed, a public information officer or the officer's agent may be subject to criminal penalties unless the ruling is challenged in court. *See id.* §§ 552.352, .353.

role in interpreting its substantive provisions or developing its application. However, in 1999, the Legislature amended the PIA to clarify that the Attorney General's role in the open records process is to "maintain uniformity in the [PIA's] application, operation, and interpretation." Act of May 27, 1999, 76th Leg., R.S., ch. 1319, § 4, 1999 Tex. Gen. Laws 4501 (adding section 552.011 to PIA). The Legislature's intention that the Attorney General, rather than the courts, perform that role, can only be accomplished if the Attorney General rules on disclosure questions in the first instance. Courts recognize this role and give due consideration to the Attorney General on PIA questions. *See Holmes v. Morales,* 924 S.W.2d 920, 924 (Tex. 1996) (explaining that Attorney General opinions are "persuasive but not controlling" authority); *City of Dallas v. Abbott,* 279 S.W.3d 806, 808 (Tex. App.—Amarillo 2007), *rev'd on other grounds*, 304 S.W.3d 380 (Tex. 2010) (giving due consideration to Attorney General decisions although not binding on appellate court, especially in cases involving the PIA "under which the Attorney General has a mandate to determine the applicability of exceptions to public disclosure"); *City of Lubbock v. Cornyn,* 993 S.W.2d 461, 463 (Tex. App.—Austin, 1999, no pet) (same); *Rainbow Group, Ltd. v. Tex. Employment Comm'n*, 897 S.W.2d 946, 949 (Tex. App.—Austin 1995, writ denied) (same); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 322 (Tex. App.—Houston [1st Dist.] 1984, no writ) ("While opinions of the Attorney General are not binding upon the courts, they should be given great weight.")

Significantly, nothing in the text of the PIA affirmatively directs the Attorney General to decline to issue an open records ruling for the benefit of the public, governmental bodies, and the reviewing courts. To the contrary, subchapter G of the PIA, which sets out a detailed statutory scheme under which the Attorney General's open records ruling process operates, evidences the Legislature's intention that the Attorney General play a critical, quasi-judicial role when a governmental body wishes to avoid releasing information requested pursuant to the PIA. *See* TEX. GOV'T CODE ANN. §§ 552.301-.308 (West 2004 & Supp. 2010). The Legislature has charged the Attorney General "to maintain uniformity in the application, operation, and interpretation of [the PIA]." *Id.* § 552.011 (West 2004). Moreover, that same statutory scheme not only requires the Attorney General to "maintain uniformity" in the interpretation of the PIA and to decide all governmental bodies' disclosure questions but also includes the following components of the open records ruling process: several deadlines a governmental body and the Attorney General must follow, *id.* §§ 552.301(b), (d), (e), (e-1), .306(a) (West Supp. 2010); a list of the particular information the governmental body must submit to the Attorney General when seeking a ruling, *id.* § 552.301(d); the requirement that the governmental body copy the requestor on its submissions to this office, *id.* § 552.301(e-1); the presumption that the requested information is public if the governmental body does not comply with the PIA's procedures for seeking a ruling, *id.* § 552.302; the requirement that the governmental body notify any third party whose privacy or property interests are implicated by the public release of the requested information, *id.* § 552.305(d) (West 2004); a provision permitting any person, including the requestor, to submit comments to the Attorney General as to why the requested information should or should not be released, *id.* § 552.304 (West Supp. 2010); a provision permitting third parties to submit arguments

to the Attorney General explaining why their information is protected from public disclosure, *id.* § 552.305(b) (West 2004); a provision permitting the Attorney General to request any additional information necessary to render a decision, *id.* § 552.303(c); and the requirement that the Attorney General promptly render a decision consistent with the standards of due process and provide a copy of the ruling to the requestor, *id.* § 552.306 (West Supp. 2010).

Thus, by including all of these components and others, the Legislature has established a system by which any governmental body's decision to withhold requested public information in Texas is evaluated by the Attorney General under a scheme that allows participation by all interested parties and results in a rapid and fair decision by the Attorney General. *Id.* §§ 552.301-.308 (West 2004 & Supp. 2010). Further, the legislatively-created scheme ensures that all Texans have equal access to information about their government, regardless of their individual ability to secure legal representation. By ensuring the Attorney General evaluates governmental bodies' decisions to withhold requested information from a requestor, the requestor's challenge to that decision is always heard and given due consideration without requiring expensive and time-consuming action by the courts. Further, if the Attorney General determines that information must be disclosed, then the governmental body must sue the Attorney General, who then represents all Texans' interest in openness before the courts. The entire scheme requires that the Attorney General be the first arbiter of openness before Texans can be denied access to their government's records. Given that the Legislature has called on the Attorney General to administer this process and to secure uniformity in the interpretation of the PIA, *id.* § 552.011 (West 2004), and given that the courts look to the Attorney General's substantive decisions, there is little to commend a rule that would avoid ruling on a pending question where the Attorney General has not previously spoken. Indeed, for the Attorney General to refrain from ruling in these circumstances impermissibly deprives the public of the role the Legislature intended that state officer to play in considering and resolving open records questions.[4] *See Houston Chronicle Publ'g Co. v. Mattox*, 767 S.W.2d 695, 698 (Tex. 1989) (finding Attorney General may explicitly refuse to render decision if he decides previous determination has been made regarding category of information to which requested information belongs).

Thus, in accordance with its legislatively-mandated function, the Attorney General has a statutory directive to rule on a PIA disclosure question in the first instance in advance of judicial review. Consequently, if, while a request for an open records ruling is pending

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[4]Indeed, a court could readily conclude that the Legislature has conferred primary jurisdiction on the Attorney General to decide PIA disclosure questions. *See In re Sw. Bell Tel. Co.*, 226 S.W.3d 400, 403 (Tex. 2007) (finding agency had primary jurisdiction where authority to interpret and enforce matter in dispute had been specifically delegated to it). The primary jurisdiction doctrine effectively requires an agency to initially decide an issue in advance of any judicial intervention. *Subaru of Am., Inc., v. David McDavid Nissan*, 84 S.W.3d 212, 221 (Tex. 2002).

in this office, a party brings an action before a Texas court posing the same open records question, this office will nevertheless rule on the claimed exception to disclosure.[5]

SUMMARY

Section 552.306 of the Government Code imposes on the Attorney General a duty to rule on a claimed exception to disclosure when, prior to the issuance of the decision, a party has brought an action before a Texas court posing the same open records question.

Very truly yours,

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[5]However, when this office has ruled in compliance with section 552.306 and a party has challenged that ruling in court, this office will not rule again on the same question if asked to do so. *Id.* § 552.306 (West Supp. 2010); *see Houston Chronicle Publ'g Co. v. Mattox*, 767 S.W.2d at 698 (holding PIA allows Attorney General to refuse to render decision if he decides previous determination has been made regarding category of information to which request belongs); *see also* TEX. GOV'T CODE ANN. § 552.321(West 2004) (providing requestor may file suit for writ of mandamus against governmental body if governmental body refuses to request Attorney General decision or refuses to supply public information or information Attorney General determined is public), *id.* § 552.324 (West Supp. 2010) (providing governmental body may file suit seeking declaratory relief from Attorney General decision).