



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 13, 2015

The Honorable Phil King
State Representative District 61
P.O. Box 2910
Austin, Texas 78768-2910

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

OR2015-07033

Dear Representative King:

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# 560271.

The Office of Representative Phil King (the "representative's office") received a request for records that pertain to House Bill 539 ("H.B. 539") during a specified time period. You state the representative's office has released some information. You state the representative's office has redacted information pursuant to chapter 306 of the Government Code.¹ *See* Gov't Code §§ 306.003(a), .004(a); *see also* Open Records Decision No. 648 at 3-7 (1996). You also state the representative's office will redact personal e-mail addresses subject to section 552.137 of the Government Code pursuant to Open Records Decision No.

¹Release of information subject to section 306.003(a) or 306.004(a) of the Government Code is governed by chapter 306, not the Act, and it is within the discretion of a legislator to either withhold or release such information.

684 (2009).² You claim the submitted information is excepted from disclosure under sections 552.101, 552.106, 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 some of the submitted information as not responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the representative's office is not required to release non-responsive information in response to this request.

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 responsive 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. U.S.*, 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 responsive information under section 552.101 of the Government Code on the basis of legislative immunity.

Section 552.106(a) of the Government Code excepts from required public disclosure "[a] draft or working paper involved in the preparation of proposed legislation[.]" Gov't Code § 552.106(a). Section 552.106(a) ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. See Open Records Decision No. 460 at 1 (1987). The purpose of this exception is to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the members of the legislative body; therefore, section 552.106 encompasses only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation and does not except purely factual information from public disclosure. *Id.* at 2. However, a

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision. ORD 684.

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).

comparison or analysis of factual information prepared to support proposed legislation is within the ambit of section 552.106. *Id.*

You state the information at issue was exchanged directly and entirely in connection with the process of developing, analyzing, deliberating on, considering, and developing strategy and actions in response to pending legislation. You explain the information at issue was exchanged between the representative's office and legislative colleagues and staff. Upon review, we find the information we have marked constitutes advice, opinion, analysis, and recommendation regarding proposed legislation. Therefore, the representative's office may withhold this information under section 552.106 of the Government Code.⁴ However, we find you have failed to demonstrate how the remaining information at issue constitutes advice, opinion, analysis, or recommendations regarding proposed legislation. Accordingly, the representative's office may not withhold any of the remaining information at issue under section 552.106 of the Government Code.

You also assert some of the remaining responsive information is excepted from disclosure under the deliberative process privilege encompassed by section 552.111 of the Government Code. *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, no writ); 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 that 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. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion,

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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). When determining if an interagency memorandum is excepted from disclosure under section 552.111, we must consider whether the agencies between which the memorandum is passed share a privity of interest or common deliberative process with regard to the policy matter at issue. *See* Open Records Decision No. 561 at 9 (1990).

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* ORD 561 at 9 (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). 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 id.*

You assert portions of the information at issue consist of communications with staff of the representative's office pertaining to policy recommendations regarding the planning and execution of legislative strategy or proposed legislation. You also assert the remaining information at issue consists of communications exchanged with other legislators and their official staff members, with whom the representative's office shares a privity of interest, regarding deliberations and strategic planning of legislative action for H.B. 539. Based on your representations and our review, we find the representative's office may withhold the information we have marked under section 552.111 of the Government Code. However, we note that the remaining communications consist of general administrative and purely factual information. Thus, we find you have not demonstrated how these communications consist of advice, opinions, or recommendations pertaining to policymaking matters of the representative's office. Accordingly, we conclude the representative's office may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

In summary, the representative's office may withhold the information we have marked under section 552.106 of the Government Code, and the information we have marked under section 552.111 of the Government Code. The representative's office must release the remaining responsive 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 "Britni Fabian".

Britni Fabian
Assistant Attorney General
Open Records Division

BF/bhf

Ref: ID# 560271

Enc. Submitted documents

c: Requestor
(w/o enclosures)