



STATE OF TEXAS  
HOUSE OF REPRESENTATIVES

**JAMES B. FRANK**

*District 69*

January 18, 2023

The Honorable Ken Paxton  
Attorney General of Texas  
Open Records Division  
P.O. Box 12548  
Austin, TX 78711

Dear General Paxton:

Enclosed with this letter are a brief and associated exhibits that House Counsel has prepared on behalf of my office.

On December 22, 2022, Robert Montoya of Texas Scorecard e-mailed our office with a request under the public information law, Chapter 552, Government Code. A copy of the request, which is marked as Exhibit A, is attached to the enclosed brief. The brief and exhibits substantiate our contention, described in our letter to you dated January 9, 2023, that the information our office is seeking to withhold is excepted from disclosure under Chapters 306 and 552, Government Code. My office provided timely notice to Mr. Montoya on January 9, 2023 and also produced a number of responsive documents that day as well. For purposes of calculating deadlines, please note my office was closed in observation of the holidays on the following dates: December 23, 26, 30 and January 2 and 16.

If you need any further information, please contact Jason Briggs at (512) 463-1100.

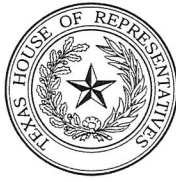
Sincerely,

A handwritten signature in black ink, appearing to read "James B. Frank".

James B. Frank  
State Representative District 69

Enclosures

cc: Robert Montoya (*with Exhibit A only*)



# TEXAS HOUSE OF REPRESENTATIVES

## MEMORANDUM

TO: The Honorable Ken Paxton  
Attorney General

FROM: Jason Briggs  
Deputy General Counsel

DATE: January 18, 2023

SUBJECT: Reasons for withholding information requested from the Office of Representative James Frank

## INTRODUCTION

This memorandum explains the reasons why certain information maintained by the office of State Representative James Frank may be withheld from public disclosure in response to a public information request by Robert Montoya of Texas Scorecard. The request (attached as **Exhibit A**) seeks certain communications with and regarding Jamie Masters, former commissioner of the Department of Family Protective Services ("the Department").

Please feel free to contact me if you have any questions. In addition, please transmit a copy of your ruling to [Jason.Briggs@speaker.texas.gov](mailto:Jason.Briggs@speaker.texas.gov) so that I may be able to adequately counsel my client regarding the implications of your ruling.

## DISCUSSION OF REQUESTED INFORMATION

The information that is the subject of this memorandum consists of memoranda or communications between legislators and legislative agency staff, interagency memoranda, and internal working documents and drafts of legislation, representative samples of which are attached to this brief as **Exhibits B through G**. As set out in Representative Frank's letter to your office dated January 9, 2023, all of this information is confidential and therefore excepted from disclosure under the public information law by operation of Sections 552.101, 552.106, 552.111, 306.003, 306.004, and 306.008, Government Code. None of the responsive information has previously been disclosed.

Arguments in support of withholding the attached information are respectfully submitted below:

## APPLICATION OF THE PUBLIC INFORMATION LAW

### I. Exhibits B, C, and E: Excepted Under Section 552.111, Deliberative Process Privilege.

Section 552.111 of the Government Code excepts from required public disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Tex. Gov’t Code § 552.111. This exception encompasses the deliberative process privilege and excepts from disclosure internal communications consisting of advice, recommendations, or opinions reflecting the policy-making processes of a governmental body. Tex. Att’y Gen. Open Records Decision No. 615 at 5 (1993); *accord City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 556 (Tex. App.—Dallas 1998) (“Section 552.111 . . . excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the policy-making processes of the governmental body at issue.”), *aff’d*, 22 S.W.3d 351 (Tex. 2000). 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* Tex. Att’y Gen. Open Records Decision No. 313 at 3 (1982).

The purpose of section 552.111 is “to protect advice and opinions on policy matters and to encourage frank and open discussion within an agency in connection with its decision-making processes.” *Dallas Morning News*, 969 S.W.2d at 556. Section 552.111 can also encompass communications between a governmental body and a third party, including another agency or other party with a shared privity of interest. *See* Tex. Att’y Gen. Open Records Decision No. 561 at 9 (1990) (recognizing that section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For it 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.

As a member of the legislature and the immediate former Chair of the House Committee on Human Services, which has jurisdiction over the Department, Representative Frank is intimately involved with the policy-making process as it relates to the Department, and often receive communications from and related to the Department, its operations, and potential legislative action that could affect the Department. These communications contain confidential analyses and details of specific legislation, contemplated legislation, and proprietary agency data. The information marked **Exhibit B** and **Exhibit C** contains privileged communications and drafts in connection with the deliberative process of legislative decision-making and agency performance metrics that are essential to and inseparable from this process. Further, as the chair of the house committee with jurisdiction over the department, Representative Frank shares a common interest with DFPS in ensuring and facilitating its smooth and efficient operation.

**Exhibit E** is an intraagency memorandum discussing a litany of internal operating processes and specifically contemplates opinions and advice of the agency regarding the policy-making process.

Because these memoranda would otherwise be protected from disclosure, and because Representative Frank shares privity of interest with the Department regarding these memoranda and their utility to the policy-making process, the deliberative process privilege should apply to **Exhibit E**.

Based on the foregoing, the information marked as **Exhibit B**, **Exhibit C**, and **Exhibit E** is excepted from disclosure under Section 552.111, Government Code.

**II. Exhibit D: Excepted Under Section 552.111, Deliberative Process Privilege or, in the Alternative, Excepted Under Section 552.101 interacting with Sections 306.003 and 306.004, Confidential Records and Public Disclosure.**

**Exhibit D** is an email to Representative Frank's House email account from a personal email account on March 28, 2022. This email contains information and agency insight which would only be available to and known by agency personnel and addresses issues which extend beyond the internal administration. The contents of the email consist of opinions and recommendations regarding the mission, vision, and operational planning of the Department which in turn directly affect the policy-making process. When intraagency memorandum speak to the broad needs of an agency's constituency, this information may be withheld under Section 552.111. *See* Tex. Att'y Gen. Open Records Decision No. 631 at 3 (1995). As such, the information marked **Exhibit D** is excepted from disclosure under Section 552.111, Government Code.

In the alternative, **Exhibit D** should be excepted from disclosure under Sections 306.003 and 306.004, Government Code. Section 306.003(a) of the Texas Government Code provides that "records of a member of the legislature or the lieutenant governor that are composed exclusively of memoranda or communications with residents of this state and of personal information concerning the person communicating with the member or lieutenant governor are confidential." Public disclosure of communications between citizens and members of the legislature is further protected by Section 306.004, where statute expressly prohibits the release of communications unless "the citizen expressly or by clear implication authorizes the disclosure, the communication is of a type that is expressly authorized by statute to be disclosed, or the official determines that disclosure does not constitute an unwarranted invasion of personal privacy of the communicator or another person." Information covered by chapter 306 of the Government Code may be released only as that chapter provides and does not fall within the scope of the Texas Public Information Act, chapter 552 of the Government Code. *Tex. Att'y Gen. Open Records Decision No. 648 at 7 (1996)*.

Although the sender of the communication appears to be affiliated with the Department in some way, perhaps as an employee, it is not clear that the communication constituting Exhibit C was sent in the sender's official state capacity, rather, the email was delivered via a personal account, after business hours, and the sender does not identify as contacting the representative's office on behalf of the Department. This seems to suggest that the sender was acting as a private resident of the state. Nowhere in this email is disclosure authorized by the citizen, nor is it the type of communication authorized by statute to be disclosure. Further, disclosure may constitute an unwarranted invasion of personal privacy in that her full name, private email address, and opinions

about agency leadership and operations would be made public without consent. As such, **Exhibit D** should be excepted from disclosure under sections 306.003 and 306.004, Government Code.

**III. Exhibit F: Excepted Under 552.101, interacting with Section 306.008, Legislative Privilege.**

**Exhibit F** consists of a communication between Representative Frank and a member of his legislative staff. As such, this information is excepted from required disclosure under Chapter 552, Government Code, through the interaction of Section 552.101 with Section 306.008, Government Code. Section 552.101 reads:

Sec. 552.101. EXCEPTION: CONFIDENTIAL INFORMATION.  
Information is excepted from the requirements of Section 552.021 if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

Section 552.101, Government Code, incorporates into Chapter 552 an exception from required disclosure for information that is made confidential under a law outside Chapter 552. Many statutes and other sources of law, such as the Rules of Evidence adopted by the Texas Supreme Court, provide that certain information is confidential for purposes of Section 552.101. In enacting Section 552.101, the legislature recognized that it would be impractical to attempt to incorporate into Chapter 552 every legal basis for withholding information.

The relevant portion of Section 306.008, Government Code, provides as follows:

(a) To protect the public's interest in the proper performance of the deliberative and policymaking responsibilities of the legislature and to preserve the legislative branch's independence under the fundamental principle of separation of powers, as guaranteed by Article II and Section 21, Article III, Texas Constitution, a communication is confidential and subject to legislative privilege if the communication:

- (1) is given privately;
- (2) concerns a legislative activity or function; and
- (3) is among or between any of the following:
  - (A) a member of the house or senate;
  - (B) the lieutenant governor;
  - (C) an officer of the house or senate;
  - (D) a member of the governing body of a legislative agency;or
- (E) a legislative employee.

\* \* \*

(c) A member of the house . . . may choose to disclose all or part of a communication to which Subsection (a) . . . applies and to which the [member] or a legislative employee acting on behalf of the [member] was a party.

\* \* \*

(e) In this section . . . "legislative employee" means . . . an employee of, assistant to, or credentialed intern for any part of the legislative branch of state government, including . . . a member of the house . . . .

The email marked **Exhibit F** consists of a communication between Representative Frank and a legislative employee that was given privately. In addition, the email concerns legislative activities and functions where the representative would be participating in his capacity as a lawmaker. As such, **Exhibit F** must be excepted from disclosure under Sections 552.101 and 306.008, Government Code.

#### **IV. Exhibit G: Excepted Under Section 552.111, Deliberative Process Privilege, and 552.106, Legislative Documents**

The communications marked as **Exhibit G consist of communication between Representative Frank and the Office of the Governor and** are covered by the deliberative process privilege in that the messages consist not of purely factual information but of opinions, advice, and recommendations related to administrative and personnel matters of broad scope that affect both the legislative and executive branches of government generally and the policy mission of the Department in particular. The purpose of Section 552.111 is "to protect advice and opinions on policy matters and to encourage frank and open discussion within an agency in connection with its decision-making processes." Both parties to these text messages share a privity of interest in the performance of Department personnel because the executive branch can appoint and remove certain Department employees and the legislature can enact legislation related to Department personnel. The text messages evidence a common deliberative process where representatives from both the legislative and executive branch are sharing confidential analyses and details of specific policy postures towards the Department. Thus, these discussions must be protected to ensure that the decision-making process related to policy affecting the Department is not impeded.

Additionally, these text messages may be excepted from disclosure under Section 552.106, as the statute protects documents concerning the deliberative processes of a governmental body relevant to the enactment of legislation. While the appointment and removal of certain employees is solely within the scope of the executive branch, the Legislature can and does pass laws that amend the criteria for who can or cannot be appointed by the Governor to certain positions and/or place additional requirements on the Department related to its operations. Because these text messages may contain ideas and recommendations which could form the basis of proposed legislation, Section 552.106 should apply.

As such, **Exhibit G** should be excepted from disclosure under Section 552.111 and/or Section 552.106.

#### **CONCLUSION**

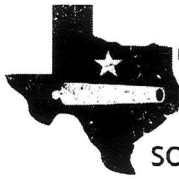
For the foregoing reasons, the above exhibits are excepted from required public disclosure under the Act. I respectfully request that your office provide a copy of the decision to Jason Briggs,

Deputy General Counsel to the House, at [Jason.Briggs@house.texas.gov](mailto:Jason.Briggs@house.texas.gov) or by interagency mail, Room 1W.15, P.O. Box 2910, Austin, TX 78748 so that I might advise my client. If you have additional questions or require further information, please contact me at 512-463-1100.



EXHIBIT

A



# TEXAS SCORECARD

SOMEONE'S ALWAYS KEEPING SCORE. WE THINK IT OUGHT TO BE THE CITIZENS.

December 22, 2022

From:  
Texas Scorecard

To:  
State Rep. James Frank

This letter ("Document Request") shall serve as a public information request under the Texas Public Information Act, Tex. Gov't Code §552.001 et seq., for copies of records in their *original (electronic/paper) format*.

## **REQUESTED RECORDS:**

For the time period of January 10, 2022 to the date a search of these records are conducted,

- Communications between the office of Rep. Frank and former DFPS Commissioner Jaime Masters.
- Communications in the possession of Rep. Frank's office regarding former DFPS Commissioner Jaime Masters.

*Communications includes but is not limited to emails, text messages, messages on social media, Slack or whatever other internal messaging services your government uses, postal mail, and/or handwritten notes. This includes all email addresses and smartphones used by any or all of these parties for official business, whether they are personal or government owned.*

*Please provide text messages, including messages on any text messaging application used by the custodian including but not limited to, iMessage, Google Messages, SMS, Facebook Messenger, Confide, Signal, WhatsApp, Dust, Threema, Telegraph, or other similar messaging application, in the possession of any of the following individuals:*

*State Rep. Frank, his chief of staff, and legislative director.*

*Please provide the metadata associated with the incoming and outgoing email logs for the following individuals, showing the metadata associated with the correspondence, including the to, from, cc, date and time, and subject fields but not the body of the email. An example of a similar FOIA that was completed, although with inappropriately truncated fields, can be found at <https://tinyurl.com/ywpph5vm>*

*State Rep. Frank, his chief of staff, and legislative director.*



We request a waiver of all fees as we are a 501(c)3 non-profit news media organization, and the disclosure of the requested information is in the public interest and will contribute significantly to the public's understanding of legislative oversight of DFPS. This information is not being sought for commercial purposes.

The Texas Public Information Act requires that you "promptly produce" the requested records unless, within 10 days, you have sought an Attorney General's Opinion. If you expect a significant delay in responding to this request, please contact me with information about when I might expect copies or the ability to inspect the requested records.

If you deny any or all of this request, please cite each specific exemption you feel justifies the refusal to release the information and notify me of the appeal procedures available to me under the law.

I appreciate your prompt attention to this matter. Please feel free to contact me with any questions.

Sincerely,

Robert Montoya

Investigative Reporter

[rmontoya@texasscorecard.com](mailto:rmontoya@texasscorecard.com)

888-410-1836 ext 710