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August 28, 2013

The Honorable Greg Abbott
Texas Attorney General's Office
Open Records Division
PO Box 12548
Austin, TX 78711-2548

Re: July 9, 2013 Texas Public information Act Request of The Center for Media and Democracy to
Hon. Stephanie Klick for records relating to the American Legislative Exchange Council (ALEC)

Dear General Abbott:

We represent the Freedom of Information Foundation of Texas and provide these comments in support of release of the information requested by The Center for Media and Democracy ("CMD") and in rebuttal to arguments made by Rep. Klick and counsel for ALEC.

Background

CMD has set out an extensive background regarding ALEC and its role in influencing the legislative agenda in Texas and throughout the country. It is worth noting that ALEC has not been retained by Rep. Klick's office as a consultant to act in any official capacity. Lawmakers such as Rep. Klick may and do join ALEC, but actually pay dues to do so. However, this does not put ALEC "in privity" with the governmental body for purposes of the deliberative process privilege nor shield correspondence between Rep. Klick and her fellow members as entitled to anonymity on grounds of the First Amendment Freedom of Association. A voluntary act of joining a group cannot, any more than entering into a contract, alter a governmental official's responsibility to observe the mandates of her office.

Argument and Authority

Both Rep. Klick and ALEC have filed briefs with your office to allow Rep. Klick to withhold the requested information. While the arguments of neither one can carry the day to block release of the requested information, they are also mutually inconsistent. Rep. Klick invokes the deliberative process privilege, which involves policy discussions internal to a governmental body. ALEC invokes its members' First Amendment right of association, which involves its internal discussions and membership. However, CMD's request is for information in possession of a sitting legislator – in her official capacity.

Section 552.111 – The Deliberative Process Privilege

Representative Klick makes no claim that she holds these documents in any capacity other than her official capacity as a member of the Texas House of Representatives. Indeed, the exception she relies upon is specifically tied to policy discussions, to allow members of a governmental body to deliberate policy “frankly” and without being “in a fishbowl” while trying to work through hard issues.

It is somewhat curious that Rep. Klick chose to rely on the deliberative process privilege rather than § 552.106 which allows withholding of legislative working papers, as 552.106 is more specific to her office. That being said, the analysis underlying each exception is the same. See ORD-460 p. 3 (1987).

And they each require privity between the governmental body and third party as a condition to assert the exception. The issue is well set out in ORD-429 p. (1985), another open records decision that looks at the statutory predecessors of both sections:

Section [552.111] applies to memoranda advising an agency prepared by someone within the agency or by an outside "consultant" who has some duty to advise the agency or act on its behalf in an official capacity.

and

We believe that section [552.106] applies only to drafts and working papers prepared by persons with some official responsibility to prepare them for the legislative body. . . . It does not, in our opinion, apply to materials prepared by another person or agency who has no official responsibility to do so but only acts as an interested party who wishes to influence the legislative process.

In ORD-429, the Texas Turnpike had been soliciting enactment of city ordinances in connection with right-of-way dedications along the Dallas North Tollway extension through Dallas, Addison, and Farmers Branch. The attorney general rejected Texas Turnpike’s argument that it could withhold its communications with these municipalities under the deliberative process privilege and/or its subset the legislative work-papers exception because Texas Turnpike was not officially required to do consult with them. That is, Texas Turnpike was not in privity with these governmental bodies.

Rep. Klick never sets out ALEC’s role vis-à-vis her office other than the fact of her membership in ALEC. However, it is fair to say ALEC was not retained by Rep. Klick as a consultant. ALEC’s argument of right of association actually undermines any idea that it is acting in an official capacity. A claim of right of association is made in opposition to the state, not as its consultant.

There is no factual support at all for Rep. Klick’s assertion that ALEC is in privity with her office. She has failed to meet her burden for applicability of the deliberative process privilege.

Right of Association

ALEC's brief claims only that the material responsive to CMD's request "may" contain information regarding its membership. Rep. Klick's brief unambiguously states that the submitted information "includes 20 pages of draft legislation." Clearly therefore much of the information has nothing to do with ALEC's members or contributors at all, but with actual drafts of laws that ALEC would like to see Rep. Klick sponsor. Unlike *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W. 2d 371 (Tex. 1998), this matter does not involve internal documents specifically targeted to members or contributors an adversary is seeking in discovery, but rather information freely provided to a sitting legislator acting in her official capacity. That is, these are the advocacy documents themselves. The bulk of the information in such documents raises no right of association issues at all. This much is clear even from OR2004-7544, cited by ALEC in its brief, regarding withholding of information of a child advocate group where the attorney general held:

Therefore, you must withhold the information that identifies contributors under section 552.101 pursuant to the right of association, unless the contributors have waived their right of association. We emphasize that the information must be withheld on this basis only to the extent reasonable and necessary to protect the identity of the contributor.

The draft legislation that ALEC shared with Rep. Klick should clearly be promptly released, however, there is no basis for withholding the names of "member" or "contributor" that "may" be included in the requested information as there was in OR2004-7544. For one thing, allowing one's name to appear on a document that has been delivered to a sitting legislator in advocacy of a specific legislation surely results in waiver of such a right. This is similar in this respect to the issue in *Doe v. Reed* __ U.S. __, 130 S.Ct. 2811, 2815 (2010), which involved citizens going beyond associating in favor of a particular position, but actually signing a petition to obtain a particular enactment.

Beyond that, ALEC is essentially asking the Attorney General to find the Texas Public Information Act unconstitutional with respect to its communications with Rep. Klick. The correct analysis shows the Act to be a disclosure statute and therefore subject to intermediate scrutiny. *Id.* at 2818. In the following quote from *Reed*, we have substituted "legislative" for "electoral" and "legislation" for "petition."

Respondents assert two interests to justify the burdens of compelled disclosure under the PRA on First Amendment rights: (1) preserving the integrity of the [legislative] process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability; and (2) providing information to the electorate about who supports the [legislation].

Id. at 2819. The analysis for the constitutionality of the Act in connection with the names of ALEC members and representatives appearing in the responsive information is on all fours with the *Reed* case.

Indeed, Rep. Klick's and ALEC's arguments reprise those made by officeholders who unsuccessfully sued the Attorney General to overturn the Texas Open Meetings Act as an unconstitutional infringement of their First Amendment Freedom of Speech. Similar to the plaintiffs' position in the case in *Asgeirsson v. Abbott*, these arguments seek to turn Texas citizens' constitutional right to disclosure of

the actions and communications of its governmental officials on its head and, in its place, raise the exclusion of the public from the processes of government to a constitutional prerogative of elected officials.

In fact, the First Amendment *requires* informed access to the workings of government. These First Amendment principles undergird the Texas Public Information Act. While there is nothing in the language of the First Amendment itself from which a right of public access to legislative and rule-making proceedings may automatically be inferred, nonetheless, the existence of the right in question can be readily recognized once the rationale of Supreme Court decisions is clearly understood. Much of the applicable case law has concerned the public's, or the media's, access to judicial, and in particular criminal, proceedings. The landmark Supreme Court case of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) established that a criminal trial must, except under certain limited conditions, be open to the public. The *Richmond Newspapers* Court was called upon to decide if a trial court had acted properly when, without considering less restrictive alternatives, it granted defense counsel's motion to close the trial to the public. The Court held that the judge's action violated the First and Fourteenth Amendments. It explained:

The First Amendment, in conjunction with the Fourteenth, prohibits government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.

Id. at 575.

Passages such as this abound in *Richmond Newspapers* and make clear that it is a case about access not only to criminal trials, but equally to "matters relating to the functioning of government." Access to criminal trials is but a special case of a right to be informed about government which the court held to be included in the First Amendment.

The importance of *Richmond Newspapers* lies both in its recognition of a public right of access to governmental proceedings and in its restriction of the conditions under which that right may be circumscribed. *Richmond Newspapers* recognized only a "qualified right," but one which cannot be qualified except for good cause. In the case of criminal trials, for example, the Court held that the public must be granted access "[a]bsent an overriding interest articulated in findings." *Id.* at 581.

That *Richmond Newspapers* applies to legislative and rule-making proceedings as well is evidenced by the elaborations to be found in its concurring opinions. Justice Stevens viewed the majority as having denounced "arbitrary" interferences with First Amendment rights. He stated:

Today ... for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.

Id. at 583. Justice Brennan recognized that such restrictions as have in the past been placed by the Supreme Court on the public's freedom of access to information were justified by the nature of the information:

Read with care and in context, our decisions must ... be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality.

Id. at 586. The privilege is also tempered by the context in which it is asserted: "An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded." It is apparent as well from Brennan's concurrence that he understood the significance of the case to extend far beyond the matter of access to criminal trials. In characterizing what he termed the "structural" role played by the First Amendment "in securing and fostering our republican form of government," Brennan indicated that freedom of communication in general is of chief concern:

Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), but also the antecedent assumption that valuable public debate--as well as other civic behavior--must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.

Id. at 588.

Subsequent Supreme Court decisions reinforce the conclusion that a First Amendment right of access extends well beyond access to criminal trials. Although most of those decisions have dealt chiefly with press or public access to criminal trials in particular, a concern for access to information about government generally informed the decisions. This concern, indeed, is typically invoked as the major premise from which the right of access to criminal trials may be inferred. Thus in *Globe Newspaper Co. v. Superior Ct*, 457 U.S. 596 (1982), the Supreme Court justified its freedom-of-access conclusion by saying that "to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Id.* at 604-605, 102 S.Ct. at 2619.

The Supreme Court's enunciation of the notion of a "qualified First Amendment right," and of the special circumstances in which alone the right may be defeated, is restated and reinforced in later decisions. *Globe Newspapers* made clear that

the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where ... the State attempts to deny the right of access in order to inhibit the disclosure of sensitive

information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.

Id. at 606-607: Then, in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), where the court specifically extended the public's right of access to include voir dire examinations of prospective jurors, it spoke of a "presumption of openness" that could be rebutted only by adducing strong, countervailing concerns. The court added:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

With these decisions in mind, can it be doubted that public access to legislative and rule-making correspondence with third-party interest groups would even more directly and forcefully serve the goals of ensuring an informed electorate and improving our system of self-government? Applying the "historical" and "functional" tests enunciated in *Globe Newspapers*, each is satisfied in the same degree by legislative as by judicial proceedings. The historical test is met because Texas' legislative and rule-making proceedings have traditionally been open to the public. Applying the functional test, the effect of holding open meetings would be salutary and the benefits would be several. Indeed, virtually all of the advantages of openness which courts have found in regard to judicial proceedings, both criminal and civil, are equally applicable to the legislative process. These include the following:

- a) The integrity of the fact-finding process is enhanced by open records.
- b) Public respect for the legislative process is increased by open records.
- c) Open records provide a "therapeutic outlet."
- d) The ability of the public to engage in informed discussion of governmental affairs, to cast an informed ballot, and ultimately to improve our system of self-government are all enhanced by open records.

The communications between Rep. Klick and ALEC are *governmental* information to which the public has a qualified First Amendment right of access. Rep. Klick's and ALEC's arguments makes no mention of this jurisprudence and essentially attempts to turn it on its head,

The Fifth Circuit agreed with the Attorney General and upheld the constitutionality of the Texas Open Meetings Act over officeholders' claim of a constitutional right to speak as a governmental body behind closed doors. *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012). The Attorney General should uphold the constitutionality of the Public Information Act over ALEC's claim of a constitutional right to communicate with Rep. Klick behind closed virtual doors.

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Based upon the foregoing argument and authority, FOIFT urges your office to reject the arguments for withholding presented by Hon. Stephanie Klick and ALEC and to require that the requested information be promptly release to The Center for Media and Democracy.

Respectfully submitted,



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