September 25, 2013

Mr. Tony McDonald
General Counsel
Empower Texans
tmcdonald@empowertexans.com

Dear Mr. McDonald:

On behalf of the House Committee on Transparency in State Agency Operations and its co-chairs, Representatives Dan Flynn and Carol Alvarado, who have requested me to represent them in this matter, I am writing in response to your written request under the Texas public information law, Chapter 552, Government Code, received by the co-chairs and committee clerks by e-mail on September 16, 2013. In your e-mail you requested "a copy of the list of 'potential witnesses" referred to by Rusty Hardin at the public meeting of the committee held on that same date.

It is the co-chairs' belief that the document you have requested is confidential by law or otherwise excepted from required disclosure under Chapter 552. Accordingly, pursuant to Section 552.301, Government Code, on behalf of the committee and its co-chairs, I am requesting a determination from the attorney general on whether the co-chairs may withhold the document from disclosure, and in that request I outline the reasons for the co-chairs' assertion that the document may be withheld. Enclosed with this letter, as required by Chapter 552, Government Code, is a copy of my written communication to the attorney general requesting a decision from the attorney general as to whether the requested document may be withheld.

Thank you for your patience in this matter. Please contact me if you have any questions. You may contact the Open Records Division of the office of the attorney general at (512) 478-6736.

Sincerely,

[Signature]
Jeff Archer
Chief Legislative Counsel
Texas Legislative Council

13L194
Mr. Tony McDonald
September 25, 2013
Page 2

Enclosure

cc: The Honorable Greg Abbott
    Attorney General of Texas
    Open Records Division
    P.O. Box 12548
    Austin, TX 78711-2548

    The Honorable Dan Flynn
    State Representative
    Co-Chair, House Committee on Transparency in State Agency Operations
    P.O. Box 2910
    Austin, TX 78768

    The Honorable Carol Alvarado
    State Representative
    Co-Chair, House Committee on Transparency in State Agency Operations
    P.O. Box 2910
    Austin, TX 78768
September 25, 2013

The Honorable Greg Abbott
Attorney General of Texas
Open Records Division
P.O. Box 12548
Austin, TX 78711-2548

Dear General Abbott:

I am writing this letter on behalf of the Committee on Transparency in State Agency Operations of the Texas House of Representatives and its co-chairs, Representatives Dan Flynn and Carol Alvarado, who have requested me to represent them in this matter. On September 16, 2013, the co-chairs and the committee’s clerks, Richard Ramirez and Matthew Posey, received a request under the public information law, Chapter 552, Government Code, by e-mail from Tony McDonald of Empower Texans. A copy of the request is enclosed with this letter.

Mr. McDonald’s request seeks a copy of a list of potential witnesses referred to by Rusty Hardin, special counsel to the committee, at the committee’s public meeting held on that same date. It is the belief of the co-chairs that the document requested by Mr. McDonald is confidential under certain laws of this state or is otherwise excepted from required disclosure under Chapter 552, Government Code. Accordingly, I am writing on behalf of the co-chairs and the committee to request your decision about whether the requested document must be disclosed. While the request was specifically directed to the committee co-chairs and clerks without referring to the committee itself, the document requested is maintained by the committee and accordingly in this letter I will refer to the committee as the recipient of Mr. McDonald’s open records request.

The committee believes that it is entitled to withhold the requested document under Section 552.101, Government Code, because it is protected from disclosure by the evidentiary and testimonial legislative privileges derived from the Texas Constitution that are applicable to the legislative activities of the committee and its individual members. In re Perry, 60 S.W.3d 857 (Tex. 2001). The committee also believes that the document is confidential under Section 552.101 by application of the attorney-client privilege established by Rule 503, Texas Rules of Evidence. In re City of Georgetown, 53 S.W.3d 328 (Tex. 2001).

Moreover, the committee believes that it is entitled to withhold the requested document under Section 552.101, Government Code, in conjunction with Section 323.017, Government
Code. Section 323.017 makes certain communications between members of the legislature and assistants or employees of the Texas Legislative Council confidential. Mr. Hardin and the other members of his firm are retained by the Texas Legislative Council under a contractual arrangement to provide legal and personal services to the committee and members of the house of representatives.

The committee also believes that it is entitled to withhold the requested document under Section 552.103, Government Code, because it is information that relates to litigation to which the state is or may be a party. The information sought relates directly to the committee's ongoing investigation of a public official subject to impeachment under Chapter 665, Government Code. Under that chapter, if the house of representatives presents articles of impeachment to the senate relating to any matters investigated by the committee, the senate is required to hold a trial, essentially judicial in nature, to determine whether the official in question is to be removed from office. That trial will provide the public official the opportunity to compel the production of evidence in order to satisfy the requirements of Section 7, Article XV, Texas Constitution.

In the committee's opinion, the requested document is also excepted from disclosure by Section 552.106, Government Code, because it is a working paper involved in the preparation of legislation. It is well established that requiring disclosure of the contents of legislative working papers would have an undesirable chilling effect on the legislative process. In this case, the committee is considering whether to propose articles of impeachment to be preferred to the senate by the house of representatives. Articles of impeachment are a legislative measure within the jurisdiction of the committee. In addition, the committee has general oversight jurisdiction that could result in the recommendation or drafting of proposed legislation as a direct result of its investigation.

The committee believes that the requested document is excepted from disclosure by Section 552.107, Government Code, because it is protected by attorney-client privilege in the same manner as information protected under Rule 503, Texas Rules of Evidence. The document constitutes a communication between the committee and the committee's outside legal counsel who created the document in the course of providing or facilitating professional legal services to the committee. The communication was never intended to be made public or disclosed to any third party other than those to whom disclosure was made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

The committee also believes that the requested document is excepted from required disclosure under Section 552.111, Government Code, as an intra-agency memorandum regarding important matters of public policy. The list of potential witnesses referred to by Mr. Hardin was prepared by the committee counsel for the confidential consideration of the members of the committee in the course of its official functions and thus should be excepted from required public disclosure under Section 552.111.

I am preparing an additional letter for submission to you that will contain a more complete explanation of the committee's reasons why the exceptions to disclosure raised in this
letter apply to the requested document. I will deliver that letter to you on the committee's behalf in the manner required by Section 552.301, Government Code.

Please accept this letter and the enclosed documents as a request by the House Committee on Transparency in State Agency Operations and its co-chairs for a ruling on whether the document requested by Mr. McDonald is excepted from required disclosure under Chapter 552, Government Code. If you need any further information, please contact me at (512) 463-1155.

In addition to a copy of Mr. McDonald's request for public information, I have enclosed a copy of the response I am sending to Mr. McDonald on the committee's behalf stating that the committee wishes to withhold the requested document and that the committee is requesting a decision from your office as to whether the document must be disclosed under Chapter 552, Government Code.

Sincerely,

Jeff Archer
Chief Legislative Counsel
Texas Legislative Council

13L195

Enclosures

cc by e-mail:

Tony McDonald
General Counsel
Empower Texans
tmcdonald@empowertexans.com

cc:
The Honorable Dan Flynn
State Representative
Co-Chair, House Committee on Transparency in State Agency Operations
P.O. Box 2910
Austin, TX 78768

The Honorable Carol Alvarado
State Representative
Co-Chair, House Committee on Transparency in State Agency Operations
P.O. Box 2910
Austin, TX 78768