THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

November 21, 1989

Ms. Mitzi I. Cotton
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

Dear Ms. Cotton:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 7567; this decision is OR89-394.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. Attorney General Opinion H-436 (1974). The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The City of Austin received a request for all documents related to incentives offered to U.S. Memories to locate in Austin. The city seeks to withhold only two documents, a September 14, 1989, letter from a private attorney to Ms. Gwendolyn Hill Webb, supervising attorney for the city's law department, and a September 14, 1989, memorandum from Ms. Webb to two assistant city managers. The private attorney who drafted the September 14 letter did so at the request of Ms. Webb. You indicate that the remainder of the information has been released.

You claim that section 3(a)(3), the litigation exception, protects the two documents from required public disclosure. To claim section 3(a)(3) the governmental body must show: 1) that litigation is actually pending or reasonably anticipated; and 2) that the information in

question "relates" to the litigation such that withholding the information is necessary to preserve the governmental body's strategy or legal interests in the litigation. Open Records Decision No. 478 (1987). The two documents at issue consist of legal advice to the city and, therefore, fall within the attorney-client privilege. See Open Records Decision No. 380 (1983); see also Open Records Decision No. 412 (1984). Withholding information that would be privileged from discovery in litigation clearly can be deemed necessary to preserve a governmental body's litigation interests.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-394.

Yours very truly,
Open Government Section
of the Opinion Committee

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of the Opinion Committee
Prepared by Jennifer S. Riggs
Chief, Open Government Section

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Ref.: ID# 7567

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