ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2006

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1546
Austin, Texas 78767

OR2006-00739

Dear Ms. Grace:

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# 240829.

The City of Austin (the "city") received five requests for information related to the Austin Clean Water Project. You state that the city will release some of the requested information, but claim that the submitted information is excepted from disclosure under sections 552.107, 552.111, and 552.116 of the Government Code, as well as rule 503 of the Texas Rules of Evidence. We have considered the exceptions you claim and reviewed the submitted information.[1] We have also considered comments submitted by one of the requestor's representatives. *See* Gov't Code § 552.304.

Initially, you state that some of the submitted documents were the subject of a previous ruling issued by this office. In Open Records Letter No. 2005-09257 (2005), this office determined that section 552.116 of the Government Code authorized the city to withhold certain information related to a city audit. You indicate that the relevant facts and circumstances have not changed since the issuance of this previous ruling. Thus, we determine that the city may continue to rely on Open Records Letter No. 2005-09257 for

[1]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

the information subject to that ruling. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). We now address your arguments regarding the remaining information.

We note, and you acknowledge, that some of the submitted documents are subject to section 552.022 of the Government Code, which provides in part that

> the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code § 552.022(a)(1). In this instance, the submitted information includes a completed report made for the city. This completed report must be released under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. You claim that the completed report is excepted from disclosure under the attorney-client privilege found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider whether the completed report is excepted from disclosure under rule 503.

As noted, rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege. Rule 503(b)(1) provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the lawyer and the lawyer's representative;

> (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
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> (D) between representatives of the client or between the client and a representative of the client; or
>
> (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. TEX. R. EVID. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the completed report at issue was completed by outside counsel. You further state that this outside counsel was hired by the city to investigate and give legal advice on a particular matter. You assert that the completed report constitutes a confidential communication exchanged between the outside counsel and city personnel for the purpose of providing legal advice. Based on your representations and our review, we find you have established that the completed report is protected by the attorney-client privilege and may be withheld pursuant to Rule 503 the Texas Rules of Evidence.

Next, the city raises section 552.107 of the Government Code for some of the submitted information. This section also protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose

of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert that the documents you have marked under section 552.107 constitute confidential communications between "the City Attorney, his assistant, the City Manger's Office, the City Auditor's Office, other City staff, and outside counsel for the City." You also state that these "communications were made for the purpose of facilitating the rendition of professional legal services and the confidentiality of these communications has been maintained." Therefore, based on your representations and our review, we conclude that the city may withhold the documents you have marked under section 552.107 of the Government Code.

Next, the city asserts that some of the remaining documents are excepted under section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This section encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including

> the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
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> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

Tex. R. Civ. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. Tex. R. Civ. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

> a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

Nat'l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

The documents marked under section 552.111 include the handwritten notes of the city attorney and outside counsel, and preliminary drafts of memoranda and investigative reports.[2] You state that this information was created in anticipation of litigation and contains the mental impressions, opinions, conclusions, and legal theories of the city attorney and outside counsel. After review of your arguments and the information at issue, we find that this information is protected under the attorney work product privilege and may be withheld under section 552.111.

Next, you assert that the remaining documents are excepted under section 552.116 of the Government Code. Section 552.116 provides as follows:

> (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code, is excepted from the

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[2]We note that the city does not claim the attorney work product privilege for the final version of the memorandum that was recently released to the public by a member of the city council. *See* Gov't Code § 552.007.

> requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.
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> (b) In this section:
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> > (1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.
> >
> > (2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:
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> > > (A) intra-agency and interagency communications; and
> > >
> > > (B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You indicate that the remaining documents were compiled and prepared by three city offices charged with auditing the city's financial affairs. You state that section 17 of Article VII of the Charter of the City of Austin established the position of city auditor and imparts to it the "responsibility to conduct, or cause to be conducted, financial, performance, investigative, and other audits following government auditing standards as promulgated by the Comptroller General of the United States." You also state that "there are two other audit divisions in the City that possess responsive information that is excepted under section 552.116." These audit divisions are the Corporate Financial Audit (Internal Audit) and the Austin Water Utility Internal Audit units. You inform us that the Corporate Financial Audit (Internal Audit) unit was established pursuant to section 2 of Article VII of the Charter of the City of Austin, while the Austin Water Utility Audit unit was established pursuant to a budget ordinance grounded in section 1 of Article V of the Charter of the City of Austin. You also inform us that the authority of the city auditor to conduct audits is further authorized by chapter 2-3 of the Austin City Code, while the authority of the Corporate Financial Audit (Internal Audit) and Austin Water Utility Internal Audit units to conduct audits is derived from section 2 of Article VII and section 2 of Article V of the Charter of the City of Austin, respectively. We understand you to represent that the audits at issue were initiated by the office of the city auditor under the authority granted by chapter 2-3-5 of the Austin City Code and by the Corporate Financial Audit (Internal Audit) and Austin Water Utility Audit units under the authority granted by the city charter. Based on our review and your representations, we find you have sufficiently demonstrated that this

information was prepared or maintained by the city's auditors in conducting audits authorized or required by the charter or an ordinance of a municipality. *See* Gov't Code § 552.116(a), (b)(1), (b)(2). Accordingly, the city may withhold the remaining documents under section 552.116 of the Government Code.[3]

In summary, the city may continue to rely on Open Records Letter No. 2005-09257 for the information subject to that ruling. The completed report is protected by the attorney-client privilege and may be withheld pursuant to Rule 503 the Texas Rules of Evidence. The documents marked under sections 552.107, 552.111, and 552.116 of the Government Code may also be withheld.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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[3]We note that the city does not raise section 552.116 for the completed audit report. *See* Gov't Code § 552.022(a)(1) (a completed audit report made of, for, or by a governmental body is public information and not excepted from required disclosure under the Act unless it is expressly confidential under other law or excepted from disclosure under section 552.108).

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

James A. Person III
Assistant Attorney General
Open Records Division

JAP/sdk

Ref: ID# 240829

Enc. Submitted documents

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