ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 30, 2009

Mr. J. Frank Onion, III
Law Offices of William M. McKamie, P.C.
941 Proton Road
San Antonio, Texas 78258

OR2009-09041

Dear Mr. Onion:

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# 347490.

The City of Woodcreek (the "city"), which you represent, received a request for contracts, agreements, and correspondence related to a risk pool in which the city has participated since January 1, 2007. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code, and privileged under Federal Rule of Evidence 501 and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.

Initially, we note that the information in Exhibits C-4 and C-5 is not responsive to the instant request because it was not created within the specified time frame. The city need not release non-responsive information in response to this request and this ruling will not address that information.

We next note that portions of the submitted information are subject to section 552.022 of the Government Code, which provides in relevant part:

> [T]he 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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> . . .
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> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Portions of the submitted information consist of information in a contract relating to the expenditure of public funds. Accordingly, the city may withhold the information we have marked that is subject to section 552.022(a)(3) only if such information is expressly confidential under "other law." You assert that this information is excepted under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code and protected under Federal Rule of Evidence 501 and Texas Rule of Civil Procedure 192.5. However, sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). In addition, the courts have not found the Federal Rules of Evidence and the Federal Rules of Civil Procedure to be "other law" for the purposes of section 552.022. Therefore, the city may not withhold the information subject to section 552.022, which we have marked, under section 552.103, 552.107, or 552.111 of the Government Code, or Federal Rule of Evidence 501. However, the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. In addition, the attorney work product privilege is found in rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that makes information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 for the information that is subject to section 552.022. In addition, because section 552.101 of the Government Code constitutes other law for the purposes of section 552.022, we will consider your argument under section 552.101.

You contend that the submitted insurance policy information, which is subject to section 552.022, is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 101.104 of the Civil Practice and Remedies Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 101.104, however, is a civil discovery privilege and does not make insurance information expressly confidential for purposes of section 552.101. *See* Open Records Decision No. 551 at 3 (1990) (provisions of section 101.104 "are not relevant to the availability of the information to the public"); *see also* Attorney General Opinion JM-1048 (1989); Open Records Decision Nos. 647 at 2 (1996) (information that may be privileged in the civil discovery context may not be withheld from disclosure pursuant to section 552.101 of the Government Code), 575 at 2 (1990) (stating explicitly that discovery privileges are not covered under statutory predecessor to section 552.101). The Texas Supreme Court has determined that the discovery privileges found in the Texas Rules of Civil Procedure and the Texas Rules of Evidence "are 'other law' within the meaning of section 552.022." *In re City*

of Georgetown, 53 S.W.3d 328 (Tex. 2001). Although section 101.104 is a civil discovery privilege under the Civil Practice and Remedies Code, it is not a discovery privilege found in either the Texas Rules of Civil Procedure or the Texas Rules of Evidence. Thus, section 101.104 does not alone, or in conjunction with the *Georgetown* decision, constitute "other law" for purposes of section 552.022. Accordingly, we determine that the submitted insurance policy information may not be withheld from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 101.104 of the Civil Practice and Remedies Code.

For purposes of section 552.022, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) 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 (2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat'l Tank 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. The second prong of the work product test requires the governmental body to show that the documents at issue contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). The information at issue consists of information in a contract relating to the city's insurance coverage. You have not demonstrated this information consists of an attorney's or an attorney's representative's mental impressions, opinions, conclusions, or legal theories that were made in anticipation of litigation. Thus, we find you have not demonstrated that any of the information that is subject to section 552.022 consists of core work product for the purposes of Texas Rule of Civil Procedure 192.5. Accordingly, the city may not withhold any of the information subject to section 552.022 under rule 192.5.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and 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;
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> > (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. *Id.* 503(a)(5). Thus, 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 information is privileged and 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). As stated above, the information at issue consists of information in a contract relating to the city's insurance coverage. You have not explained how this information constitutes a communication between an attorney or an attorney's representative and a client in furtherance of the rendition of legal services to the client. Further, you have not explained that the information at issue was intended to be and has remained confidential. Therefore, we find you have failed to demonstrate that the information that is subject to 552.022 constitutes communications between privileged parties or that it reveals confidential communications. Accordingly, the information subject to section 552.022 may not be withheld under rule 503. Because you have made no further

arguments against the disclosure of the information that is subject to section 552.022, it must be released.

We now address your claim under section 552.103 of the Government Code for the submitted information that is not subject to section 552.022. Section 552.103 of the Government Code provides as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . .
>
> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You have provided documentation showing that prior to the city's receipt of this request, a lawsuit styled *Westridge Joint Venture v. City of Woodcreek*, Cause No. A-08-CA-851-JRN, was filed in the United States District Court for the Western District of Texas. You state the lawsuit is pending and that discovery is in process. Thus, based on your representations and our review of the remaining submitted information, we find that litigation was pending on the date the city received the request for information. The remaining submitted information consists of communications regarding the pending lawsuit, and information relating to the city's liability. Therefore, we find it relates to the pending litigation. Accordingly, the city

may withhold the remaining submitted information pursuant to section 552.103 of the Government Code.[1]

However, we note once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all other parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the information that is subject to section 552.022, which we have marked, must be released. The remaining responsive information may be withheld pursuant to section 552.103 of the Government Code.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

Karen E. Stack
Assistant Attorney General
Open Records Division

KES/cc

Ref: ID# 347490

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[1]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.