ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 28, 2011

Mr. Ronald J. Bounds
Assistant City Attorney
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR2011-09223

Dear Mr. Bounds:

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# 423023.

The City of Corpus Christi (the "city") received two requests for the names of all attorneys hired by the city during a specified time period; the amount billed to the city; each attorney's rate, number of hours worked, scope and dates of work, and reason for hire; and documents showing how much money the city has paid outside attorneys for legal services during another specified time period. You state you will release some information to the requestors. You state you have redacted certain information under section 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009).[1] You claim portions of the requested information are privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted representative sample of information.[2] We have also received and

[1]Open Records Decision No. 684 is a previous determination issued by this office to all governmental bodies authorizing them to withhold ten categories of information, including credit card, debit card, charge card, insurance policy, bank account, and bank routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

[2]We assume the "representative sample" of information 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 those records contain substantially different types of information than that submitted to this office.

considered comments from the first requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the first requestor's contention that the city failed to comply with the procedural requirements of the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information that it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See id.* § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D).

You state the city received the requests for information on April 7 and April 8, 2011. You further state the city provided each requestor with a written itemized estimate of the charges for responding to the requests and required full payment of those charges as a bond pursuant to sections 552.2615 and 552.263 of the Government Code on April 19, 2011. *See id.* §§ 552.2615 (providing governmental body shall provide requestor with estimate of charges if charges exceed $40), .263(a) (governmental body may require deposit or bond for payment of anticipated costs in certain instances if governmental body provides requestor with written itemized statement). In response to the itemized statements, both requestors modified their requests on April 21, 2011, agreeing to seek access to instead of copies of the requested information. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives deposit or bond); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, 10-day period to request attorney general ruling is measured from date request is clarified or narrowed). Therefore, we agree April 21, 2011 is the date the city is deemed to have received the requests for information. *See id.* §§ 552.263(f), .301(b), (c). Accordingly, the ten-business-day deadline for requesting a ruling from this office was May 5, 2011, and the fifteen-business-day deadline was May 12, 2011. You requested a ruling from this office on May 3, 2011 and submitted the information required by section 552.301(e) on May 12, 2011. Therefore, we find the city complied with the procedural requirements of section 552.301 of the Government Code in requesting this decision.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. We note the submitted information consists of attorney fee bills subject to

section 552.022(a)(16) of the Government Code.[3] For purposes of section 552.022, information may be withheld under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* Open Records Decision No. 677 at 9-10 (2002). Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* 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 the material was (1) created for trial or in anticipation of litigation when the governmental body received the request for information, 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 the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate(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 the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test may be withheld 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). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You contend the information you have marked reveals the mental impressions, opinions, conclusions, legal theories, or strategies of outside counsel and city attorneys pertaining to legal services provided during the course of lawsuits and arbitration proceedings involving the city. Having considered your arguments and reviewed the information at issue, we conclude a portion of the information in the attorney fee bills, which we have marked, constitutes privileged attorney work product. Therefore, the city may withhold this information under rule 192.5 of the Texas Rules of Civil Procedure. You have not

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[3]Section 552.022(a)(16) of the Government Code provides for required public disclosure of "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege," unless the information is expressly confidential under "other law." Gov't Code § 552.022(a)(16). The Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001).

demonstrated, however, that any of the remaining information you have marked constitutes privileged attorney work product, and the city may not withhold it under rule 192.5.

Rule 503 of the Texas Rules of Evidence enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

> 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:
>
> (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;
>
> (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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and 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). *See Caldwell*, 861 S.W.2d at 427.

You state the remaining information you have marked documents communications between the city, city attorneys, city staff, and outside counsel and consultants made in connection with the rendition of professional legal services to the city. You have identified most of the parties to the communications, and we are able to discern the identities of the remaining

privileged party from the face of the submitted documents. You also state these communications were intended to be and have remained confidential. Accordingly, the city may withhold the remaining information you have marked on the basis of the attorney-client privilege under rule 503 of the Texas Rules of Evidence.

In summary, the city may withhold the information we have marked under rule 192.5 of the Texas Rules of Civil Procedure. The city may withhold the remaining information you have marked under rule 503 of the Texas Rules of Evidence. The city must release the remaining information.

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, toll free, at (888) 672-6787.

Sincerely,

Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 423023

Enc. Submitted documents

c: Requestor
(w/o enclosures)