KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 2, 2016

Mr. Ryan D. Pittman
Counsel for the City of Frisco
Abernathy, Roeder, Boyd & Hullett, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2016-02432

Dear Mr. Pittman:

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# 596410.

The City of Frisco (the "city"), which you represent, received a request for a copy of a specified master settlement agreement ("MSA") and all exhibits and schedules attached thereto, as well as all communications related to the negotiation, drafting, and implementation of the MSA over a specified time period.[1] You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rules 192.3 and 192.5 of the

[1]We understand you sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the requestor paid the required deposit on November 2, 2015. *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 bond or deposit).

Texas Rules of Civil Procedure.[2] We have considered the raised arguments and reviewed the submitted information.

Initially we note some of the information you have submitted is not responsive to the request because it was created after the specified time period. This ruling does not address the public availability of that information, and the city need not release any non-responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983) (governmental body not required to disclose information that did not exist at time request was received).

Next, we note the responsive information contains minutes of special meetings of the city's Community Development Corporation board. Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, expressly provides the "minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." Gov't Code § 551.022. Accordingly, section 551.022 is applicable to these minutes. Although the city raises sections 552.103, 552.107, and 552.111 of the Government Code, we note the exceptions to disclosure found in the Act are generally not applicable to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the city may not withhold the submitted minutes, which we have marked, under section 552.103, 552.107, or 552.111 of the Government Code.

Next, we note some of the remaining responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

> (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
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> > . . .
> >
> > (17) information that is also contained in a public court record; [and]
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> > (18) a settlement agreement to which a governmental body is a party.

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[2]Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503 and Texas Rules of Civil Procedure 192.3 and 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we do not address your argument under section 552.101 of the Government Code.

Gov't Code § 552.022(a)(17), (18). The remaining responsive information contains court-filed documents that are subject to section 552.022(a)(17) and a settlement agreement subject to subsection 552.022(a)(18). The city must release this information pursuant to sections 552.022(a)(17) and 552.022(a)(18), unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(17), (18). You seek to withhold this information under sections 552.103, 552.107, and 552.111 of the Government Code. However, these sections are discretionary exceptions and do not make information confidential under the Act. *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. 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, the information at issue may not be withheld under these exceptions. However, the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your arguments under rule 503 of the Texas Rules of Evidence, and rules 192.3 and 192.5 of the Texas Rules of Civil Procedure for the information subject to section 552.022 of the Government Code. We will also consider the applicability of the raised exceptions to the remaining responsive information not subject to section 552.022 of the Government Code.

Texas Rule of Evidence 503(b)(1) provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:
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> > (A) between the client or the client's representative and the client's lawyer or the lawyer's representative;
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> > (B) between the client's lawyer and the lawyer's representative;
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> > (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;
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> > (D) between the client's representatives or between the client and the client's representative; or
> >
> > (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is 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 it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 at 6-7 (2002). 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 Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, orig. proceeding).

You state the information subject to section 552.022 of the Government Code constitutes privileged communications between city attorneys, special legal counsel, consultants to the city, employees of the city, and employees of other state agencies. You state the communications at issue were made in furtherance of the rendition of professional legal services to the city. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the attachments we have marked. Accordingly, the city may withhold the information we have marked under rule 503 of the Texas Rules of Evidence.[3] However, the remaining information at issue does not document a communication. Thus, we find you have not demonstrated the remaining information constitutes privileged attorney-client communications for the purposes of Texas Rule of Evidence 503. Thus, the city may not withhold the remaining information at issue on that basis.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work-product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work-product aspect of the work-product privilege. *See* ORD 677 at 9-10. 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

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[3]As our ruling is dispositive for this information, we need not consider your remaining arguments against its disclosure.

product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *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 there was a substantial chance litigation would ensue, and (2) the party resisting discovery believed in good faith there was a substantial chance 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 part of the work-product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *See* TEX. R. CIV. P. 192.5(b)(1). A document containing core work-product information that meets both parts of the work-product test is confidential under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). *See Pittsburgh Corning Corp.*, 861 S.W.2d at 427.

You assert the remaining information at issue reveals the mental impressions, opinions, conclusion, or legal theories of counsel for the city. Upon review, we find the city has failed to establish any of the remaining information subject to section 552.022 constitutes privileged attorney work product, and the city may not withhold it on the basis of rule 192.5 of the Texas Rules of Civil Procedure.

Rule 192.3 of the Texas Rules of Civil Procedure provides the consulting expert privilege. A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. *See* TEX. R. CIV. P. 192.3(e). A "consulting expert" is defined as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." TEX. R. CIV. P. 192.7. Although you generally claim this privilege, we find you have not demonstrated its applicability to the information at issue. Accordingly, the city may not withhold any portion of the remaining information subject to section 552.022 of the Government Code under rule 192.3 of the Texas Rules of Civil Procedure.

Section 552.103 of the Government Code provides, in part, 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.
>
> . . .
>
> (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 governmental body has the burden of providing relevant facts and documents to show section 552.103 is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date 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, orig. proceeding); *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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The city informs us, and provides documentation showing, prior to its receipt of the request for information, the company with which the city entered into the agreement (the "company") filed bankruptcy proceedings in federal court. The city states it joined the bankruptcy proceedings and the litigation is ongoing. Therefore, we agree litigation was pending when the city received the request. We also find the city has established the remaining responsive information not subject to section 552.022 is related to the pending litigation for purposes of section 552.103 of the Government Code. Thus, we find section 552.103 of the Government Code is applicable to the remaining responsive information not subject to section 552.022.

We note, however, the opposing party to the pending litigation has seen or had access to some of the information at issue, which we have marked. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once an opposing party has seen or had access to information related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the city may not withhold the marked information the opposing party has seen or had access to. Accordingly, with the exception of the information the requestor has seen or had access to, which we have marked, the city may withhold the remaining

responsive information we have marked under section 552.103.[4] We note the applicability of section 552.103 ends once the related litigation has concluded. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350(1982).

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. The elements of the privilege under section 552.107(1) are the same as those discussed for rule 503. 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. *See* ORD 676 at 6-7. 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*, 922 S.W.2d at 923 (privilege extends to entire communication, including facts contained therein).

You claim some of the information seen by the requestor is protected by section 552.107(1) of the Government Code. The information at issue consists of e-mails and attachments sent from or received by representatives and employees of the company, which you state are part of e-mail communications involving city attorneys, special legal counsel, consultants to the city, employees of the city, and employees of other state agencies who you assert are privileged parties. You state the e-mail communications were made for the purpose of facilitating the rendition of professional legal services to the city and that these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to some of the information at issue. Thus, the city may generally withhold the information we have marked under section 552.107(1) of the Government Code. However, as previously noted, the information at issue was sent by representatives and employees of the company, who are non-privileged parties. Furthermore, if the information at issue stands alone from the e-mail strings of which it is a part, it is separately responsive to the request for information. Therefore, if the information at issue, which we have marked, is maintained by the city separate and apart from the otherwise privileged e-mail strings in which it appears, then the city may not withhold such information under section 552.107(1) of the Government Code. Furthermore, we note the remaining responsive information at issue consists of communications with individuals whom the city has not demonstrated are privileged parties or information you have not demonstrated constitutes privileged communications made for the purpose of facilitating the rendition of legal services to the city. Thus, we find the city has not demonstrated this information constitutes privileged attorney-client communications for the purposes of section 552, 107(1). Therefore, the city may not withhold the remaining responsive information at issue under section 552.107(1) of the Government Code.

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

To the extent the non-privileged e-mails and attachments exist separate and apart, we will consider the applicability of section 552.111 of the Government Code. We will also consider the applicability of section 552.111 to the remaining responsive information not subject to section 552.022. Section 552.111 of the Government Code excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" *See id.* § 552.111. This section encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking).

Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third party, including a consultant or other party with a privity of interest. *See* Open Records Decision Nos. 631 at 2 (section 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (section 552.111 applies to memoranda prepared by governmental body's consultants). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body

and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

The city argues the deliberative process privilege is applicable to the remaining responsive information not subject to section 552.022. The city states the information at issue consists of communications between representatives and employees of the city that constitute advice, opinions, and recommendations related to the city's dealings with the company. The city informs us the communications also include consultants for the city who share a common deliberative process with the city with regard to matters at issue. Upon review, however, we find the information at issue consists communications with parties with whom you have not demonstrated the city shares a privity of interest. Consequently, the city has failed to establish any portion of the information at issue constitutes advice, opinions, recommendations, or other material reflecting the policymaking processes of the city. Accordingly, the city may not withhold any portion of the remaining information at issue under the deliberative process privilege of section 552.111 of the Government Code.

Section 552.111 of the Government Code also 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); ORD 677 at 4-8. As noted above, rule 192.5 defines work product as:

> (1) [M]aterial 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
>
> (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 the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. The test to determine whether information was created or developed in anticipation of litigation is the same as that discussed above concerning rule 192.5.

The city asserts the remaining responsive information not subject to section 552.022 reveals the mental impressions, opinions, conclusion, or legal theories of counsel for the city. Upon review, however, we find the city has failed to establish any of the remaining responsive information not subject to section 552.022 constitutes privileged core attorney work product, and the city may not withhold it on the basis of the work-product privilege of section 552.111 of the Government Code.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential."[5] Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Thus, the city must withhold the insurance policy numbers, a representative sample marking of which we have marked, under section 552.136 of the Government Code.

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The city must withhold the personal e-mail addresses, a representative sample of which we have marked, under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release.

In summary, the city must release the minutes we have marked under section 551.022 of the Government Code. The city may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. With the exception of the information we have marked, the city may withhold the remaining responsive information not subject to section 552.022 under section 552.103 of the Government Code. The city may generally withhold the information we have marked under section 552.107(1) of the Government Code; however if the city maintains the non-privileged e-mails and attachments we have marked separate and apart from the otherwise privileged e-mail strings in which they appear, they must be released. The city must withhold the insurance policy numbers, a representative sample of which we have marked, under section 552.136 of the Government Code. The city must withhold the personal e-mail addresses, a representative sample of which we have marked, under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release. The city must release the remaining responsive 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.texasattorneygeneral.gov/open/

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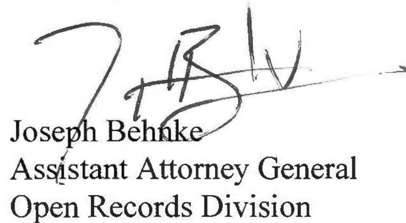
[5]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480(1987), 470 (1987).

orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 596410

Enc. Submitted documents

c: Requestor
(w/o enclosures)