CITY OF CONVERSE
CONNECTING COMMUNITY + COMMERCE™

TO: Councilwoman Kate Silvas

FROM: Felix Arambula III, Ethics Compliance Officer

DATE: June 10, 2019

SUBJECT: Advisory Opinion (AO) 2019-001 for AO Request 1

You requested on AO on the following:

*Advisory Opinion Request One**:** Section 2-202(d)(2) of the Code of Ordinances contains the following prohibition:*

> *Improper disclosure or use. A city official or employee shall not intentionally or knowingly disclose any confidential information gained by reason of said official or employee's position concerning the property, operations, policies or affairs of the city. This rule does not prohibit: Any disclosure that is no longer confidential by law; or the confidential by law; or the confidential reporting of illegal or unethical conduct to authorities designated by law.*

Would the above provision preclude a City Council member from: (1) disclosing executive session activity/discussions; or (2) stating publicly that, in her opinion, the Executive Session activity/discussions did not adhere to, or exceeded the scope of, the language of the posted agenda?

Opinion

The Texas Open Meetings Act (TOMA) provides the following as related to information obtained in executive session:

> (a) An individual, corporation, or partnership that without lawful authority knowingly discloses to a member of the public the certified agenda or recording of a meeting that was lawfully closed to the public under this chapter: (1) commits an offense; and (2) is liable to a person injured or damaged by the disclosure for: (A) actual damages, including damages for personal injury or damage, lost wages, defamation, or mental or other emotional distress; (B) reasonable attorney fees and court costs; and (C) at the discretion of the trier of fact, exemplary damages.
>
> (b) An offense under Subsection (a)(1) is a Class B misdemeanor.
>
> (c) It is a defense to prosecution under Subsection (a)(1) and an affirmative defense to a civil action under Subsection (a)(2) that: (1) the defendant had good reason to believe the disclosure was lawful; or (2) the disclosure was the result of

> a mistake of fact concerning the nature or content of the certified agenda or recording.
>
> TEX. GOV'T CODE §551.146 (Vernon 2018)

In order to find that a person has violated one of these provisions, the person must be determined to have "knowingly." Section 6.03(b) of the Penal Code, defines that state of mind as follows: A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to his conduct when he is aware that his conduct is reasonably certain to cause the result. TEX. PEN. CODE §6.03(b) (Vernon 2018).

Please note, a 2012 court of appeals case enumerated the elements of this criminal offense to be (1) a lawfully closed meeting, (2) a knowing disclosure of the agenda or tape recording of the lawfully closed meeting to a member of the public, and (3) a disclosure made without lawful authority. *Cooksey v. State,* 377 S.W.3d 901, 905 (Tex. App.—Eastland 2012, no pet.) *In Cooksey,* Mr. Cooksey attached a copy of the tape recording of a closed meeting to his petition in his suit to remove the county judge. *Id.* He was later charged with violation of section 551.146. *Id.* The court of appeals determined that the posted notice for the emergency meeting did not clearly identify the emergency and thus the meeting was not sufficient as a "lawfully closed meeting" to uphold Cooksey's conviction. *Id.*

Further, TOMA does not prohibit members of the governmental body or other persons who attend an executive session from making public statements about the subject matter of the executive session. Tex. Att'y Gen. Op. No. JM-1071 (1989) at 2–3. Other statutes or duties, however, may limit what a member of the governmental body may say publicly.

Thus, if a councilmember felt an item and its subsequent actions were in violation of TOMA, same provides the following:

> (a) An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body.
>
> (b) The court may assess costs of litigation and reasonable attorney fees incurred by a plaintiff or defendant who substantially prevails in an action under Subsection (a). In exercising its discretion, the court shall consider whether the action was brought in good faith and whether the conduct of the governmental body had a reasonable basis in law.
>
> TEX. GOV'T CODE §551.142 (Vernon 2018)

However, please recall TOMA does not require the notice of a closed meeting to cite the section or subsection numbers of provisions authorizing the closed meeting. *See Rettberg v. Tex. Dep't of Health,* 873 S.W.2d 408, 411–12 (Tex. App.—Austin 1994, no writ); Tex. Att'y Gen. Op. No. GA-0511 (2007) at 4. Rather, the notice must be sufficient to apprise the general public of the subjects to be considered during the meeting. *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762 (Tex. 1991).

Also please recall that when counsel for the City of Converse is present during an executive session and information is shared, same is protected, unless an exception applies, by the Lawyer-Client Privilege and/or Work Product as noted below:

Rule 503: Lawyer-Client Privilege

(a) Definitions. In this rule: (1) A "client" is a person, public officer, or corporation, association, or other organization or entity—whether public or private—that: (A) is rendered professional legal services by a lawyer; or (B) consults a lawyer with a view to obtaining professional legal services from the lawyer. (2) A "client's representative" is: (A) a person who has authority to obtain professional legal services for the client or to act for the client on the legal advice rendered; or (B) any other person who, to facilitate the rendition of professional legal services to the client, makes or receives a confidential communication while acting in the scope of employment for the client. (3) A "lawyer" is a person authorized, or who the client reasonably believes is authorized, to practice law in any state or nation. (4) A "lawyer's representative" is:
(A) one employed by the lawyer to assist in the rendition of professional legal services; or (B) an accountant who is reasonably necessary for the lawyer's rendition of professional legal services. (5) A communication is "confidential" if not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.

(b) Rules of Privilege. (1) *General Rule*. 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: (A) between the client or the client's representative and the client's lawyer or the lawyer's representative; (B) between the client's lawyer and the lawyer's representative; (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; (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. (2) *Special Rule in a Criminal Case*. In a criminal case, a client has a privilege to prevent a lawyer or lawyer's representative from disclosing any other fact that came to the knowledge of the lawyer or the lawyer's representative by reason of the attorney–client relationship.

(c) Who May Claim. The privilege may be claimed by: (1) the client; (2) the client's guardian or conservator; (3) a deceased client's personal representative; or (4) the successor, trustee, or similar representative of a corporation, association, or other organization or entity—whether or not in existence. The person who was the client's lawyer or the lawyer's representative when the communication was made may claim the privilege on the client's behalf—and is presumed to have authority to do so.

(d) Exceptions. This privilege does not apply: (1) *Furtherance of Crime or Fraud*. If the lawyer's services were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a

crime or fraud. (2) *Claimants Through Same Deceased Client*. If the communication is relevant to an issue between parties claiming through the same deceased client. (3) *Breach of Duty By a Lawyer or Client*. If the communication is relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer. (4) *Document Attested By a Lawyer*. If the communication is relevant to an issue concerning an attested document to which the lawyer is an attesting witness. (5) *Joint Clients*. If the communication: (A) is offered in an action between clients who retained or consulted a lawyer in common; (B) was made by any of the clients to the lawyer; and (C) is relevant to a matter of common interest between the clients.

TEX. R. EVID. 503

192.5 Work Product.

(a) *Work product defined.* Work product comprises: (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 (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.

(b) *Protection of work product.* (1) *Protection of core work product – attorney mental processes.* Core work product - the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories - is not discoverable. (2) *Protection of other work product.* Any other work product is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means. (3) *Incidental disclosure of attorney mental processes.* It is not a violation of subparagraph (1) if disclosure ordered pursuant to subparagraph (2) incidentally discloses by inference attorney mental processes otherwise protected under subparagraph (1). (4) *Limiting disclosure of mental processes.* If a court orders discovery of work product pursuant to subparagraph (2), the court must - insofar as possible - protect against disclosure of the mental impressions, opinions, conclusions, or legal theories not otherwise discoverable.

(c) *Exceptions.* Even if made or prepared in anticipation of litigation or for trial, the following is not work product protected from discovery: (1) information discoverable under Rule 192.3 concerning experts, trial witnesses, witness statements, and contentions; (2) trial exhibits ordered disclosed under Rule 166 or Rule 190.4; (3) the name, address, and telephone number of any potential party or any person with knowledge of relevant facts; (4) any photograph or electronic image of underlying facts *(e.g.,* a photograph of the accident scene) or a photograph or electronic image of any sort that a party intends to offer into evidence; and (5) any work product created under circumstances within an exception to the attorney-client privilege in Rule 503(d) of the Rules of Evidence.

(d) *Privilege.* For purposes of these rules, an assertion that material or information is work product is an assertion of privilege.

TEX. R. CIV. P. 192.5