



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 14, 2020

Mr. Troupe Brewer  
Counsel for the Windermere Oaks Water Supply Corporation  
Lloyd Gosselink Rochelle & Townsend, P.C.  
816 Congress Avenue, Suite 1900  
Austin, Texas 78701

OR2020-17442

Dear Mr. Brewer:

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# 834912.

The Windermere Oaks Water Supply Corporation (the "corporation"), which you represent, received a request for attorney fee bills for deposition training and preparation for corporation directors. You claim the submitted information is excepted from disclosure under section 552.107 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

You state some of the requested information relates to litigation. *See Windermere Oaks Water Supply Corp. v. Paxton*, No. D-1-GN-19-006219 (201st Dist. Ct., Travis County., Tex.). The lawsuit concerns a previous request for some of the information at issue, in response to which this office issued Open Records Letter No. 2019-22667 (2019). In Open Records Letter No. 2019-22667, we determined the corporation may withhold the information we marked pursuant to rule 503 of the Texas Rules of Evidence but must release the remaining information. In response to Open Records Letter No. 2019-22667, the corporation filed the referenced lawsuit against our office challenging the ruling, which is pending. Accordingly, we will allow the trial court to resolve the issue of whether the information that is the subject of the pending litigation must be released to the public. However, we will consider your arguments against disclosure of the submitted information, which was not at issue in the previous ruling.

We note, and you acknowledge, the submitted information consists of attorney fee bills that are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16)

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 confidential under the Act or other law. Gov’t Code § 522.022(a)(16). Although the corporation raises section 552.107 of the Government Code for the attorney fee bills, this exception is discretionary in nature and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the corporation may not withhold the information subject to section 552.022(a)(16) under section 552.107. The Texas Supreme Court has held, however, the Texas Rules of Evidence and 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). Accordingly, we will address your attorney-client privilege claim under rule 503 of the Texas Rules of Evidence and attorney work product privilege claim under rule 192.5 of the Texas Rules of Civil Procedure for the submitted fee bills.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. 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
- (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.* 192.5; Open Records Decision 677 at 6-8 (2002). In order for this office to conclude 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.

You contend the submitted information constitutes attorney work product protected by rule 192.5 of the Texas Rules of Civil Procedure. You state this information was created in

anticipation of litigation. You further state this information reflects attorneys' mental impressions, conclusions, or legal theories. Having considered the submitted arguments and reviewed the information at issue, we conclude some of the information at issue, which we marked, constitutes privileged attorney work product that may be withheld under rule 192.5. Accordingly, the corporation may withhold the information we marked under Texas Rule of Civil Procedure 192.5.<sup>1</sup> However, we find you have not demonstrated the remaining information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney's representative that was developed in anticipation of litigation or for trial. We therefore conclude the corporation may not withhold the remaining information at issue under Texas Rule of Civil Procedure 192.5.

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

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.

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).

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. 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

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<sup>1</sup> As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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. *Id.* Upon a demonstration of all three factors, the entire communication 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). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

You state the remaining information in the attorney fee bills contains communications between the corporation and attorneys of the corporation that were made for the purpose of facilitating the rendition of professional legal services to the corporation. However, upon review, we find you have not demonstrated the remaining information at issue constitutes privileged attorney-client communications for the purposes of Texas Rule of Evidence 503. Thus, the corporation may not withhold the remaining information on that basis.

In summary, the corporation may withhold the information we marked under Texas Rule of Civil Procedure 192.5. The corporation 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Emily Kunst  
Assistant Attorney General  
Open Records Division

EK/be

Ref: ID# 834912

Enc. Submitted documents

c: Requestor  
(w/o enclosures)