



March 28, 2007

Office of the Attorney General  
Open Records Division  
P.O. Box 12548  
Austin, Texas 78711-2548

Dear Attorney General Abbott:

As counsel for the Woodlands Community Association, Inc. ("WCA"), we are writing to formally request a decision regarding a Chapter 552 Public Information request for information. On February 22, 2007, our client, the WCA received a request for information from Mr. Foster McNair "for a copy of all information pertaining to the franchise fee issue that was discussed during the executive session of the WCA board meeting that was held on February 13, 2007". Mr. McNair's letter is attached as Enclosure A.

Mr. McNair's request was originally denied by the WCA for two reasons. The first is that the records manager for the association believed that no discoverable materials were distributed and that only a verbal report was given by the association's attorney. This information was provided, in good faith, by an employee not in attendance at the executive session but who normally prepares or is aware of materials that are presented to the board of directors. However, staff who responded to the records request recently became aware that documents were, in fact, provided to the board prior to the meeting; additionally, a privileged communication from the association's attorney was distributed during executive session.

The second reason is that the records manager mistakenly believed that records pertaining to a matter discussed in executive session are automatically exempted from disclosure. Clearly, that is not the case as provisions in the Open Meetings Act are separate from those in the Public Information Act (the "Act").

Due to their recent awareness of the documents that were in fact presented, staff has made the appropriate steps to timely correct the manner in which Mr. McNair's request was originally handled. The documents attached as Enclosures B and C are being provided to Mr. McNair as they would have been originally if records staff had known of their existence. Pursuant to section 552.301 of the Act, the association is requesting a decision from the Attorney General's Office on whether information attached as Enclosure D can be exempted from disclosure under sections 552.107, 552.111, 552.022 of the Act, Rule 503 of the Texas Rules of Evidence, and Rule 192.5 of Texas Rules of Civil Procedure.

While the WCA now fully understands that information discussed and presented at an executive session held in accordance with the Texas Open Meetings Act, Section 551.071, is not

automatically exempt from disclosure under the Act, we do believe that the information for which we request this decision is, in fact, exempt from disclosure based on the following reasons.

**Confidential under "Other Law" as described in Section 552.022(b) of the Act**

Section 552.022 of the Public Information Act provides that "[w]ithout limiting the amount or kind of information that is public information under this chapter," that certain information may be shielded from disclosure if they "are expressly confidential under *other law*." Gov't Code § 552.022(a) and (b). *emphasis added*.

"Other law" under which information may be considered confidential, and therefore not subject to disclosure under the Act, for the purpose of section 552.022(b) is not limited simply to statutes and judicial decisions that expressly make information confidential. *See* Gov't Code § 552.022(a) and (b); *In re City of Georgetown*, 53 S.W.3d at 332-337. The Texas Supreme Court has held that discovery privileges included in the Texas Rules of Civil Procedure and the Texas Rules of Evidence are also "other law" that may make information confidential for the purpose of section 552.022(b). *Id* at 337; *see generally* Tex. R. Evid. 501-513; Tex. R. Civ. P. 192.5.

Therefore, even if information is otherwise subject to disclosure under 552.022 of the Act, the information is still protected from disclosure if a the WCA can show that the information is privileged under the Texas Rules of Evidence or the Texas Rules of Civil Procedure. *In re City of Georgetown*, 53 S.W.3d at 333-34, 337

**Attorney-Client privileged communication under Rule 503 of the Texas Rules of Evidence**

The attorney-client privilege is found in Rule 503 of the Texas Rules of Evidence.

Rule 503(b)(1) 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:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer...

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. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, WCA 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. *See* Open Records Decision No. 676 (2002).

Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided WCA has not waived the privilege or the communication 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, 4527 (Tex. App.--Houston [14th

Dist.] 1998, no pet.) (Privilege attaches to complete communication, including factual information).

Enclosure D is a confidential email communication by our firm, as counsel for the WCA, to Don T. Norrell, the chief administrator for the WCA, and Kim D. Cogburn, Mr. Norrell's assistant. This communication was then shared by our firm, and Mr. Norrell with, and only with, the WCA board members in a closed executive session discussing potential litigation. This communication contains the legal opinion, judgment and assessment of our firm regarding and in anticipation of a potentially volatile legal situation regarding the WCA's potential claim to utility franchise fees and the impact that annexation by the city of Houston could have on the ability to potentially collect these fees in the future. The matter had, and still has, the potential of resulting in litigation by the parties involved in the franchise fee payments; therefore confidentiality was of the utmost importance. This communication was never intended to be, nor has it ever been, made public to anyone aside from the WCA board members attending the February 22, 2007 executive session. Our firm made this communication in the furtherance of rendition of legal services to the WCA regarding this matter. At no point has WCA waived, nor does it intend to waive in the future, their attorney-client privilege concerning this matter.

**Confidential as "core" attorney work product under Rule 192.5 of the Texas Rules of Civil Procedure**

Additionally we believe that the information contained in Exhibit D qualifies as core attorney work product as described in the Texas Rules of Civil Procedure, Rule 192.5. As previously discussed, the email communication from The Strong Firm to the WCA contains the mental impressions, assessment and legal opinion prepared for the WCA regarding and in anticipation of a matter pending before the WCA which very likely may result in litigation. As privileged core attorney work product, this communication is absolutely privileged and is likewise shielded from disclosure under 552.022 of the Act.

**Exempt from disclosure under the "Certain Legal Matters" exception of 552.107 of the Act**

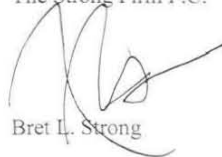
Furthermore, we believe that Enclosure D is exempt from disclosure under Section 552.107 of the Act because, for the reasons stated above, our firm is prohibited from disclosing this privileged communication because of its duty to the client under the Texas Rules of Evidence. Section 552.107 specifically exempts from mandatory disclosure the privileged communication contained in Enclosure D since our firm would be expressly prohibited from disclosing the referenced enclosure as it would violate the attorney-client privilege granted to clients under rule 503 of the Texas Rules of Evidence.

**Exempt from disclosure under the "Agency Memorandum" exception of 552.111 of the Act**

Finally, we believe that Enclosure D qualifies as an "interagency memo" and is exempt from disclosure under Section 552.211 of the Act. Enclosure D contains the interagency opinions, advice, and recommendations of the WCA counsel to the members of the WCA officers and board members. As such, it should be completely exempt from disclosure under 552.111 of the Act.

As a result of this denial for information request to Mr. McNair, and in accordance with §552.301, the WCA hereby request that the Office of the Texas Attorney General issue a decision regarding the above mentioned denial for information requested.

Respectfully,  
The Strong Firm P.C.



Bret L. Strong

Enclosure A: February 16, 2007 letter from Foster McNair to Lisa Morris

Enclosure B: January 18, 2007 letter from Don Norrell to Bret L. Strong

Enclosure C: December 11, 1997 letter from Karen West to Peggy Hausman

CC:

Foster McNair  
135 E. Mistybreeze Circle  
The Woodlands, TX 77381