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May 15, 2020

The Honorable Ken Paxton
Office of the Attorney General
Open Records Division
209 W. 14th Street, Suite 600
Austin, Texas 78701

VIA ELECTRONIC FILING

Re: Request for Attorney General Decision Pursuant to Texas Government Code
§ 552.301 on behalf of the Windermere Oaks Water Supply Corporation, ID#
OR83491220

Dear Attorney General Paxton:

Our firm represents the Windermere Oaks Water Supply Corporation ("WOWSC"), which is a non-profit water supply corporation operating under Chapter 67 of the Texas Water Code that provides retail water utility service to customers in Burnet County, Texas. On April 24, 2020 Mr. Danny Flunker (the "Requestor") sent an e-mail to the Board President and Public Information Officer of WOWSC requesting certain information pursuant to the Texas Public Information Act (the "Act"). A copy of the Requestor's April 24, 2020 request was provided in previous correspondence to your Office dated May 8, 2020 and is attached herein for convenient reference as **Exhibit A**. WOWSC seeks a decision from your Office pursuant to Texas Government Code § 552.301 as to whether it must produce public information in response to the April 24, 2020 request that is excepted from disclosure by Texas Government Code § 552.022, as well as pursuant to Rule 503 of the Texas Rules of Evidence ("Rule 503") and Rule 192.5 of the Texas Rules of Civil Procedure ("Rule 192.5").¹

I. Background

In his April 24, 2020 request, the Requestor seeks from WOWSC "all attorney fee bills paid by WOWSC for any and all deposition prep or training for past and current WOWSC directors. The time period is from March 2019 to current [April 24, 2020]."² Our firm, Lloyd

¹ In previous correspondence dated May 8, 2020, WOWSC also raised 552.101 as a basis for withholding responsive information. Upon further review of guidance from this Office, WOWSC is aware that Op. Tex. Att'y Gen. No. OR2009-13422 (2009) provides, "[a]lthough you raise section 552.101 of the Government Code in conjunction with rules 192.5 and 503, this office has concluded that section 552.101 does not encompass discovery privileges," and Tex. Att'y Gen. Open Records Decision No. 676 (2002) provides "[w]e find no authority to support a conclusion that the Texas Rules of Civil Procedure or the Texas Rules of Evidence are constitutional law, statutory law, or judicial decisions so as to fall within section 552.101's purview."

² See **Exhibit A**.

Gosselink Rochelle & Townsend, P.C. (“Lloyd Gosselink”), was retained by WOWSC in August of 2018, and thus our representation of WOWSC covers the entire time period specified by the Requestor. WOWSC has the responsive invoices available, and copies these invoices are enclosed herein as **Exhibit B**.

Beginning on May 14, 2019, WOWSC and several of its former and current directors have been defendants in ongoing litigation filed by several members of WOWSC, including members who have been and/or remain in privity with the Requestor by nature of their involvement as registered principals of an entity known as TOMA Integrity, Inc. TOMA Integrity, Inc. previously sued WOWSC in a *separate* suit, which suit was the basis of asserted privileges over information contained in legal bills responsive to a *prior* request under the Act submitted by the Requestor’s for attorney fee bills. Those responsive invoices and information therein became the subject of a request for determination submitted by WOWSC in OAG #OR2019-22667, which is now currently under appeal before the 201st District Court in Travis County (Cause No. D-1-GN-19-006219).

The litigation between WOWSC, some of its members, and some of its current and former directors has been ongoing since May 14, 2019, and remains pending as of the date of this correspondence (a copy of the Plaintiff’s Second Amended Original Petition in Cause No. 48292 pending in Burnet County District Court is attached as **Exhibit C**). The Requestor’s April 24, 2020 request was therefore submitted while this litigation was pending. All of the information responsive to the April 24, 2020 request is related to the aforementioned ongoing legal proceeding and the Requestor, who formerly was a principal of TOMA Integrity, Inc. at the same time as some of the plaintiffs in the current litigation against WOWSC, should not be allowed to use the Act as a means of circumventing the discovery process under Texas law or as a means of exposing privileged information of WOWSC that could jeopardize its position during the pendency of ongoing litigation.

This Office has previously concluded that the exception to disclosure for information subject to the litigation exception contained in Texas Government Code § 552.103 or to the attorney-client privilege exception contained in Texas Government Code § 552.107(1) does not allow a governmental entity to “withhold the attorney fee bills under Sections 552.103 and 552.107 of the Government Code” because those sections are *not* “other law” for purposes of § 552.022.³ However, the Texas Supreme Court has held that the Texas Rules of Evidence and Texas Rules of Civil Procedure *are* “other law” within the meaning of § 552.022 and documents that are otherwise “public information” under § 552.022 may be withheld from disclosure pursuant to Rule 503 and Rule 192.5.⁴

The documents responsive to Mr. Flunker’s request and the information contained therein were provided to WOWSC by legal counsel for the purpose of rendering professional

³ Op. Tex. Att’y Gen. No. OR2011-12797 (2011).

⁴ See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001); see also Tex. Att’y Gen. Open Records Decision No. 677 (2002)(“[t]hus a governmental body may assert Rule 192.5 to withhold section 552.022 information”).

legal services and were intended to be confidential communications reflecting the legal work performed and corresponding charges for such services, all of which pertain to the ongoing litigation between WOWSC and several of its members. In particular, our firm prepared and now maintains a separate matter file pertaining to legal services rendered *only* in relation to the ongoing litigation that is separate from the services our firm provides as WOWSC’s general counsel. Additionally, these communications and the information contained therein reflect the mental impressions, opinions, conclusions, and legal theories of WOWSC’s legal counsel during litigation. WOWSC cannot imagine a more appropriate time to assert the privileges lawfully available to it under Rule 503 and under Rule 192.5, as disclosure of this information would violate those privileges and significantly impair the rights of WOWSC and its legal counsel to assert and use such privileges to protect their interests, especially during pendency of ongoing litigation.

II. Information Relating to the Attorney-Client Privilege

Texas Government Code § 552.107 excepts from disclosure certain legal matters, stating specifically that information can be withheld from disclosure if “an attorney of a political subdivision is prohibited from disclosing [the information] because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct.”⁵ This Office has previously concluded that the exception to disclosure for information subject to the attorney-client privilege contained in Texas Government Code § 552.107(1) does not allow a governmental entity to “withhold the attorney fee bills” because that section is *not* “other law” for purposes of § 552.022.⁶ However, the Texas Supreme Court has held that the Texas Rules of Evidence *are* “other law” within the meaning of § 552.022 and responsive documents may be withheld from disclosure pursuant to Rule 503.⁷

Information contained in the documents responsive to the April 24, 2020 request may therefore be withheld upon successful demonstration that such information is protected by the attorney-client privilege provided by Rule 503 of the Texas Rules of Evidence.⁸ The governmental body carries the burden of demonstrating how and why information is excepted from disclosure under Rule 503, and must establish each element of the test to determine the applicability of the attorney-client privilege to certain information.⁹ Such information may be redacted accordingly upon demonstration by the governmental body that the information is excepted from disclosure under Rule 503.¹⁰

⁵ Tex. Gov’t Code Ann. § 552.107(1).

⁶ Op. Tex. Att’y Gen. No. OR2011-12797 (2011).

⁷ See Op. Tex. Att’y Gen. No. OR2011-12797 (2011) (*citing In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (discussing the applicability of the exception provided in § 552.107 and Texas Rule of Evidence 503 to a request for information pertaining to legal bills)).

⁸ Tex. Att’y Gen. ORD-676 (2002) at 5-6.

⁹ *Id.* at 6.

¹⁰ *Id.*

In Open Records Decision No. 676, the Attorney General interpreted § 552.107 to protect the same information as protected under Texas Rule of Evidence 503, and therefore the standard for demonstrating the attorney-client privilege under the Act is the same as the standard used in the discovery process under Rule 503.¹¹ In order to withhold information from disclosure under Rule 503, this Office has established that a governmental body 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.¹²

If a governmental entity can demonstrate the satisfaction of all three factors, the information is privileged and confidential under Rule 503 and may be withheld from disclosure unless the documents at issue fall within the listed exceptions to the privilege enumerated in Rule 503(d).¹³ Finally, because the attorney-client privilege can be waived at any time, the governmental body must demonstrate how the confidentiality of the communication has been maintained.¹⁴

In determining whether the attorney-client privilege is applicable to specific information, it is necessary to look at the “facts surrounding the creation and maintenance of the information” rather than its content.¹⁵ For the attorney-client privilege to apply, the information or document must be communicated for the “purpose of facilitating the rendition of professional legal services” to the governmental body.¹⁶ The privilege may not apply if the attorney or representative of the attorney is acting in any capacity other than that of facilitating legal services to the governmental body.¹⁷ Thus, the governmental body must describe the nature of the professional services to which each communication pertains and how these legal services are for the governmental body as the client.¹⁸

Considering the information requested, it is important to reiterate that, while a legal bill is specifically-listed public information in § 552.022, this Office has found that “information that is

¹¹ Tex. Att’y Gen. ORD-676 at 4 (2002).

¹² Op. Tex. Att’y Gen. No. OR2011-12797 (2011).

¹³ *Id.* (citing *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ)).

¹⁴ Tex. Att’y Gen. ORD-676 (2002) at 6-11; see *Osborne v. Johnson*, 954 S.W.2d 180, 435 184 (Tex. App.—Waco 1997, orig. proceeding) (whether communication was confidential depends on intent of parties involved at time information was communicated).

¹⁵ Tex. Att’y Gen. ORD-676 (2002) at 4.

¹⁶ Tex. R. Evid. 503(a)(5), (b)(1); Tex. Att’y Gen. ORD-676 (2002) at 7.

¹⁷ Tex. Att’y Gen. ORD-676 (2002) at 7.

¹⁸ *Id.* at 7-8.

specifically demonstrated to be protected by the attorney-client privilege or made confidential by other law may be withheld from fee bills.”¹⁹ The invoices for legal services that are responsive to this request contain individual time entry narratives describing in detail the work provided to WOWSC by its legal counsel related to the ongoing litigation. Each time entry itself contains a *detailed description* of the work performed, and it is this precise information WOWSC wishes to withhold from disclosure. Such information, even in summary form, is a clear “communication” to WOWSC by its legal counsel, and is certainly a communication made for the purposes of providing legal services to WOWSC.

To be clear, WOWSC is not seeking to assert a privilege over any document or communication referenced *within* any specific time entry narrative or work description in these invoices. The communications at issue are both the *invoices themselves and the information contained within the time entry narratives in each invoice*. WOWSC is not seeking to withhold any communications, documents, work product, etc. referenced *within* any particular invoice or individual time entry. The invoices themselves are communications, mailed on a monthly basis from an attorney or attorney representative directly to the client or a client representative, and the specific work descriptions and time entries are further communications as to the specifics of the work performed in the previous month that has resulted in the accumulation of charges for legal services. *This* is the information that WOWSC seeks to withhold from disclosure pursuant to the privilege provided in Rule 503. As such, none of the factors for the application of the Rule 503 attorney-client privilege need to be met or applied regarding any other communication, document, or information referenced within a particular invoice or time entry. No such communication, document, information, or otherwise is responsive to the April 24, 2020 request and is therefore irrelevant as to the determination of the applicability of the Rule 503 privilege to the information contained in the invoices provided as **Exhibit B**.

These invoices were prepared and reviewed exclusively by WOWSC attorneys or attorney representatives and mailed to the attention of a WOWSC Board member, and furthermore were not intended to be made available to anyone outside WOWSC representatives, all of whom are “clients” or “client representatives” for the purpose of the Rule 503 attorney-client privilege. These invoices were sent by an attorney or the attorney’s representative in their capacity as legal counsel to WOWSC, and this sort of routine invoicing is certainly for the facilitation of legal services to WOWSC. No waiver of this privilege has occurred at any time regarding these documents, and the confidential nature of the information therein has thus been preserved. The nature of the services provided are readily apparent by the documents themselves, as the invoices and time entry narratives within describe the legal services provided to WOWSC and serve as a summary thereof for the purposes of understanding the associated costs of legal representation and, more importantly, to keep the client and its representatives up to date on the most recent work done by legal counsel during the ongoing litigation.

Therefore, all elements established by this Office for applicability of the Rule 503 privilege are satisfied. The invoices and specifically the time entry narratives and work

¹⁹ Op. Tex. Att’y Gen. No. OR2009-13151 (2009).

descriptions are “communications” from legal counsel to WOWSC. At no time whatsoever were these invoices or their contents shared with anyone beyond WOWSC representatives and WOWSC’s legal counsel, and thus the confidentiality of these invoices among attorneys, attorney representatives, clients, and client representatives has been preserved. The information at issue does not fall within any of the exceptions to the attorney-client privilege provided by Rule 503(d) and the privilege has not otherwise been waived by WOWSC. Therefore, WOWSC claims that all time entry narratives and work descriptions contained in the invoices responsive to the April 24, 2020 request are excepted from discovery pursuant to the attorney-client privilege provided in Rule 503 of the Texas Rules of Evidence.

III. Information relating to the Work Product Privilege

As stated above, Texas Government Code § 552.022 identifies certain types of information that are categorically “public information” and may not be excepted from required disclosure unless made confidential by Chapter 552 or by other law, and attorney fee bills are categorically considered to be public information pursuant to § 552.022(a)(16). In addition, the litigation exception provided under § 552.103 does not operate to allow a governmental entity to “withhold the attorney fee bills” because that section is not “other law” for purposes of § 552.022.²⁰ However, the Texas Supreme Court holds that the Texas Rules of Civil Procedure, like the Texas Rules of Evidence, is “other law” within the meaning of § 552.022. Furthermore, in Open Records Decision No. 677, your Office conducted a thorough evaluation of the assertion of the work product privilege provided under Texas Rule of Civil Procedure 192.5 vis-à-vis information specifically listed in § 552.022.²¹ In ORD-677, your Office concluded that “core work product” as defined by Rule 192.5 is not discoverable and the duration of the privilege is perpetual,” and thus “[R]ule 192.5 makes core work product expressly confidential for purposes of section 552.022.”²²

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.²³

²⁰ Op. Tex. Att’y Gen. No. OR2011-12797 (2011).

²¹ See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001); see also Tex. Att’y Gen. ORD-677 (2002).

²² See Tex. Att’y Gen. ORD-677 (2002) at 6.

²³ Tex. R. Civ. P. 192.5(a).

“Core” work product is defined as “the work product of an attorney or an attorney representative that contains the attorney’s or the attorney representative’s mental impressions, opinions, conclusions, or legal theories.”²⁴ Thus, to withhold § 552.022 information pursuant to the work product privilege under Rule 192.5, a governmental body must demonstrate that the information at issue was (1) either material prepared or mental impressions developed during trial or in anticipation of litigation by or for a party or a party’s representatives, or a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, *and* (2) consists of the “mental impressions, opinions, conclusions, or legal theories” of an attorney or that attorney’s representative.²⁵

The Requestor seeks legal invoices from a date range beginning in March 2019 to the present. All responsive invoices, therefore, cover a period during which litigation was not only anticipated, it was active and ongoing throughout the entire date range specified in the April 24, 2020 request. Our firm’s representation of WOWSC and our corresponding responsive invoices during that time frame easily satisfy the “during trial or anticipation of litigation” element of the test for Rule 192.5 application—litigation was not merely anticipated but rather active and ongoing throughout the duration of the date range specified by the Requestor himself.

Information contained in the responsive invoices is protected by the work-product privilege because the documents embody communications from attorneys and attorney representatives to the client, WOWSC and its representatives, that further reflect the mental impressions and applicable legal theories, opinions, and conclusions of legal counsel for WOWSC.²⁶ Those communications, particularly the time entry and work description narratives in the responsive invoices, frequently summarize, detail, or otherwise reflect those mental impressions, legal theories, opinions, and conclusions of WOWSC’s legal counsel on numerous areas of law specifically regarding the ongoing litigation. Furthermore, those same communications were developed during the course of the litigation for the client (WOWSC) to review and remain updated on the latest developments of the suit. For example, information in time entries describing deposition preparation, work product being developed, and other summaries of actions taken by legal counsel in the course of representing WOWSC indicate legal counsel’s overall mental impressions of the suit. In other words, they reflect that legal counsel is of the impression that certain action is necessary to further the client’s interest during the litigation. Information in the time entries describing research, work product, and other actions by legal counsel also indicates the theories on the areas and aspects of law that could be applicable in the course of litigation, the opinions of legal counsel on the viability of certain legal arguments and legal strategies related to the litigation, and legal counsel’s conclusions on those arguments and strategies. Taken in totality, the time entry narratives and work descriptions in the responsive invoices certainly convey WOWSC’s legal counsel’s mental impressions of the case as it developed and evolved over time and in light of new or additional filings and conversations with the client and client representatives as well as with opposing counsel.

²⁴ Tex. R. Civ. P. 192.5(b)(1).

²⁵ Tex. R. Civ. P. 192.5(a) & (b)(1); *see also* Tex. Att’y Gen. ORD-677 (2002).

²⁶ *See* Tex. R. Civ. P. 192.5(a) & (b)(1).

By reviewing and comparing the legal invoices, an individual like the Requestor can readily ascertain those impressions, legal positions, theories, opinions, conclusions, strategies, and advice conveyed to WOWSC by legal counsel regarding the ongoing litigation with several of its members. As a whole, this confidential information reveals the internal strategy of WOWSC and its legal counsel regarding the lawsuit. These bills *themselves* are communications, as are the individual time entries and work description narratives contained therein, as they are sent to WOWSC to convey a sufficient description of legal work performed previously as well as ongoing tasks and assignments, and are intended to facilitate the provision of legal services in that regard. The invoices are sent to and reviewed by *only* WOWSC representatives and those communications remain confidential as they are kept in WOWSC’s records and legal counsel’s files without dissemination outside of those parties.

It is important to emphasize that although the fee invoices may reference certain communications in the narratives of time entries or work descriptions, the narratives *themselves* constitute communications between attorneys and attorney representatives and WOWSC. The time entries in the invoices in **Exhibit B** are narratives constituting communications between an attorney or the attorney’s representative and conveyed to WOWSC as the client to communication legal work performed on behalf of the client. The narratives are generated internally at Lloyd Gosselink by our attorneys or attorney representatives and identified by initials of the attorney or attorney representative—the time entries and corresponding initials do not represent any party that is not an attorney or attorney representative actively representing WOWSC. Such narratives not only facilitate the continued legal relationship between legal counsel and WOWSC, but are necessary communications to keep WOWSC and its representatives (particularly, its Board of Directors) advised as to what legal services are being provided in a particular timeline and to summarize the specifics of work performed on a particular matter, in this case the ongoing member-driven litigation. It is also necessary that these narratives include information relating to particular projects or client questions so as to adequately communicate to WOWSC the particular legal tasks performed, the topics researched, the opinions and conclusions thereon, and the overall mental impressions of legal counsel as reflected by specific tasks performed. For example, a narrative discussing certain deposition preparation details the attorney’s mental impressions regarding that deposition and in direct relation to WOWSC’s defense of the lawsuit.

Importantly in ORD-677, your Office held that “[i]n the litigation discovery context, Texas courts protect the *entirety* of such documents containing privileged information,” and that “this case law must inform our analysis in the context of the Act.”²⁷ Balancing the rights of requestors under the Public Information Act, your Office held that the “incidental withholding of otherwise unprivileged information in a privileged document would not vitiate the availability of public information under the Act, especially when that information is also contained in records that are not subject to the privilege,” therefore concluding “that, generally, where a document is

²⁷ Tex. Att’y Gen. ORD-677 (2002) at 7 (*citing Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein), and *In re Bloomfield Mfg Co.*, 977 S.W.2d 389, 392 (Tex.App.—San Antonio 1998, orig. proceeding) (privilege extends to entire document)) (*emphasis added*).

demonstrated to contain work product that may be withheld under the standards discussed in this decision, this office in the open records ruling process may authorize the governmental body to withhold the *entire document*.²⁸

Under this guidance, WOWSC respectfully requests to withhold the entirety of each responsive invoice to which the work-product privilege applies pursuant to Rule 192.5, as all such invoices specifically pertain to the ongoing litigation itself and describe preparation, work product, research topics, issues, or communications regarding the same. All of these invoices detail either communications made during trial that reflect legal counsel's mental impressions, theories, conclusions, and opinions regarding the suit, material prepared or mental impressions developed during trial that indicate legal counsel's mental impressions, theories, conclusions, and opinions regarding the suit, or both.

IV. Conclusion

Mr. Flunker's April 24, 2020 request seeks information that WOWSC wishes to lawfully exclude from disclosure pursuant to the attorney-client privilege provided in Rule 503 of the Texas Rules of Evidence and pursuant to the work product privilege provided in Rule 192.5 of the Texas Rules of Civil Procedure.

The information requested by Mr. Flunker should be withheld from disclosure pursuant to Texas Rule of Evidence 503, as WOWSC has met the evidentiary burden provided by the Texas Rules of Evidence to establish the attorney-client privilege over the requested legal invoices and specifically over the information within the time entries and work descriptions contained within those invoices. As stated above, the requested documents embody communications from legal counsel, in that capacity, to WOWSC and made for the provision of professional legal services to WOWSC and its representatives. Further, those invoices and the information contained within were intended to be confidential communications and have remained confidential between WOWSC representatives and WOWSC's legal counsel. Therefore, WOWSC should be allowed to withhold the information in the all responsive documents from disclosure pursuant to its lawful assertion of the attorney-client privilege in Rule 503 of the Texas Rules of Evidence.

Additionally, information contained in the responsive documents is protected pursuant to the work product privilege under Rule 192.5 because the invoices in **Exhibit B** and specifically the time entries and work description narratives reflect work produced during active, ongoing litigation that was not merely speculative, but was actually occurring at the time the entries were recorded and the invoices communicated to the client, WOWSC. Moreover, the time entry and work description narratives in the responsive documents reflect the legal positions, strategies, mental impressions, conclusions, opinions, and other advice generated by attorneys and attorney representatives during the pending litigation. Therefore, and under the guidance of your Office in

²⁸ *Id.* (emphasis added).

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ORD-677, Rule 192.5 should apply to allow WOWSC to withhold any invoice responsive to the April 24, 2020 request in its *entirety*.

Should you have any questions concerning this request for decision, please contact me at the number referenced above. Thank you for your attention to this matter.

Sincerely,

J. Troupe Brewer

Enclosures

cc via email: Mr. Danny Flunker, Requestor
Exhibits excluded

Mr. Joe Gimenez, Board President & Public Information Officer
Windermere Oaks Water Supply Corporation

Mr. Jose de la Fuente *of the firm*