

CAUSE NO. D-1-GN-19-006219

**WINDERMERE OAKS WATER
SUPPLY CORPORATION**

Plaintiff,

v.

**THE HONORABLE KEN PAXTON,
ATTORNEY GENERAL OF TEXAS**

Defendant.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

201ST
JUDICIAL DISTRICT

**WINDERMERE OAKS WATER SUPPLY CORPORATION'S
ORIGINAL PETITION FOR DECLARATORY RELIEF**

TO THE HONORABLE JUDGE OF THE COURT:

Plaintiff Windermere Oaks Water Supply Corporation (the "WOWSC" or "Plaintiff") files this Original Petition seeking a declaratory judgment pursuant to Section 552.324 of Chapter 552 of the Texas Government Code (the "Texas Public Information Act" or the "Act").

I. EXECUTIVE SUMMARY

1. WOWSC seeks a declaratory judgment from the Court to allow it to withhold from release to the public invoices detailing legal services provided to WOWSC from March 7, 2018 to May 28, 2019 (the requested information is the "Legal Invoices") because the Legal Invoices are properly excepted from disclosure under Texas Government Code Section 552.022 and, more specifically, pursuant to the privileges provided by Rule 503 of the Texas Rules of Evidence ("Rule 503") and Rule 192.5 of the Texas Rules of Civil Procedure ("Rule 192.5"). Specifically, § 552.022 and Rules 503 and 192.5 allow a governmental entity to withhold information contained in a legal invoice pursuant to the attorney-client and the work product privileges.

2. The Legal Invoices include invoices for legal services from WOWSC's former legal counsel, the Law Office of Les Romo, and from Lloyd Gosselink Rochelle & Townsend, P.C. ("Lloyd Gosselink"), which firm was retained on or around May of 2018 by WOWSC following the termination of the professional relationship between Mr. Romo and WOWSC. In March 2018, an entity known as TOMA Integrity, Inc. filed a First Amended Petition naming WOWSC as a defendant in the suit. In its petition, TOMA Integrity, Inc. alleges various violations of the Texas Open Meetings Act against WOWSC. That litigation has been ongoing since March of 2018 and remains pending as of the date of this filing. Importantly, the requestor, Mr. Daniel "Danny" Flunker, was once a registered principal of TOMA Integrity, Inc. Furthermore, Mr. Flunker's May 29, 2019 request was submitted while the litigation between TOMA Integrity, Inc. and WOWSC was pending.

3. Much of the information contained in the Legal Invoices is related to the ongoing legal proceeding between WOWSC and TOMA Integrity, Inc., and the Requestor, especially in light of his status as a former principal of TOMA Integrity, Inc., 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. The Legal Invoices contain time entry descriptions for legal services rendered to WOWSC detailing the work product, strategies, actions, etc. of WOWSC's legal counsel. This information in turn reflects the mental impressions, opinions, conclusions, and legal theories of WOWSC's legal counsel both in anticipation of and during litigation.

4. Accordingly, WOWSC requests that the Court declare that WOWSC is relieved from compliance with the Attorney General's Letter Ruling OR2019-22667 (the "Ruling"), and from responding to Requestor Danny Flunker's May 29, 2019 public information request (the

“Request”) because the Legal Invoices are excepted from disclosure under Texas Government Code Section 552.022 and pursuant to privileges provided by Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure.

II. DISCOVERY

5. Plaintiff does not anticipate a need for discovery in this proceeding. If discovery is necessary, Plaintiff proposes that it be conducted pursuant to the Level 2 procedures of Rule 190 of the Texas Rules of Civil Procedure.

III. PARTIES AND SERVICE

6. Plaintiff the Windermere Oaks Water Supply Corporation 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. Thus, WOWSC is subject to the Act pursuant to Texas Government Code § 552.003(1)(A)(x).

7. Defendant the Honorable Ken Paxton is the Attorney General of the State of Texas. The Open Records Division of the Office of the Attorney General issued Open Records letter ruling number OR2019-22667. Attorney General Paxton may be served in the Price Daniel, Sr. Building, 209 West 14th Street, Austin, Texas 78701.

8. In accordance with Texas Government Code § 552.325(b), the undersigned attorney for WOWSC will notify the requestor, Danny Flunker, by certified mail, return receipt requested, of the following:

- a) The existence of the suit, including the subject matter and cause number of the suit and the court in which the suit is filed;
- b) The Requestor’s right to intervene in the suit or to choose not to participate in the suit;
- c) The fact that the suit is against the Attorney General; and

- d) The address and phone number of the Office of the Attorney General.

IV. JURISDICTION AND VENUE

9. Venue and jurisdiction are proper in this Court pursuant to Texas Government Code § 552.324(a).

V. FACTUAL BACKGROUND

10. On May 28, 2019 and after WOWSC's business hours, Mr. Danny Flunker (the "Requestor") sent an e-mail to the Board President of WOWSC requesting certain information pursuant to the Texas Public Information Act. That request was officially received and processed by WOWSC the following morning on May 29, 2019. A true and correct copy of the Request is attached as **Exhibit A**. Among other things, the Requestor requested "copies of all legal invoices from 3/7/18 to today's date, that is all invoices of all work done by Les Romo and Lloyd Goosling [sic] for WOWSC."

11. In accordance with Section 552.301(b) of the Texas Government Code, on June 12, 2019 (within 10 business days after receipt of the Request), WOWSC asked the Attorney General for a determination as to whether the Legal Invoices fell within certain exceptions to the Texas Public Information Act so that those documents could be withheld from disclosure. A true and correct copy of WOWSC's correspondence to the Attorney General, which it also provided to Requestor, is attached as **Exhibit B**. Citing Texas Government Code Sections 552.022, 552.101, as well as Texas Rule of Evidence 503 and Rule 192.5 of the Texas Rules of Civil Procedure, WOWSC took the position that the documents were excepted from disclosure.

12. In accordance with Section 552.301(e) of the Texas Government Code, on June 19, 2019 (15 business days after receipt of the Request), WOWSC provided to the Attorney General written comments outlining the reasons why its cited exceptions applied and copies of the

requested information it sought to withhold. WOWSC also provided a copy of this correspondence to the Requestor but without copies of the information it sought to withhold. A true and correct copy of this correspondence to the Attorney General, without copies of the Legal Invoices, is attached as **Exhibit C**. Those June 19, 2019 written comments are incorporated herein by reference as if fully set forth in their entirety, and are not fully restated here in the interest of judicial economy.

13. On August 15, 2019, the Attorney General issued Open Records letter ruling number OR2019-22667. A true and correct copy of the Ruling is attached as **Exhibit D**. WOWSC received the Ruling on August 16, 2019 by and through its legal counsel. In its Ruling, the Attorney General held that while certain, limited parts of time entries may be withheld and redacted under the asserted privileges, the remaining portions of the Legal Invoices must be released. WOWSC seeks to withhold those time entries in their entirety for the reasons stated herein or, in the very least, all time entries pertaining to legal services performed in relation to the ongoing litigation involving TOMA Integrity, Inc. and WOWSC.

VI. CAUSE OF ACTION: DECLARATORY JUDGMENT

14. WOWSC incorporates by reference paragraphs 1-13 above as if fully pleaded here.

15. WOWSC requests a declaration authorizing it to withhold the information responsive to the Request. 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). Furthermore, the Texas Supreme Court and rulings of the Attorney General hold 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 of the Texas Government Code are *not* “other law” for purposes of § 552.022.¹ However, the Texas Supreme Court held that the Texas Rules of Evidence and Texas Rules of Civil Procedure *are* “other law” within the meaning of § 552.022 and information that is otherwise “public information” under § 552.022 may be withheld from disclosure pursuant to Rule 503 and Rule 192.5.²

16. The documents responsive to the Request and the information contained therein were provided to WOWSC by its former and current legal counsel for the purpose of rendering professional legal services and were intended to be confidential communications reflecting the legal work performed and corresponding charges for such services, the majority of which pertain to the litigation between WOWSC and TOMA Integrity, Inc. Additionally, these communications and the information contained therein reflect the mental impressions, opinions, conclusions, and legal theories of WOWSC’s legal counsel both in anticipation of and during litigation. To that end, WOWSC cannot imagine a more appropriate setting 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 in the course of litigation.

A. Attorney-Client Privilege under Texas Rule of Evidence 503

17. 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

¹ Op. Tex. Att’y Gen. No. OR2011-12797 (2011).

² 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”).

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.”³ While the Attorney General 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 § 552.022,⁴ the Texas Supreme Court has held that the Texas Rules of Evidence *are* “other law” within the meaning of § 552.022 and documents otherwise responsive to a request under the Act may be withheld from disclosure pursuant to Rule 503.

18. In order to withhold such information from disclosure under Rule 503, the Attorney General established a test requiring a governmental body to:

- (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.⁵

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.

19. The Legal 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,

³ Tex. Gov’t Code Ann. § 552.107(1).

⁴ Op. Tex. Att’y Gen. No. OR2011-12797 (2011).

⁵ *Id.*

all of whom are “clients” or “client representatives” for the purpose of the Rule 503 attorney-client privilege. The Legal Invoices were communications 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 Legal 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 especially considering the ongoing litigation with TOMA Integrity, Inc.

20. All elements of the test for applicability of the Rule 503 privilege are satisfied. The Legal Invoices and specifically the time entry narratives and work 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 May 29, 2019 Request are exempt from discovery pursuant to the attorney-client privilege provided in Rule 503 of the Texas Rules of Evidence.

B. Work Product Privilege under Rule 192.5 of the Texas Rules of Civil Procedure

21. As stated above, 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, the Attorney General conducted a thorough evaluation of the assertion of the work product privilege provided under Rule 192.5 vis-à-vis information specifically listed in § 552.022.⁶ In ORD-677, the Attorney General 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.”⁷

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.⁸

“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.”⁹

23. 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

⁶ See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001); see also Tex. Att’y Gen. ORD-677 (2002).

⁷ See Tex. Att’y Gen. ORD-677 (2002) at 6.

⁸ Tex. R. Civ. P. 192.5(a).

⁹ Tex. R. Civ. P. 192.5(b)(1).

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.¹⁰

24. The Legal Invoices and the information contained therein cover a period during which litigation was not only anticipated, it was active and ongoing throughout the entire date range specified by the Request. Mr. Romo's representation of WOWSC and his 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. Additionally, litigation was active at the time WOWSC engaged Lloyd Gosselink, and that same litigation has been ongoing throughout Lloyd Gosselink's representation of WOWSC and remains pending to date.

25. Information contained in the Legal 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, mental impressions, and conclusions of legal counsel for WOWSC.¹¹ Those communications, particularly the time entry and work description narratives in the Legal Invoices, frequently summarize and detail those mental impressions, legal theories, opinions, and conclusions of WOWSC's legal counsel on numerous areas of law—often specifically regarding the ongoing litigation with TOMA Integrity, Inc.

26. As a whole, this confidential information reveals the internal strategy of WOWSC and its legal counsel regarding the lawsuit with TOMA Integrity, Inc. and surrounding related

¹⁰ Tex. R. Civ. P. 192.5(a) & (b)(1); *see also* Tex. Att'y Gen. ORD-677 (2002).

¹¹ *See* Tex. R. Civ. P. 192.5(a) & (b)(1).

issues. These Legal Invoices *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. Although the Legal Invoices may reference certain other communications within the narratives of time entries or work descriptions, the narratives *themselves* constitute communications between attorney and attorney representatives and WOWSC.

27. The Attorney General importantly 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.”¹² Balancing the rights of requestors under the Public Information Act, the Attorney General explained 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 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*.”¹³

¹² 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*).

¹³ *Id.* (*emphasis added*).

28. Under the guidance and rulings of the Texas Supreme Court and the Attorney General himself, WOWSC respectfully requests to withhold the entirety of information within the Legal Invoices to which the work-product privilege applies pursuant to Rule 192.5—specifically any invoice of Mr. Romo or Lloyd Gosselink containing references to either (1) the ongoing litigation with TOMA Integrity, Inc. itself or (2) any work product, meetings, research topics, issues, or communications regarding the same. All of these references are 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.

29. Finally, the Attorney General’s narrow application of the privileges provided by Rules 503 and 192.5 carries dangerous policy implications. Potential plaintiffs could easily circumvent Texas’s statutory rules on procedure and privilege that govern the discovery process by submitting a Public Information Act request for legal invoices to a governmental entity with whom the requestor is currently involved in litigation, thereby gaining invaluable insight to the strategies, legal theories, mental impressions, and conclusions of a governmental entity’s legal counsel *during the litigation*.

30. Such an interpretation of the applicability of Rule 503 and Rule 192.5 privileges would put governmental entities in a disadvantageous position by allowing opposing parties access to information that would be *otherwise privileged* during litigation. Not only is such a narrow application of these privileges disadvantageous to governmental entities, such an application would only encourage legal counsel for governmental entities to reduce the amount of information

contained in legal invoices, out of fear of release and in effort to protect the client, ultimately *decreasing* transparency in government.

31. Therefore, pursuant to Section 552.324 of the Texas Government Code, WOWSC requests the Court to declare that WOWSC is relieved from compliance with the Attorney General's Letter Ruling OR2019-22667, and from responding to Requestor's May 29, 2019 public information request because the Legal Invoices are excepted from disclosure pursuant to Texas Government Code Section 552.022 and, more specifically, pursuant to the privileges provided by Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure.

VII. PRAYER

32. For the above reasons, Plaintiff the Wintemere Oaks Water Supply Corporation prays:

- a. That the Court declare that WOWSC is relieved from compliance with the Attorney General's Letter Ruling OR2019-22667, and from responding to Requestor Danny Flunker's May 29, 2019 public information request because the Legal Invoices are excepted from disclosure under Texas Government Code Section 552.022 and pursuant to the privileges provided by Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure.
- b. For any and all other relief to which it may be justly entitled.

Respectfully submitted,

LLOYD GOSSELINK
ROCHELLE & TOWNSEND, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
Telephone: (512) 322-5800
Fax: (512) 472-0532

By: /s/ Jose E. de la Fuente
J. TROUPE BREWER
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tbrewer@lglawfirm.com

JOSE E. de la FUENTE
State Bar No. 00793605
jdelafuente@lglawfirm.com

ATTORNEYS FOR PLAINTIFF
WINDERMERE OAKS WATER
SUPPLY CORPORATION

EXHIBIT A

Unofficial copy Travis Co. District Clerk Velva L. Price

From: Mister Flunker (dfunker@gmail.com)

To: 1129jig@gmail.com

Cc: normanmorse@gmail.com; brownsandniners@aol.com; dbertinojr@me.com; u2torche@yahoo.com, mgershon@lglawfirm.com; hging@lglawfirm.com

Date: Tuesday, May 28, 2019, 05:36 PM CDT

Joe

I am requesting per the PIA, copies of all legal invoices from 3/7/18 to today's date, that is all invoices of all work done by Les Romo and Lloyd Goosling for WOWSC.

Do you understand this request?

Danny

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As the Texas Constitution states, "All political power is inherent in the people," and that means a free government should work for the people, not the other way around.

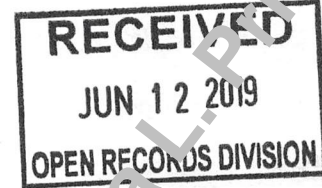
Unofficial copy Travis Co. District Clerk Velda L. Price

EXHIBIT B

Unofficial copy Travis Co. District Clerk Velva L. Price

Mr. Brewer's Direct Line: (512) 322-5858
Email: tbrewer@lglawfirm.com

June 12, 2019



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

VIA HAND DELIVERY

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

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 May 28, 2019 and after WOWSC's business hours, Mr. Danny Flunker (the "Requestor") sent an e-mail to the Board President of WOWSC requesting certain information pursuant to the Texas Public Information Act (the "Act"). Mr. Flunker's request was officially received and processed by WOWSC the following morning on May 29, 2019. A copy of the Requestor's May 29, 2019 request is enclosed 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 May 29, 2019 request that is exempted from disclosure by Texas Government Code §§ 552.022 and 552.101, as well as pursuant to Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure.

Texas Government Code § 552.022 identifies certain documents that are categorically "public information" and not excepted from disclosure unless otherwise "made confidential under this chapter or other law." Tex. Gov't Code § 552.022(a). The Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are "other law" as contemplated by §552.022, and thus information that would otherwise be public pursuant to §552.022 may be withheld from disclosure pursuant to certain privileges established in the Texas Rules of Evidence and the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 53 S.W.3d 323, 336 (Tex. 2001); *see also* Tex. Att'y Gen ORD 677 (2002) ("[t]hus, a governmental body may assert Rule 192.5 to withhold section 552.022 information"). Therefore, WOWSC requests a determination that information within responsive documents to which Rule 503 of the Texas Rules of Evidence (pertaining to the attorney-client privilege) and Rule 192.5 of the Texas Rules of Civil Procedure (pertaining to the work product privilege) apply need not be disclosed to the Requestor.

Windermere Oaks WSC Request for Attorney General Determination

Flunker PIA Request

June 12, 2019


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Texas Government Code § 552.101 excepts from public disclosure information “considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Tex. Gov’t Code § 552.101. Certain documents responsive to the May 29, 2019 request include information relating to settlement discussions and negotiations, documents which may be confidential by law and thus subject to the exception under Section 552.101. WOWSC requests a determination that information within the responsive documents to which Section 552.101 is applicable need not be disclosed to the Requestor.

Pursuant to Texas Government Code § 552.301(e), WOWSC will provide to your office, not later than the fifteenth business day from the date the District received the May 29, 2019 request, the following materials: written comments outlining the reasons why the stated exceptions apply and a copy of the specific information requested or representative samples of such information.

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

Sincerely,



J. Troupe Brewer

Enclosure

cc via email: Mr. Danny Flunker
dflunker@gmail.com

Mr. Joe Gimenez, Board President
Windermere Oaks Water Supply Corporation

Mr. Michael A. Gershon *of the firm*

EXHIBIT C

Unofficial copy Travis Co. District Clerk Velva L. Price

Mr. Brewer's Direct Line: (512) 322-5858
Email: tbrewer@lglawfirm.com

June 19, 2019



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

VIA HAND DELIVERY

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

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 May 28, 2019 and after WOWSC's business hours, Mr. Danny Flunker (the "Requestor") sent an e-mail to the Board President of WOWSC requesting certain information pursuant to the Texas Public Information Act (the "Act"). That request was officially received and processed by WOWSC the following morning on May 29, 2019. A copy of the Requestor's May 29, 2019 request was provided in previous correspondence to your Office dated June 12, 2019 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 May 29, 2019 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 May 29, 2019 request, the Requestor seeks from WOWSC "copies of all legal invoices from 3/7/18 to today's date, that is all invoices of all work done by Les Romo and

¹ In previous correspondence dated June 12, 2019, 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."

Lloyd Goosling [sic] for WOWSC.”² The Law Office of Les Romo represented WOWSC in March of 2018, and Lloyd Gosselink Rochelle & Townsend, P.C. (“Lloyd Gosselink”) was retained approximately one year ago by WOWSC following the termination of the professional relationship between Mr. Romo and WOWSC. WOWSC has the responsive invoices available, and copies these invoices are enclosed herein as **Exhibit B**.

In March 2018, an entity known as TOMA Integrity, Inc. filed its First Amended Petition naming WOWSC as the defendant. In its suit, TOMA Integrity, Inc. alleges various violations of the Texas Open Meetings Act against WOWSC. That litigation has been ongoing since that time and remains pending as of the date of this correspondence (a copy of the First Amended Petition is attached as **Exhibit C**). Mr. Flunker’s May 29, 2019 request was therefore submitted while the litigation between TOMA Integrity, Inc. and WOWSC was pending. Importantly, the Requestor, Mr. Daniel “Danny” Flunker, was once a registered principal of TOMA Integrity, Inc. Much of the information responsive to the May 29, 2019 request is related to the ongoing legal proceeding between WOWSC and TOMA Integrity, Inc., and the Requestor, especially in light of his status as a former principal of TOMA Integrity, Inc., 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. Current legal counsel for WOWSC, Lloyd Gosselink began its representation of WOWSC in August 2018, and thus the entirety of the firm’s representation of WOWSC has been under the shadow of this ongoing litigation with TOMA Integrity, Inc.

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 its former and current legal counsel for the purpose of rendering professional legal services and were intended to be confidential communications reflecting the legal work performed and corresponding charges for such services, the majority of which pertain to the litigation between WOWSC and TOMA Integrity, Inc. Additionally, these communications and the information contained therein reflect the mental impressions, opinions, conclusions, and legal theories of WOWSC’s legal counsel both in anticipation of and during

² See **Exhibit A**.

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”).

litigation. To that end, WOWSC cannot imagine a more appropriate time to assert the privileges lawfully available to it under Rule 503 and under Rule 192.5, and thus 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.

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

Therefore, certain information contained in the documents responsive to the May 29, 2019 request may 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

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;

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. 2000) (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.*

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

- (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 specifically demonstrated to be protected by the attorney-client privilege or made confidential by other law may be withheld from fees bills.”¹⁹ The invoices for legal services that are responsive to this request contain many individual time entry narratives describing in detail the work provided to WOWSC by its legal counsel, and many such entries particularly describe work performed relative to the litigation with TOMA Integrity, Inc. 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.

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.

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

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 May 29, 2019 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 especially considering the ongoing litigation with TOMA Integrity, Inc.

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 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 May 29, 2019 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)(1). 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

“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

²⁰ See 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).

²⁴ Tex. R. Civ. P. 192.5(b)(1).

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 2018—the same month that TOMA Integrity, Inc. filed its First Amended Petition (Exhibit C). 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 May 29, 2019 request. Mr. Romo’s representation of WOWSC and his 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. Additionally, litigation was active at the time WOWSC engaged Lloyd Gosselink, and that same litigation has been ongoing throughout Lloyd Gosselink’s representation of WOWSC and remains pending to date. As to the documents and information responsive to the May 29, 2019 request, 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 and detail those mental impressions, legal theories, opinions, and conclusions of WOWSC’s legal counsel on numerous areas of law—often specifically regarding the ongoing litigation with TOMA Integrity, Inc. 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 research topics, 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 all the 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.

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, particularly in regards to the litigation with

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).

TOMA Integrity, Inc. As a whole, this confidential information reveals the internal strategy of WOWSC and its legal counsel regarding the lawsuit with TOMA Integrity, Inc. and surrounding related issues. 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 by 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. 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, i.e., the litigation involving TOMA Integrity, Inc. 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 research details the attorney's mental impressions as to the possible viability of the particular topic in relation to WOWSC's defense of the TOMA Integrity, Inc. suit, and entries discussing settlement indicate the mental impression of legal counsel that such action is possible or a viable option for WOWSC to pursue.

Importantly in ORD-677, in relation to the ongoing litigation with TOMA Integrity, Inc., 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 demonstrated to

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*).

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 invoice to which the work-product privilege applies pursuant to Rule 192.5, specifically any invoice of Mr. Romo or Lloyd Gosselink containing references to either (1) the ongoing litigation with TOMA Integrity, Inc. itself or (2) any work product, research topics, issues, or communications regarding the same. All of these references are 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 May 29, 2019 request seeks information that WOWSC wishes to 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

²⁸ *Id.* (emphasis added).

representatives during the pending litigation. Therefore, and under the guidance of your Office in ORD-677, Rule 192.5 should apply to allow WOWSC to withhold any invoice responsive to the May 29, 2019 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,

A handwritten signature in black ink, appearing to read 'J. Troupe Brewer', written in a cursive style.

J. Troupe Brewer

Enclosures

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

Mr. Joe Gimenez, Board President
Windermere Oaks Water Supply Corporation

Mr. Michael A. Gershon *of the firm*

Unofficial copy Travis Co. District Clerk Velda L. Price

EXHIBIT D

Unofficial copy Travis Co. District Clerk Velva L. Price



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

RECEIVED
AUG 16 2019
Lloyd Gosselink

August 15, 2019

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

OR2019-22667

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# 781033.

The Windermere Oaks Water Supply Corporation (the "corporation"), which you represent, received a request for specified legal invoices. You claim the submitted information privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. We have considered your submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, 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 expressly confidential under the Act or other law. *Id.* § 552.022(a)(16). The Texas Supreme Court has held 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 assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence and the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure for the submitted attorney fee bills.

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

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).

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. 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 any 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 attaches to complete communication, including factual information).

You assert the submitted attorney fee bills must be withheld in their entireties under rule 503. However, section 552.022(a)(16) of the Government Code provides information "that is in a bill for attorney's fees" is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. *See* Gov't Code § 552.022(a)(16) (emphasis added). This provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld. *See also* Open Records Decisions Nos. 676 (attorney fee bill cannot be withheld in entirety on basis it contains or is attorney-client communication pursuant to language in section 552.022(a)(16)), 589 (1991)

(information in attorney fee bill excepted only to extent information reveals client confidences or attorney's legal advice). Accordingly, the corporation may not withhold the entirety of the submitted fee bills under Texas Rule of Evidence 503.

Additionally, you assert portions of the submitted fee bills should be withheld under rule 503. You state the submitted fee bills include privileged attorney-client communications between the corporation and its outside counsel that were made in furtherance of the rendition of professional legal services to the corporation. You also state these communications were intended to be, and have remained, confidential. Based on these representations and our review of the information at issue, we find you have established the information we have marked constitutes privileged attorney-client communications under rule 503. Thus, the corporation may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. However, upon review, we find some of the remaining information has been shared with individuals you have not demonstrated are privileged parties. We do note an entry stating a memorandum or an email was prepared or drafted does not demonstrate the document was communicated to the client. Therefore, we find you have failed to demonstrate the remaining information consists of privileged attorney-client communications. Thus, the corporation may not withhold any portion of the remaining information under rule 503.

We next address Texas Rule of Civil Procedure 192.5 for the remaining attorney fee bills. Rule 192.5 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 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. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You claim the remaining information consists of attorney core work product that is protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, however, we find you have not demonstrated the information at issue contains the mental impressions, opinions, conclusions, or legal theories of an attorney or the attorney's representative that were developed in anticipation of litigation or for trial. We therefore conclude the corporation may not withhold any of the remaining information under Texas Rule of Civil Procedure 192.5.

In summary, the corporation may withhold the information we have marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence. 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eb

Ref: ID# 781033

Enc. Submitted documents

c. Requestor
(w/o enclosures)