

D-1-GN-20-007251

CAUSE NO. _____

**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**

126TH

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 attorney fee bills/legal invoices detailing legal services provided to WOWSC (herein "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 allows a governmental entity to withhold information contained in a legal invoice pursuant to the attorney-client and the work product privileges pursuant to Rules 503 and 192.5 as "other law".

2. Further, this suit is necessary to preserve WOWSC's rights due to an error in the Public Information Act Electronic Filing System. On September 23, 2020, WOWSC timely

submitted comments and a brief pursuant to 552.301(e) of the Texas Government Code, 15 business days after receipt of the Request, to the Office of the Attorney General via the online Public Information Act Electronic Filing System. On November 20, 2020, WOWSC received notice that Office of the Attorney General did not receive the September 23, 2020 filing, likely due to a malfunction with the online Public Information Act Electronic Filing System, and issued its letter ruling without properly considering the WOWSC's comments.

3. The Legal Invoices include invoices for legal services from Lloyd, Gosselink, Rochelle, & Townsend, P.C. ("Lloyd Gosselink"), retained by WOWSC in August of 2018, and Enoch Kever, PLLC, retained by WOWSC, pursuant to its bylaws and relevant statutes providing for the defense of directors, in June of 2019 to represent certain WOWSC Directors in the ongoing suit pending before Burnet County District Court (Cause No. 48292). Further, in connection with the pending Burnet County District Court matter, WOWSC and its Directors, all named as defendants in connection with the same transactions at issue in that case and represented by separate counsel, are "allied litigants," and thus the applicable privileges extend to the communications from counsel for the Directors (e.g., her invoices). The information contained in the Legal Invoices is related to several ongoing legal proceedings including proceedings for which Requestor is opposed to the WOWSC. 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 OR2020-29074 (the "Ruling"), and from responding to Requestor Danny Flunker's September 1, 2020 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 and because the Ruling was made without considering WOWSC’s timely filed September 23, 2020 brief and comments.

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)(ix).

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 September 1, 2020, Danny Flunker (the “Requestor”) sent an e-mail to the Board President of WOWSC requesting certain information pursuant to the Texas Public Information Act. A true and correct copy of the Request is attached hereto as **Exhibit A**. Among other things, the Requestor requested:

- a) “ALL Attorney fee bills for the protective order regarding youtube videos to include any attempt at having your deposition videos removed from youtube prior to the decision to file a protective order”
- b) “ALL Attorney fee bills regarding SAPA (Pilots Association) request for fencing off Currin Van Emans property.”
- c) “ALL Attorney fee bills regarding the Attorney General Lawsuit.”
- d) “ALL Attorney fee bills regarding the PUC rate case.”

11. In accordance with Section 552.301(b) of the Texas Government Code, on September 16, 2020 (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 hereto as **Exhibit B**. A true and correct copy of the September 16, 2020 Filing Confirmation is attached hereto as **Exhibit C**. WOWSC was closed for business on September 7, 2020, in observance of Labor Day and thus that date was not included

when calculating the timeline for filing a request for decision with the Office of the Attorney General. Citing Texas Government Code Sections 552.022 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. In its September 16, 2020 Request for Attorney General Decision, Lloyd Gosselink stated that it intended to file additional materials with the Office of the Attorney General no later than the fifteenth business day from the date WOWSC received the September 1, 2020 request pursuant to Texas Government Code § 552.301(e).

12. In accordance with Section 552.301(e) of the Texas Government Code, on September 23, 2020 (15 business days after receipt of the Request) WOWSC by and through its legal counsel, Lloyd Gosselink, filed its 15-Day Brief and Written Comments (“Brief”) with the Office of the Attorney General via the Public Information Act Electronic Filing System. A true and correct copy of the September 23, 2020 Filing Confirmation for the Brief is attached hereto as **Exhibit D**. In its Brief 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 hereto as **Exhibit E**. The September 23, 2020 Brief and 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. As evidenced by the September 23, 2020 Filing Confirmation and dated Brief Lloyd Gosselink timely filed the Brief with the Office of the Attorney General via the Public Information Act Electronic Filing System in accordance with Section 552.301(e) of the Texas Government Code. (Ex. D; Ex. E.)

14. On November 19, 2020 the Attorney General issued Open Records letter ruling number OR2020-29074. A true and correct copy of the Ruling is attached hereto as **Exhibit F**. WOWSC received the Ruling on November 20, 2020 by and through its legal counsel. In its Ruling, the Attorney General held that WOWSC had failed to meet their obligations under 552.301(e) to provide written comments. The Office of the Attorney General contends that it did not receive WOWSC's September 23, 2020 Brief, despite it being timely filed.

15. Immediately upon receiving Open Records letter ruling number OR2020-29074 WOWSC Counsel's office contacted the Open Government Hotline and was advised to resubmit the September 23, 2020 Brief along with the September 23, 2020 Filing Confirmation and a statement to the Public Information Act Electronic Filing System. On November 23, 2020 Counsel re-filed its September 23, 2020 Brief and also filed a copy of the same via certified mail return receipt requested. A true and correct copy of the November 23, 2020 Re-filing Confirmation is attached hereto as **Exhibit G** and a true and correct copy of the November 23, 2020 Certified Mail Receipt is attached hereto as **Exhibit H**.

16. Therefore, WOWSC files this petition not later than the 30th calendar day after the date receipt of letter ruling number OR2020-29074 to preserve its rights under Tex. Gov't Code Section 552.324. Due to an apparent error in the Attorney General's Public Information Act Electronic Filing System WOWSC's timely-filed September 23, 2020 Brief was not properly considered by the Office of the Attorney General when making letter ruling number OR2020-29074. WOWSC seeks to withhold the Legal Invoices at issue in their entirety for the reasons stated herein.

VI. CAUSE OF ACTION: DECLARATORY JUDGMENT

17. WOWSC incorporates by reference paragraphs 1-16 above as if fully pleaded here.

18. 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

19. The documents responsive to the Request and the information contained therein were provided to WOWSC by its 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. Additionally, these communications and the information contained therein reflect the mental impressions, opinions, conclusions, and legal

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”).

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

20. 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.”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 § 552.022⁴ 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.

21. 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 Tex. Gov't Code Ann. § 552.107(1).

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

- (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.

22. 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, 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.

23. 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

⁵ *Id.*

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 September 1, 2020 Request are excepted 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

24. 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

25. 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

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).

“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

26. 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.¹⁰

27. 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. The 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 and Enoch Kever, PLLCs’ representation of WOWSC and remains pending to date.

28. 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

⁹ Tex. R. Civ. P. 192.5(b)(1).

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

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 involving Requestor Danny Flunker.

29. As a whole, this confidential information reveals the internal strategy of WOWSC and its legal counsel regarding ongoing litigation and various other legal matters. 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 attorneys and attorney representatives and WOWSC.

30. 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

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

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).

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

31. Under the guidance and rulings of the Texas Supreme Court and the Texas Attorney General, 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.

32. 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 OR2020-29074, and from responding to Requestor’s September 1, 2020 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 and because WOWSC’s timely-filed September 23, 2020 Brief was not properly considered by the Office of the Attorney General when making letter ruling number OR2020-29074.

¹³ *Id.* (emphasis added).

VII. PRAYER

33. For the above reasons, Plaintiff the Windermere Oaks Water Supply Corporation prays:

- a) That the Court declare that WOWSC is relieved from compliance with the Attorney General's Letter Ruling OR2020-29074, and from responding to Requestor Danny Flunker's September 1, 2020 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
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By: /s/ Jose E. de la Fuente
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ATTORNEYS FOR PLAINTIFF
WINDERMERE OAKS WATER
SUPPLY CORPORATION

EXHIBIT A

On Tue, Sep 1, 2020 at 8:42 AM Mister Flunker <dflunker@gmail.com> wrote:
All,

I am respectfully requesting-

ALL Attorney fee bills for the protective order regarding youtube videos to include any attempt at having your deposition videos removed from youtube prior to the decision to file a protective order..

ALL Attorney fee bills regarding SAPA (Pilots Association) request for fencing off Currin Van Emans property.

ALL Attorney fee bills regarding the Attorney General Lawsuit.

ALL Attorney fee bills regarding the PUC rate case

ALL canceled checks paid to any law firm or attorney by WOWSC since July of 2019

Do you understand this request?

I am attaching what attorney fee bills look like unredacted from Lloyd Gosselink more specifically Michael A. Gershon so you understand what I am wanting regarding attorney fee bills. Let me know if you want to see the cancelled checks written by Dick Dial, Bruce Sorgen and Bill Doffing for these services.

Regards

EXHIBIT B

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

September 16, 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

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 September 1, 2020, WOWSC received an e-mail from Mr. Danny Flunker (the "Requestor") requesting certain information pursuant to the Texas Public Information Act (the "Act"). A copy of the Requestor's September 1, 2020 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 September 1, 2020 request that is excepted 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. WOWSC was closed for business in observation of Labor Day, September 7, 2020, and thus that date was not included in the calculation regarding the timing of filing a request with your office pursuant to Texas Government Code § 552.301(d).

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 328, 336 (Tex. 2001); *see also Paxton v. City of Dall.*, No. 06-18-00095-CV, 2019 WL 2119644, at *9-10 (Tex. App.—Texarkana May 15, 2019, pet. denied) (mem. op.) (holding that within information subject to Gov't Code § 552.022, noncore work product as described in Rule 192.5 of the Texas Rules of Civil Procedure is subject to the same mandatory withholding requirement as core work product); *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.

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 September 1, 2020 request include information relating to attorney client communications and litigation strategy, 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. This is the Requestor’s third request for WOWSC’s attorney fee bills that are subject to the privileges and legal protections cited above (*see* OAG ID# 781033 and OAG ID# 834912).

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 September 1, 2020 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,

A handwritten signature in black ink, appearing to read 'J. Troupe Brewer', with a stylized flourish at the end.

J. Troupe Brewer

Enclosure

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

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

Mr. Jose de la Fuente *of the firm*

On Tue, Sep 1, 2020 at 8:42 AM Mister Flunker <dflunker@gmail.com> wrote:
All,

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Regards

EXHIBIT C

Texas Attorney General

Public Information Act Electronic Filing System

Confirmation

Texas.gov Request ID: 66107426

Date and Time of Submission (CST): 09/16/2020 09:55:33 AM

This confirmation indicates the status of the upload process, including:

- Files that successfully uploaded

Uploaded Files:

- Windermere Oaks WSC's 10 Day OAG Notice - 09.01.2020 D. Flunker Request.pdf

This is not a confirmation of receipt by the Office of the Attorney General. You will receive a separate confirmation email from them within 3 business days. **Please do not call or contact the Office or the Attorney General with questions about your submitted request prior to receiving their confirmation email.** If you have not received the confirmation email from the Office of the Attorney General within this time period, please contact Texas.gov Help at 1-877-452-9060 or send an email to support@texasgovhelpdesk.com.

EXHIBIT D

Texas Attorney General

Public Information Act Electronic Filing System

Confirmation

Texas.gov Request ID: 66107426

Date and Time of Submission (CST): 09/23/2020 04:46:43 PM

This confirmation indicates the status of the upload process, including:

- Files that successfully uploaded

Uploaded Files:

- Windermere Oaks WSC's 15 Day Brief - Flunker 09.01.2020 Request.pdf

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EXHIBIT E

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

September 23, 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#
OR85342020

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 September 1, 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 September 1, 2020 request (the "Request") was provided in previous correspondence to your Office dated September 16, 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 September 1, 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"). As stated in the September 16, 2020 letter, WOWSC was closed for business on September 7, 2020 in observance of Labor Day and thus that date was not included when calculating the timeline for filing a request with your office pursuant to Texas Government Code § 552.301(e).

I. Background

In his September 1, 2020 request, the Requestor seeks from WOWSC several series of attorney fee bills pertaining to several specific subjects or areas of representation provided by our firm to WOWSC. Specifically, the Requestor seeks: (1) all attorney fee bills for the protective order regarding youtube videos to include any attempt at having [WOWSC director] deposition videos removed from youtube; (2) all attorney fee bills regarding SAPA request for fencing off Currin Van Eman's property; (3) all attorney fee bills regarding the Attorney

General lawsuit, and; (4) all attorney fee bills regarding the PUC rate case.¹ Our firm, Lloyd Gosselink Rochelle & Townsend, P.C. (“Lloyd Gosselink”), was retained by WOWSC in August of 2018, and Enoch Keever, PLLC, was retained by WOWSC, pursuant to its bylaws and relevant statutes providing for the defense of directors, in June of 2019 to represent certain WOWSC Directors in the ongoing suit pending before Burnet County District Court (Cause No. 48292). Further, in connection with the pending Burnet County District Court matter, WOWSC and its Directors, all named as defendants in connection with the same transactions at issue in that case and represented by separate counsel, are “allied litigants,” and thus the applicable privileges extend to the communications from counsel for the Directors (e.g., her invoices).

WOWSC has the responsive invoices available, and copies these invoices are enclosed herein as **Exhibit B** (pertaining to item (1) above and bills related to legal work done related to the aforementioned protective order); **Exhibit C** (pertaining to item (2) above and bills related to legal work done related to the request by SAPA to look into issues related to an alleged easement encroachment); **Exhibit D** (pertaining to item (3) above and bills related to legal work done on behalf of WOWSC in the pending appeal of a prior ruling of the Open Records Division which remains pending in Travis County District Court), and; **Exhibit E** (pertaining to item (4) above and bills related to the ongoing administrative appeal of WOWSC’s utility rates led by WOWSC members Josie Fuller and Patti Flunker before the Public Utility Commission of Texas).

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, and legal services provided to WOWSC in both suits have previously been, and are currently, the basis of asserted privileges over information contained in legal bills responsive to this and *two prior* requests under the Act submitted by the Requestor for WOWSC attorney fee bills. 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 H**). Item (1) above in the Request pertains to legal services provided to obtain a protective order on behalf of WOWSC regarding the online posting of deposition videos in this proceeding. Work on the protective order was done largely by counsel for the current and former directors of WOWSC, and the responsive invoices in **Exhibit B** reflect services provided by both our firm and the Directors’ counsel specific to the protective order.

In addition, many of those responsive invoices and the information therein mentioned above in the various lawsuits filed against WOWSC became the subject of a request for

¹ See **Exhibit A** (the Requestor also requested cancelled checks paid by WOWSC to any law firm “since July 2019,” and WOWSC subsequently provided the Requestor all documents responsive to that part of his September 1, 2020 Request).

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 - a copy of Plaintiff's Original Petition in this suit pending in Travis County District Court is attached as **Exhibit F**), as well as a second request for determination (*see* ORD Letter Ruling #OR2020-17442). Regarding the appeal pending in Travis County District Court, WOWSC and the AG are in agreement on terms proposed via settlement agreement and were prepared to sign and execute the agreement thereby dismissing the appeal. However, the Requestor challenged the proposed settlement agreement and the case thus remains pending. It is worth noting that legal counsel representing the Requestor in challenging the proposed settlement agreement between WOWSC and the AG is the *same person* currently serving as legal counsel to the plaintiffs in the pending Burnet County District Court suit against WOWSC. The legal bills responsive to itemized request (3) above in the Request pertain to this ongoing appeal (**Exhibit D**). The Request was therefore submitted while this litigation is ongoing.

As to the SAPA issue, on or around July 13, 2020, WOWSC was made aware of a potential issue regarding an easement owned by WOWSC near the airport in the Spicewood community. Legal counsel for the Spicewood Airport and Pilot's Association, Inc. ("SAPA") sent correspondence to WOWSC's Board President informing him of a dispute between SAPA and a property owner and developer within the airport area, which dispute involved the aforementioned easement owned by WOWSC and an alleged encroachment thereon. The correspondence from SAPA legal counsel is attached as **Exhibit I**. Furthermore, the third party involved in this dispute, Mr. Currin Van Eman, appeared by telephone at a recent WOWSC Board meeting where this issue was on the agenda for discussion by the Board. Both Mr. Van Eman and SAPA legal counsel presented argument to the Board, and implications and threats of lawsuits between the parties and potentially involving WOWSC were made during the course of that meeting. Furthermore, Mr. Van Eman sent correspondence to both SAPA's legal counsel and directly to WOWSC legal counsel stating that any action regarding this easement or enforcement thereof would likely result in the filing of lawsuits against any such party. Correspondence from Mr. Van Eman to WOWSC legal counsel is attached as **Exhibit J**. Given the contested nature regarding this dispute, the involvement of three separate parties all represented by legal counsel, and particularly the allegations and threats of the initiation of legal proceedings regarding the easement issue, WOWSC legal counsel proceeded to provide legal advice to WOWSC in the reasonable anticipation of litigation. The responsive invoices to item (2) in the itemized Request are attached as **Exhibit C**.

Additionally, WOWSC is currently engaged in a retail water and sewer rate appeal case before the Public Utility Commission of Texas ("PUC") which was referred the State Office of Administrative Hearings ("SOAH") for conducting of the hearing on the merits (PUC Docket No. 50788, SOAH Cause No. 473-20-4071 - a copy of WOWSC's Response to Order No. 1 in Docket No. 50788 pending before the PUC is attached as **Exhibit G**). This rate appeal was initiated by WOWSC ratepayers on April 27, 2020. The legal bills responsive to item (4) in the itemized Request are directly related to this ongoing administrative appeal before the PUC and SOAH. Our firm as legal counsel for WOWSC has opened a separate and distinct matter for

purposes of tracking time entries and billing throughout this appeal, and the responsive invoices are contained in **Exhibit E**.

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 192.5.² That holding was recently reinforced by the Texarkana Court of Appeals, where the Court even *expanded* the applicability of the privilege under Rule 192.5 available to entities subject to the Act in the context of otherwise categorical public information identified § 552.022.³

The documents responsive to the Request and the information contained therein were provided to WOWSC by 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 ongoing litigation (including an administrative appeal) involving WOWSC and its members. Additionally, these communications and the information contained therein reflect the mental impressions, opinions, conclusions, and legal theories of WOWSC’s legal counsel during litigation and in anticipation thereof. 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.”⁴ Importantly, 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 (and pursuant to Rule 192.5 and discussed *infra*).⁵

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”).

³ See *Paxton v. City of Dallas*, 2019 WL 2119644 (Tex.App.-Texarkana) (Cause No. No. 06-18-00095-CV).

⁴ Tex. Gov’t Code Ann. § 552.107(1).

⁵ 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)); see also *Paxton v. City of Dallas*, 2019 WL 2119644 (Tex.App.-Texarkana) (Cause No. No. 06-18-00095-CV) (expanding the applicability of the Rule 192.5 work product privilege by entities subject to the Act over information otherwise considered “categorical” public information under § 552.022 of the Government Code to include *both* core and non-core work product).

Information contained in the documents responsive to the 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.⁶ 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.⁷ Such information may be redacted accordingly upon demonstration by the governmental body that the information is excepted from disclosure under Rule 503.⁸

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 503.⁹ 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.¹⁰

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).¹¹ 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.¹²

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”

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

⁷ *Id.* at 6.

⁸ *Id.*

⁹ Tex. Att’y Gen. ORD-676 at 4 (2002).

¹⁰ Op. Tex. Att’y Gen. No. OR2011-12797 (2011).

¹¹ *Id.* (citing *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ)).

¹² 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).

rather than its content.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

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 fee bills.”¹⁷ 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 ongoing and anticipated 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 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 **Exhibits B – E**.

These invoices were prepared and reviewed exclusively by WOWSC attorneys or attorney representatives and mailed to the attention of a WOWSC Board member, and

¹³ Tex. Att’y Gen. ORD-676 (2002) at 4.

¹⁴ Tex. R. Evid. 503(a)(5), (b)(1); Tex. Att’y Gen. ORD-676 (2002) at 7.

¹⁵ Tex. Att’y Gen. ORD-676 (2002) at 7.

¹⁶ *Id.* at 7-8.

¹⁷ Op. Tex. Att’y Gen. No. OR2009-13151 (2009).

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 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 Request and contained in **Exhibits B - E** are excepted from disclosure under the Act 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 § 552.022.¹⁸ 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.

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 § 552.022.¹⁹ 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

¹⁸ Op. Tex. Att’y Gen. No. OR2011-12797 (2011).

¹⁹ See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001); see also Tex. Att’y Gen. ORD-677 (2002).

for purposes of section 552.022.”²⁰ Furthermore, a recent 2019 ruling from the Texas Court of Appeals in Texarkana expanded the applicability of the work product privilege provided by Rule 192.5, and specifically in the context of categorical public information in section 552.022, to include *all* work product—core and otherwise—from disclosure pursuant to a request under the Act.²¹

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.²²

“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.”²³ 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.²⁴

The Requestor seeks legal invoices from a date range beginning in July 2019 to the date of the Request. All responsive invoices, therefore, cover a period during which litigation either was not only anticipated (as it was for the SAPA matter), but also when it was active and ongoing throughout the entire date range specified in the Request (for the Burnet County lawsuit, the Travis County appeal of prior AG ruling, and the PUC rate case). 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—in most cases, litigation in various contexts was not merely anticipated but rather active and ongoing throughout the duration of the date range specified by the Requestor himself.

²⁰ See Tex. Att’y Gen. ORD-677 (2002) at 6.

²¹ See *Paxton v. City of Dallas*, 2019 WL 2119644 (Tex.App.-Texarkana) (Cause No. No. 06-18-00095-CV).

²² Tex. R. Civ. P. 192.5(a).

²³ Tex. R. Civ. P. 192.5(b)(1).

²⁴ Tex. R. Civ. P. 192.5(a) & (b)(1); see also Tex. Att’y Gen. ORD-677 (2002).

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.²⁵ 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 ongoing litigation. Furthermore, most of those same communications were developed during the course of litigation for the client (WOWSC) to review and remain updated on the latest developments of the suit. For example, information in time entries describing 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.

In addition, and particularly in reference to the responsive documents in Exhibit C related to *anticipated* litigation between SAPA and/or Mr. Van Eman regarding the WOWSC’s easement at the airport property, Texas courts will look at both objective and subjective criteria to determine if the work product privilege under Rule 192.5 is properly invoked. As to the objective criteria, Texas courts look to determine whether there is a “substantial chance” litigation could arise from the issue at hand, and hold that a “[s]ubstantial chance of litigation” is not a “particular statistical probability that litigation will occur; rather, it simply means that litigation is ‘more than *merely* an abstract possibility or unwarranted fear.’”²⁶ Importantly, “[i]f a reasonable person would conclude from the severity of the [issue] and the other circumstances surrounding it that there was a substantial chance that litigation would ensue, then the objective prong” of the applicability of the work product privilege under Rule 192.5 is satisfied.²⁷ The subjective element “is properly satisfied if the party invoking the privilege believes in good faith that there is a substantial chance that litigation will ensue.”²⁸

²⁵ See Tex. R. Civ. P. 192.5(a) & (b)(1).

²⁶ *Paxton v. City of Dallas*, 2019 WL 2119644 (Tex.App.-Texarkana), 6 (quoting *Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993) (*emphasis added*)).

²⁷ *Paxton v. City of Dallas*, 2019 WL 2119644 (Tex.App.-Texarkana), 6 (quoting *Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 204 (Tex. 1993)).

²⁸ *Id.*

Since the initial communication from SAPA legal counsel, followed by subsequent communications from Mr. Van Eman, all combined with the discussion of both SAPA legal counsel and Mr. Van Eman during the course of a WOWSC Board meeting this past August, there has been *much more* than “merely an abstract possibility or unwarranted fear” that litigation would ensue following any action by the WOWSC Board. In light of the totality of the circumstances surrounding the easement issue at the airport property, combined with WOWSC’s Board’s good faith belief that there is a “substantial chance” litigation could ensue if it was to take any action on this issue, both the objective and subjective prongs of the test for proper applicability of Rule 192.5 work product privilege is satisfied. Therefore, the responsive documents in Exhibit C and the information contained therein are subject to lawful use of the Rule 192.5 work product privilege.

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 and anticipated litigation, as well as the ongoing administrative appeal. As a whole, this confidential information reveals the internal strategy of WOWSC and its legal counsel regarding these legal proceedings. 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, Exhibit C, Exhibit D, and Exhibit E are narratives constituting communications between an attorney or an 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 Enoch Kever (the firm that WOWSC is paying pursuant to its bylaws and Chapter 8 of the Texas Business Organizations Code, of which all relevant provisions for permissive advancement of expenses have been satisfied, to separately represent its Directors) and at Lloyd Gosselink 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 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, an appeal related to a prior request for legal bills, anticipated litigation, and a rate case before the Public Utility Commission

of Texas. 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.

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.”²⁹ 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 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*.”³⁰

Under this guidance, WOWSC respectfully requests to withhold the entirety of each responsive invoice in **Exhibits B - E** to which the work-product privilege applies pursuant to Rule 192.5, as all such invoices specifically pertain to anticipated or ongoing litigation and describe preparation, work product, research topics, issues, or communications regarding the same. All of these invoices detail *either* communications made during the course of ongoing or anticipated litigation (including the ongoing administrative appeal) which reflect legal counsel’s mental impressions, theories, conclusions, and opinions regarding the suit, material prepared or mental impressions developed during litigation, or anticipation thereof, that indicate legal counsel’s mental impressions, theories, conclusions, and opinions regarding legal representation to WOWSC, or *both*.

IV. Conclusion

The Requestor’s September 1, 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. As the Texas Supreme Court holds, and in full interpretation of the term “other law” in the context of section 552.022, the Texas Supreme Court recognized that:

without the protections offered by the work-product and attorney-client privileges,
[t]he ability of governmental entities to pursue and defend claims would also be

²⁹ 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*).

³⁰ *Id.* (*emphasis added*).

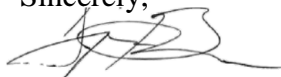
significantly impaired. All governmental bodies would be required to conduct litigation at a severe disadvantage since written legal advice and strategy would have to be disclosed to opposing parties upon request. Governmental entities would also be required to disclose to their opponents written evaluations of settlement strategies, which would impair a governmental entity's ability to negotiate the lowest possible settlement.³¹

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 **Exhibits B - E** (and specifically the time entries and work description narratives) reflect work produced during anticipated as well as active, ongoing litigation that 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 pending or anticipated litigation. Therefore, and under the guidance of your Office in ORD-677 and pursuant to the recent ruling in *Paxton v. City of Dallas*, Rule 192.5 should apply to allow WOWSC to withhold all invoices responsive to the Request in their *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

³¹ *Paxton v. City of Dallas* at 8-9 (quoting *City of Georgetown*, 53 S.W.3d at 333).

Windermere Oaks WSC – Flunker PIA Request
OAG ID # OR85342020
September 23, 2020
Page 13

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*

EXHIBIT F



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 19, 2020

Mr. J. Troupe Brewer
Counsel for the Windermere Oaks Water Supply Corporation
Lloyd Gosselink
816 Congress Avenue, Suite 1900
Austin, Texas 78701

OR2020-29074

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# 853420.

The Windermere Oaks Water Supply Corporation (the "corporation"), which you represent, received a request for attorney fee bills pertaining to five specified topics. You claim the requested information is excepted from disclosure under section 552.101 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rules of Evidence 503. We have considered your arguments.

We must address the corporation's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to subsection 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The corporation received the request for information on September 1, 2020. As of the date of this letter, you have not submitted for our review comments stating the reasons why the claimed exceptions apply or a copy or representative sample of the information requested.

Consequently, we find the corporation failed to comply with the requirements of section 552.301 in requesting this decision from our office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). Although the corporation raises exceptions to disclosure, because you have not submitted the requested information for our review, we have no basis for finding any of the information excepted from disclosure. Thus, we have no choice but to order the requested information released pursuant to section 552.302. If you believe the information may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Emily Kunst
Assistant Attorney General
Open Records Division

EK/gw

Ref: ID# 853420

c: Requestor

EXHIBIT G

Texas Attorney General

Public Information Act Electronic Filing System

Confirmation

Texas.gov Request ID: 66112570

Date and Time of Submission (CST): 11/23/2020 03:43:16 PM

This confirmation indicates the status of the upload process, including:

- Files that successfully uploaded

Uploaded Files:

- 11.23.2020 - WOWSC Cover letter, Affidavit, and Brief for re-filing with OAG.PDF

This is not a confirmation of receipt by the Office of the Attorney General. You will receive a separate confirmation email from them within 3 business days. **Please do not call or contact the Office or the Attorney General with questions about your submitted request prior to receiving their confirmation email.** If you have not received the confirmation email from the Office of the Attorney General within this time period, please contact Texas.gov Help at 1-877-452-9060 or send an email to support@texasgovhelpdesk.com.

EXHIBIT H

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only

For delivery information, visit our website at www.usps.com®.

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Certified Mail Fee

\$ 3.55

Extra Services & Fees (check box, add fee as appropriate)

☒ Return Receipt (hardcopy) \$ 2.85

☐ Return Receipt (electronic) \$

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☐ Adult Signature Restricted Delivery \$

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\$ 15.10

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P.O. Box 12548

City, State, ZIP+4®

Austin TX 78711

PS Form 3800, April 2015 PSN 7530-02-000-9047

See Reverse for Instructions

OFFICIAL USE

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Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Cathy Daniels on behalf of Jose de la Fuente
Bar No. 00793605
cdaniels@lglawfirm.com
Envelope ID: 48484025
Status as of 12/2/2020 3:58 PM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jose E.de la Fuente		jdelafuente@lglawfirm.com	11/30/2020 3:45:29 PM	SENT
Stefanie Albright		salbright@lglawfirm.com	11/30/2020 3:45:29 PM	SENT
Lindsay R.Killeen		lkilleen@lglawfirm.com	11/30/2020 3:45:29 PM	SENT

C I T A T I O N
T H E S T A T E O F T E X A S
CAUSE NO. D-1-GN-20-007251

WINDERMERE OAKS WATER SUPPLY CORPORATION

, Plaintiff

vs.

THE HONORABLE KEN PAXTON ATTORNEY GENERAL OF TEXAS

, Defendant

TO: KEN PAXTON ATTORNEY GENERAL OF STATE OF TEXAS
209 WEST 14TH STREET - PRICE DANIEL BUILDING
AUSTIN, TEXAS 78701

Defendant, in the above styled and numbered cause:


YOU HAVE BEEN SUED. You may employ an attorney. If you or your attorney do not file a written answer with the clerk who issued this citation by 10:00 A.M. on the Monday next following the expiration of twenty days after you were served this citation and petition, a default judgment may be taken against you.

Attached is a copy of the WINDERMERE OAKS WATER SUPPLY CORPORATIONS ORIGINAL PETITION FOR DECLARATORY RELIEF of the PLAINTIFF in the above styled and numbered cause, which was filed on NOVEMBER 30, 2020 in the 126TH JUDICIAL DISTRICT COURT of Travis County, Austin, Texas.

ISSUED AND GIVEN UNDER MY HAND AND SEAL of said Court at office, December 08, 2020.

REQUESTED BY:
JOSE E. DE LA FUENTE
816 CONGRESS AVE STE 1900
AUSTIN, TX 78701
BUSINESS PHONE: (512) 322-5800 FAX: (512) 472-0532




Velva L. Price
Travis County District Clerk
Travis County Courthouse
1000 Guadalupe, P.O. Box 679003 (78767)
Austin, TX 78701

PREPARED BY: RUBEN TAMEZ

-- - -- - -- - -- - -- - -- **R E T U R N** -- - -- - -- - -- - -- - --

Came to hand on the _____ day of _____, _____ at _____ o'clock ____ M., and
executed at _____ within the County of _____
_____ on the _____ day of _____, _____, at _____ o'clock ____ M.,
by delivering to the within named _____, each
in person, a true copy of this citation together with the WINDERMERE OAKS WATER SUPPLY CORPORATIONS
ORIGINAL PETITION FOR DECLARATORY RELIEF accompanying pleading, having first attached such copy of
such citation to such copy of pleading and endorsed on such copy of citation the date of delivery.

Service Fee: \$ _____

Sheriff / Constable / Authorized Person

Sworn to and subscribed before me this the

By: _____

_____ day of _____, _____.

Printed Name of Server

Notary Public, THE STATE OF TEXAS

County, Texas

D-1-GN-20-007251

SERVICE FEE NOT PAID

P01 - 000101100

1/12/2021 12:33 PM

Velva L. Price
District Clerk
Travis County
D-1-GN-20-007251
Gilberto Rios

AFFIDAVIT OF SERVICE

State of Texas

County of Travis

126th Judicial District Court

Case Number: D-1-GN-20-007251

Plaintiff:

**WINDERMERE OAKS WATER
SUPPLY CORPORATION**

vs.

Defendant:

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

Received these papers on the 8th day of January, 2021 at 8:00 am to be served on **THE HONORABLE KEN PAXTON, ATTORNEY GENERAL OF TEXAS, 209 W. 14th Street, 1st Floor Lobby, Austin, Travis County, TX 78701.**

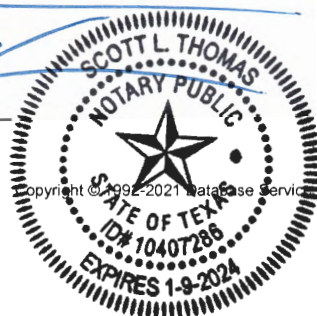
I, Jeff Keyton, being duly sworn, depose and say that on the **8th day of January, 2021 at 10:05 am, I:**

delivered a true copy of this **Citation together with Windermere Oaks Water Supply Corporation's Original Petition for Declaratory Relief, Exhibits "A" through "H", and The Lawyer Referral Service Notice to THE HONORABLE KEN PAXTON, ATTORNEY GENERAL OF TEXAS** by delivering in hand to, **SARAH BURGESS, Executive Assistant**, at the address of **209 W. 14th Street, 1st Floor Lobby, Austin, Travis County, TX 78701**, having first endorsed upon such copy of such of such process the date of delivery.

I certify that I am approved by the Judicial Branch Certification Commission, Misc. Docket No. 05-9122 under rule 103, 501, and 501.2 of the TRCP to deliver citations and other notices from any District, County and Justice Courts in and for the State of Texas. I am competent to make this oath; I am not less than 18 years of age, I am not a party to the above-referenced cause, I have not been convicted of a felony or a crime of moral turpitude, and I am not interested in the outcome of the above-referenced cause.

Subscribed and Sworn to before me on the 8th day of January, 2021 by the affiant who is personally known to me.

NOTARY PUBLIC



Jeff Keyton
PSC-735; Exp 7/31/2022

Our Job Serial Number: THP-2021000094
Ref: Windermere Oaks

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