



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 3, 2010

Mr. Mark Sokolow  
City Attorney  
City of Georgetown  
P.O. Box 409  
Georgetown, Texas 78627-0409

OR2010-11677

Dear Mr. Sokolow:

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# 389082 (Georgetown OR# 10).

The City of Georgetown (the "city") received a request for any performance evaluations of the city attorney by the mayor and the Georgetown City Council (the "council"). You claim the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code and protected under rule 503 of the Texas Rules of Evidence.<sup>1</sup> We have considered your 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 the submitted information is subject to section 552.022 of the Government Code. Section 552.022 states in relevant part:

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<sup>1</sup> Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you also raise sections 552.102 and 552.109 of the Government Code, you have not submitted any arguments explaining how these exceptions apply to the submitted information. Therefore, we presume you have withdrawn these exceptions. See Gov't Code §§ 552.301 552.302.

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). You claim the submitted information is not a completed evaluation because the city attorney has not received an annual performance review under his contract or city policy, there was no council vote resulting from the executive session in which the council delivered the evaluation to the city attorney, and the city attorney has not had an opportunity to respond to the evaluation. However, the document at issue bears the title "6 Month Evaluation of City Attorney – Mark Sokolow," consists of a review of the city attorney's overall performance, and includes six suggestions for improvement. Thus, although the document is not an annual performance review as contemplated by the contract or city policy, **it is an evaluation of the city attorney's performance and it is completed.** *Id.*; *cf. Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364, 368 (Tex. App.—Austin, 2006) (memorandum was evaluation for purposes of Educ. Code § 21.355 because it reflected supervisor's judgment, gave corrective direction, and provided for further review). **Thus, we find the document is a completed evaluation subject to section 552.022(a)(1) of the Government Code. Pursuant to section 552.022(a)(1) of the Government Code, a completed evaluation is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law.** Although you raise sections 552.107 and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 677 at 10-11 (2002) (attorney work-product privilege under section 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived). As such, sections 552.107 and 552.111 are not "other law" that make information confidential for the purposes of section 552.022, and the city may not withhold any of the submitted information under these sections. However, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Therefore, we will consider your argument under rule 503.

Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:



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

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *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 the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the evaluation is a communication "between the City Attorney and various City Council Members concerning issues on which the City Attorney, as attorney, has been advising the Mayor, City Council and/or the City manager, as client, including document review and monitoring litigation." You further inform us the communication was not intended to be disclosed to third parties. Based on your representations and our review, we find the city has established a portion of the submitted evaluation is protected by the attorney-client privilege. Thus, the city may withhold this information, which we have marked, pursuant to rule 503 of the Texas Rules of Evidence. However, we find you have failed to demonstrate the remaining information is protected by the attorney-client privilege. Therefore, we conclude Texas Rule of Evidence 503 is not applicable to the remaining information, and it must be released.

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 [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/em

Ref: ID# 389082

Enc. Submitted documents

c: Requestor  
(w/o enclosures)