

CAUSE NO. D-1-GU-10- <sup>001353</sup>

THE CITY OF GEORGETOWN

*Plaintiff,*

v.

GREG ABBOTT, ATTORNEY,  
GENERAL OF TEXAS

*Defendant,*

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§

IN THE DISTRICT COURT OF

TRAVIS COUNTY

250 JUDICIAL DISTRICT

Filed in The District Court  
of Travis County, Texas

AUG 13 2010 BP

At  
Amalia Rodriguez-Mendoza, Clerk

**PLAINTIFF'S ORIGINAL PETITION**

TO THE HONORABLE JUDGE IF SAID COURT:

COMES NOW the City of Georgetown and files this Original Petition pursuant to Section 552.324 of the Government Code, part of the Texas Public Information Act, seeking to withhold information from a requestor and seeking relief from compliance with, and challenging, Open Records letter ruling number OR2010-11677 issued by the Attorney General of Texas. In support of this Petition, Plaintiff shows:

**I. Discovery**

1. Plaintiff intends to conduct discovery, if necessary, under Level 2 of the Texas Rule of Civil Procedure 190.

**II. Parties and Service**

2. Plaintiff, the City of Georgetown, Texas (the "City"), is a home rule municipality under the laws of the State of Texas and located in Williamson County, Texas.

3. Defendant, Greg Abbott, is the Attorney General of Texas (the "Attorney General"). The Open Records Division of the Office of Attorney General issued Open Records letter ruling number OR2010-11677.

4. Attorney General Greg Abbot may be served in the Price Daniel, St. Building, 8<sup>th</sup> Floor 209 West 14<sup>th</sup> Street, Austin, Texas 78701.

### **III. Venue and Jurisdiction**

5. Venue and jurisdiction of this suit are proper in this pursuant to section 552.324 of the Government Code.

6. In accordance with section 552.325(b) of the Government Code, the City's attorney will notify the requestor by certified mail, return receipt requests 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 to not 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. Background Facts**

7. The City received a public information request for certain documents containing the evaluations of the City Attorney. See Exhibit "A."

8. The City concluded that the requested information was excepted from disclosure pursuant to Sections 552.101, 552.102, 552.107, 552.109, and 552.111 of the Government Code, and as further noted in Exhibit "B."

9. In accordance with section 552.301 of the Government Code, the City timely requested an opinion from the Attorney General as to whether the information at issue was excepted from disclosure. See Exhibit "B." The requestor was timely notified and sent copies of the letter to the Attorney General.

10. In response, the Attorney General issued letter ruling OR2010-11677. See Exhibit "C," redacted to preserve privilege. Dated August 3, 2010 and received by the City on August 4, 2010, the ruling held that the Requestor is entitled to certain portions of the requested information and that the City must disclose it to him.

#### **V. Grounds for Withholding the Requested Information**

11. This suit by the City, challenging Open Records letter rule number OR2010-11677, is brought pursuant to section 552.324 of the Government Code. It has been timely filed.

12. The information withheld by the City in this case does not constitute a "completed evaluation" pursuant to Section 552.022(a)(1).

13. Section 552.101 of the Government Code excepts information from disclosure under the Public Information Act "if it is information considered confidential by law, either constitutional, statutory, or by judicial decision." The information withheld by the City in this case constitutes information that is confidential by law under Rule 503 of the Texas Rules of Evidence. If a governmental body demonstrates that any portion of a communication is protected under the attorney client privilege pursuant to Rule 503 of the Texas Rules of Evidence, the entire communication is privileged. In this case, portions of the communication are clearly privileged, as established by letter ruling OR2010-11677, and as a result, the entire communication is confidential by law under Rule 503 of the Texas Rules of Evidence.



14. Section 552.102 of the Government Code excepts information from disclosure under the Public Information Act “if it is information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” The information withheld by the City in this case constitutes information that is confidential under Section 552.102 of the Government Code.

15. Section 552.107 of the Government Code excepts information from disclosure under the Public Information Act “if it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct.” The information withheld by the City in this case constitutes information that is confidential under Section 552.107 of the Government Code.

16. Section 552.109 of the Government Code excepts information from disclosure under the Public Information Act if it is “private correspondence or communication of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy.” The information withheld by the City in this case constitutes information that is confidential under Section 552.109 of the Government Code.

17. Section 552.111 of the Government Code excepts information from disclosure under the Public Information Act if it is “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” The information withheld by the City in this case constitutes information that is confidential under Section 552.111 of the Government Code.

18. Accordingly, the City contests the ruling in OR2010-11677 requiring the release of the remaining portions of the requested information.

#### **VI. Relief Requested**

WHEREFORE, PREMISES CONSIDERED, the City requests that this Court find that the requested information is protected by sections 552.101, 552.102, 552.107, 552.109, and 552.111 of the Government Code and as further noted in Exhibit "B," and therefore is excepted from disclosure under the Public Information Act, and additionally seeks all other and further relief, at law or in equity, to which it may be justly entitled.

Respectfully submitted,



MARK T. SOKOLOW

City Attorney, City of Georgetown

Texas Bar No. 18824750

BRIDGET S. CHAPMAN

Assistant City Attorney, City of Georgetown

Texas Bar No. 04119020

City of Georgetown

P.O. Box 409

Georgetown, Texas 78627

512.930.8158

ATTORNEYS FOR PLAINTIFF



Fw: Open Records Request No. 10

Mark Sokolow to: Skye.Masson@georgetown.org, Bridget Chapman

05/17/2010 08:08 AM

Sent by: Skye Masson

Mark Sokolow  
City Attorney  
City of Georgetown  
P.O. Box 409  
Georgetown, Texas 78626  
(512) 930-8158  
msokolow@georgetowntx.org

— Forwarded by Skye Masson/City of Georgetown on 05/17/2010 08:08 AM —

Open Records Request No. 10

Ken Martin to: khutchinson

05/16/2010 07:12 PM

Cc: Mark Sokolow

Dear Keith Hutchinson,

This is a request for the City of Georgetown to produce records under the Texas Public Information Act.

Please promptly acknowledge receipt of this request to my e-mail address at [ken@theaustinelldog.org](mailto:ken@theaustinelldog.org) and produce the following records:

The evaluations of the performance of Mark Sokolow as city attorney for Georgetown that were delivered in writing by the mayor and members of the Georgetown City Council during executive sessions held on or about May 13, 2010, and on any other dates on which Mark Sokolow may have received such written evaluations by the mayor and council members.

Please note that the Texas Public Information Act, Section 552.102, Section 1, states:

"Because there is a legitimate public interest in the activities of public employees in the workplace, information about public employees is commonly held not to be excepted from required public disclosure under this test. Therefore, although this exception is commonly referred to as the "personnel file" exception, in reality this provision excepts very little of the information commonly found in the personnel files of public employees. For example, information about public employees' job performance or the reasons for their dismissal, demotion, promotion, or resignation is not excepted from public disclosure." 374 (Emphasis added).

374: Open Records Decision Nos. 444 at 5-6 (1986), 405 at 2-3 (1983).

Please also note that Section 552.107.1, Information Within the Attorney-Client Privilege, offers no basis for withholding the written evaluations of Mark Sokolow's performance as the city attorney of Georgetown. That section states, in part, "The privilege will not apply if the attorney...was acting in a capacity 'other than that of providing or facilitating professional legal services to the client.'"

Clearly, in receiving written evaluations of his performance, City Attorney Sokolow was not providing or facilitating professional legal services to the mayor and council that might conceivably be exempted from disclosure

**EXHIBIT A**



under this provision.

He was being counseled--as any other city employee would be--about the mayor and council members' perceptions of the strengths and weaknesses of his performance as an employee of the City of Georgetown.

If clarification of this request is needed, please e-mail me at [ken@theaustinbulldog.org](mailto:ken@theaustinbulldog.org) to explain the clarification that is requested.

I look forward to your acknowledgement of receiving this e-mail and obtaining these records.

Ken Martin  
Founder, Editor & Publisher  
The Austin Bulldog



Investigative journalism in the public interest

An initiative of the Austin Investigative Reporting Project, a 501(c)(3) nonprofit

Phone O: 512-474-1022

e-mail [ken@theaustinbulldog.org](mailto:ken@theaustinbulldog.org)

web [www.theaustinbulldog.org](http://www.theaustinbulldog.org)

<http://twitter.com/AustinBulldog>

<http://www.linkedin.com/myprofile>

P.O. Box 4400 Austin TX 78765

Organizer: [Austin Investigative Reporting Team](#) meetup group



May 28, 2010

**SENT VIA CERTIFIED MAIL, CMRR # 70081830000304994730**

Office of the Attorney General  
Attention: Open Records Division MC-014  
P. O. Box 12548  
Austin, Texas 78711-2548

***Re: Open Records Request: Ken Martin Request #10***

Dear Sir or Madam:

The City of Georgetown (City) received an Open Records Act Request No. 10 (Request) from Mr. Ken Martin by email on May 16, 2010. A copy of the Request, reflecting the date of the email transmission, is attached as Exhibit "A."

Mr. Martin is requesting the following information:

"The evaluations of the performance of Mark Sokolow as city attorney for Georgetown that were delivered in writing by the mayor and members of the Georgetown City Council during executive sessions held on or about May 13, 2010, and on any other dates on which Mark Sokolow may have received such written evaluations by the mayor and council members."

The City objects to the disclosure of the requested information pursuant to Tex. Gov. Code Sections 552.101, 552.107 and 552.111, as well as Sections 552.102 and 552.109. A copy of the requested information is attached as Exhibit "B."

The City submits the following written comments stating the reasons why the exceptions would allow information to be withheld. The City requests that the Attorney General's Office issue an opinion pursuant to Tex. Gov. Code Section 552.301.

**EXHIBIT B**



Requested Evaluation Not Complete  
Tex. Gov. Code Section 552.022(a)(1)

The Act provides for required public disclosure of "a *completed* report, audit, *evaluation*, or investigation made of, for, or by a governmental body..." The requested information is exempt from disclosure in its entirety because the evaluation is not complete.<sup>1</sup>

Mark Sokolow currently serves as the City Attorney of the City of Georgetown. Mark Sokolow has been a licensed attorney in the State of Texas for thirty years and is Board Certified in Civil Trial Litigation. For the last twenty years Mark Sokolow has been a City Attorney, for various Texas municipalities.

Mark Sokolow was hired as the City Attorney of the City of Georgetown as of October 19, 2009. Prior to that time, all of the City's legal services were outsourced to various private attorneys. The Employment Contract between Mark Sokolow and the City, executed on September 14, 2009, provides in pertinent part:

"On or before October 19, 2009, the City agrees to employ Employee as City Attorney of Georgetown to perform the functions and duties specified in the City Charter and to perform other legally permissible and proper duties and functions which the City Council shall, from time to time, request and assign. The Employee is appointed by and shall, at all times, serve as City Attorney, pursuant to the specific terms of Section 5.06 of the Georgetown City Charter...

...Except as otherwise provided herein, all provisions of the City Ordinances and Code, and personnel policy manual of the City...shall apply to the Employee, in the same manner they apply to other employees of the City.

The City Council shall provide Employee with an annual performance evaluation and review each year he is employed by the City as City Attorney. Any review and evaluation shall be in accordance with specific criteria developed jointly by the City Council and Employee. Such criteria may be revised by the City Council, from time to time, with notice of any such revision provided to the Employee. Any discussion of Employee's evaluation or review of the Employee shall be conducted only in closed Executive Session, unless otherwise requested by Employee. The Employee shall be provided a copy of any written statement or findings of the City Council or any of its members and shall have an adequate

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<sup>1</sup> This case is clearly distinguishable from circumstances where a final written evaluation is completed in accordance with applicable policies and procedures. See *eg* Open Records Decision 272 (1993).

opportunity to discuss his evaluations with the City Council, in Executive Session or in Open Session, if Employee so requests. Any written evaluation or statement concerning the Employee's performance shall be confidential and placed in the Employee's personnel file along with any written response by the Employee. In effecting the provisions of this Section, the City Council and Employee mutually agree to abide by the provisions of applicable State law concerning personnel matters, due process, and rights of the Employee and of the City.

After the first initial six months, the City will review and consider an annual increase of \$5,000 to be added to the base salary. On an ongoing basis, the City shall review and consider adjustment of the Employee's salary in conjunction with Employee's year-end performance evaluation and review."

Unless superseded by the Employment Contract, the provisions of the City personnel policies applies to Mark Sokolow in the same manner of other employees of the City. A copy of the Employment Contract is attached as Exhibit "C." A copy of the applicable section of the City Charter is attached as Exhibit "D." A copy of the applicable personnel policy concerning performance evaluation and review is attached as Exhibit "E."

There is no complete performance review and evaluation of the City Attorney as contemplated by the Employment Contract or the City's personnel policy requirements.

"Performance review and evaluation of the City Attorney is to be on an annual basis." The annual review is to be conducted at the end of the fiscal year (ie. October 2010). It is not time for Mark Sokolow's annual performance review and evaluation.

"Any review and evaluation of Mark Sokolow, as City Attorney, is to be in accordance with specific criteria developed jointly by the City Council and Mark Sokolow." No criteria has been developed for the review and evaluation of Mark Sokolow.

"The City employee performance review form to be used for all formal performance reviews." City Council has not completed a performance review form for any review and evaluation of Mark Sokolow. Consequently, Mark Sokolow has not had an opportunity for full discussion with City Council, to comment thereon.

According to the Employment Contract, the \$5,000 increase was reviewed and approved by City Council at the April 27, 2010 meeting. A copy of the meeting minutes is attached as Exhibit "F."



On May 11, 2010, the City Council held another meeting. A copy of the documents delivered to Mark Sokolow at that meeting, during executive session, is attached as Exhibit "B." The first two pages of the document includes comments from various Council Members, compiled by one Council Member, without attributing the comments to the Council Member who made them. Said Council Member handed the document attached as Exhibit "B" to the City Attorney. These documents do not constitute a completed performance evaluation of the City Attorney by City Council. There was no vote or other action resulting from the May 11, 2010 executive session. If the documents are considered an evaluation, the evaluation is not complete, as Mark Sokolow has not had any opportunity to fully discuss same with City Council, comment or make a written response.

The initial comments included in the documents at issue may change and be further clarified once the City Attorney has the opportunity for full discussion with City Council and has had a full opportunity to review all of the documents contemplated by the City Attorney's agreement and by the personnel policies. The documents that were provided in the executive session on May 11, 2010 are only the first step of a process that will not be complete until at least October 2010 when the City Attorney will receive his annual performance review and evaluation by City Council as delineated in the Employment Contract. There is no completed evaluation as contemplated under Section Tex. Gov. Code Section 552.022 and it is inappropriate for interim and incomplete documents to be released as a performance evaluation.

Information Confidential by Law  
Tex. Gov. Code Section 552.101  
and  
Attorney-Client Privilege  
Tex. Gov. Code Section 552.107

The Act does not mandate the disclosure of information that other law requires be kept confidential. Tex. Gov. Code Section 552.352. The City has no discretion to release information deemed confidential by law. Tex. Gov. Code Section 552.007. Consequently, the City must withhold disclosure of information considered to be confidential by law, either constitutional, statutory or by judicial decision.

The Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of Tex. Gov. Code Section 552.022. See Open Records Letter Ruling. 2010-06099 citing *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Consequently, the City contends that the requested information is exempt from



disclosure as privileged attorney-client communications pursuant to TRE 503.<sup>2</sup> See Open Records Letter Ruling Nos 2010-06099; 2005-00098.

Information is excepted from public disclosure if it is information that an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct. The duties of the City Attorney are delineated in Section 5.06 of the City Charter of Georgetown as noted in Exhibit "D":

"The City Council shall appoint a competent attorney who shall have practiced law in the State of Texas for at least two (2) years immediately preceding the appointment. The City Attorney shall be the legal adviser of, and attorney for, all of the offices and departments of the City, and shall represent the City in all litigation and legal proceedings. The City Attorney shall draft, approve or file written objections to every ordinance adopted by the Council, and shall pass upon all documents, contracts and legal instruments in which the City may have an interest..."

The City Council has not authorized the City Attorney to act in any capacity, other than as an attorney.

The attorney-client privilege protects from disclosure confidential information between a client and its attorney to facilitate the rendition of legal services. The privilege allows unrestrained communications and contact between an attorney and client in all matters in which the attorney's professional advice or services are sought, without fear that these confidential communications will be disclosed by the attorney voluntarily or involuntarily in any legal proceeding. The privilege attaches to the complete communication between the attorney and client, including legal advice and factual information. *In re Valero Energy Corporation*, 973 S.W. 2d 453 (Tex. App. – Houston [14<sup>th</sup> Dist.]1998) (the subject matter of the information contained in the communication between attorney and client is irrelevant when determining whether the privilege applies). If a governmental body demonstrates that any portion of a communication is protected under the attorney-client privilege, then the entire communication will be excepted from disclosure under section Tex. Gov. Code Section 552.107. *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996)(privilege extends to entire communication, including facts contained therein).

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<sup>2</sup> The City also claims that the requested information is excepted from disclosure pursuant to Tex. Gov. Code Section 552.107(1).

Mark Sokolow, as City Attorney, has served in accordance with, and within the parameters of, the City Charter by providing confidential opinions as to the legal roles of the Mayor, City Council, City Manager, the documentary process, litigation, potential claims, and other matters. These opinions and related discussions took place between City representatives and the City's Attorney and were intended to be privileged among the attorney and client, not for disclosure to outside third parties.

The standard for demonstrating the attorney-client privilege under the Act is the same as the standard used in discovery under Rule 503. Open Records Decision Nos. 676 at 4 (2002), 429 at 5 (1985). The information the City seeks to withhold as protected by the attorney-client exemption meets the requisite standard: 1) the information constitutes or documents a communication; 2) the communication was made "for the purpose of facilitating the rendition of professional legal services" to the City; 3) the communication was between or among the City, City representatives, current and former City Attorneys or private attorneys engaged by the City to perform legal services, and their respective staff; 4) the communication was confidential; and, 5) the communication has remained confidential.

The documents at issue include privileged communications 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. As a result, the documents are exempt from disclosure under TRE 503 and Tex. Gov. Code Section 552.107. For example:

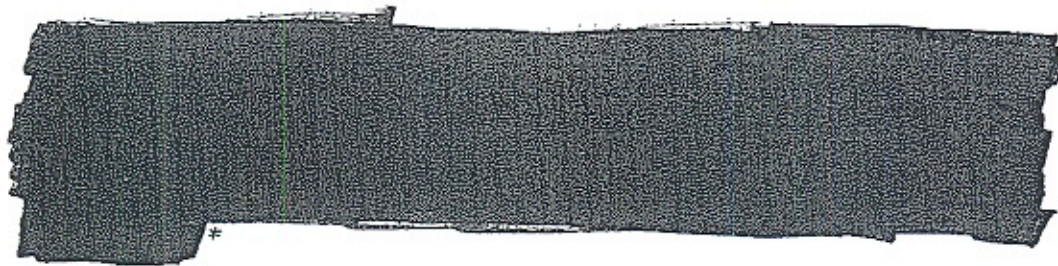


This comment discusses the legal services provided by the City Attorney and former counsel and is clearly privileged and confidential. Other specific privileged communications included in the documents are highlighted in yellow.

Agency Memoranda  
Tex. Gov. Code Section 552.111

The purpose of Section 552.111 is to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes. *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App. – San Antonio 1982, writ ref'd n.r.e.). The City objects to the disclosure of information pursuant to this exception to the extent that it constitutes internal communication consisting of advice, recommendations, opinions and other material reflecting policymaking processes. For example:





This comment is an internal communication of advice, recommendation and opinion of a council member concerning policy and is clearly exempt from disclosure. See eg Open Records Letter Ruling No. 2009-11598. Other specific examples of such policy discussion included in the documents are highlighted in pink.

If Mr. Martin's request is granted, then this decision would cause consternation with all government attorneys as they seek to consult with their elected or appointed bodies as well as further seek the necessary rapport as to facilitate the rendition of legal services.

Thank you for your attention to this matter. The City looks forward to receiving your opinion regarding the disclosure of documents responsive to the Request.

Sincerely,

Mark Sokolow  
City Attorney, City of Georgetown

Bridget Chapman  
Assistant City Attorney, City of Georgetown

\*These sections have been redacted in the copy of the letter being sent to Mr. Martin to preserve the attorney-client privilege.

Enclosures: Exhibit "A": Open Records Act Request # 10 from Mr. Ken Martin  
Exhibit "B": Documents as requested by Mr. Martin  
Exhibit "C": City Attorney Contract  
Exhibit "D": Section 5.06 of the City Charter  
Exhibit "E": Copy of applicable City Personnel Policies  
Exhibit "F": Minutes of April 27, 2010 Council Meeting

cc: Ken Martin (redacted copy w/o Exhibit "B") Sent Via U.S. Regular Mail

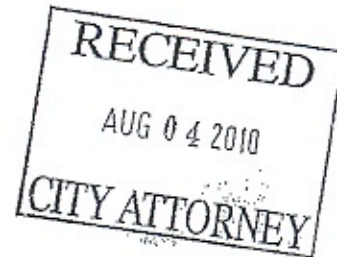




ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

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.

**EXHIBIT C**

(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.

[REDACTED] 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).

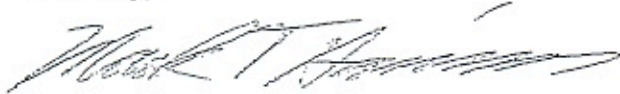
You state the evaluation is a communication "between the City Attorney and various City Council Members concerning issues on which the City Attorney, as attorney, has been advising the Mayor, City Council and/or the City manager, as client, including document review and monitoring litigation." You further 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,

A handwritten signature in black ink, appearing to read "Mack T. Harrison", with a stylized flourish at the end.

Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/em

Ref: ID# 389082

Enc. Submitted documents

c: Requestor  
(w/o enclosures)