



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

October 25, 1989

Mr. Larry D. Gilley  
City Manager  
City of San Marcos  
City Hall, 630 E. Hopkins  
San Marcos, Texas 78666

Dear Mr. Gilley:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 7361; this decision is OR89-344.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The City of San Marcos received an open records request for various information, all of which the city apparently released, except for a copy of a memorandum from the former city attorney, Lamar Hankins, that was distributed by him, marked "confidential," to city council members on or about May 30, 1989, and for copies of Mr. Hankins' last two performance evaluations by the city council.

The city claims that the memo from the city attorney to the city council members is protected from required public disclosure by section 3(a)(7) of the Open Records Act. Section 3(a)(7) excepts from public disclosure

matters in which the duty of the Attorney General of Texas or an attorney of a political subdivision, to his client,

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pursuant to the Rules and Canons of Ethics of the State Bar of Texas are prohibited from disclosure, or which by order of a court are prohibited from disclosure."

Section 3(a)(7) contains two components: protection of the attorney-client privilege, and protection of disclosure granted by court orders. You have cited no court orders barring release of the memorandum in question. Nor have you cited any rule or canon of ethics promulgated by the State Bar of Texas prohibiting release of the memo. See State Bar Rules, Gov't. Code, Tit. 2, Subtit. G - Appendix, foll. § 82.064.

Section 3(a)(7) protects legal advice and opinion from public disclosure. Open Records Decision Nos. 462 (1987); 380 (1983). The memorandum in question here contains no legal advice, opinion, or recommendation from the city attorney to the city council. It consists only of the city attorney's personal response to the city council's performance review of him. Information is not protected from disclosure under section 3(a)(7) simply because it was written by an attorney. See Open Records Decision No. 230 (1979). Nor does the mere fact that the document is marked "confidential" render it confidential. A governmental body may not by rule or contract render information confidential. See Open Records Decision No. 283 (1981). The memorandum, therefore, is not protected from disclosure by section 3(a)(7).

The city also claims that section 3(a)(2) protects the city council's performance evaluation of the city attorney. Section 3(a)(2) protects information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.

The test for section 3(a)(2) privacy is the same as that for information protected by common-law privacy rights under section 3(a)(1), which protects "information deemed confidential by law, either Constitutional, statutory or by judicial decision." See Hubert v. Hart-Hanks Texas Newspapers, Inc., 652 S.W.2d 546, 550 (Tex. App. - Austin 1983, writ ref'd n.r.e.) (citing Industrial Found. of the South v. Texas Indus. Accident Bd., 540 S.W.2d 688 (Tex. 1976), cert. denied, 430 U.S. 930 (1977)). Under the test for common-law privacy, information may be withheld only if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public.

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Id. The performance evaluations of the city attorney relate not to his private affairs but to his actions and performance while acting in a public capacity as the attorney for the city. Moreover, the city council's performance evaluations of the city attorney are of legitimate public interest. They are therefore not protected from public disclosure. See also Open Records Decision Nos. 350 (1982) (letters advising of disciplinary action against police officer not protected by common-law privacy); 167 (1977) (teacher evaluations not protected by common-law privacy). You have submitted to this office only one performance evaluation. The requestor seeks the last two evaluations. They must both be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-344.

Yours very truly,  
*Open Government Section  
of the Opinion Committee*  
Open Government Section  
of the Opinion Committee  
Prepared by David A. Newton  
Assistant Attorney General

DAN/lcd

Ref.: ID# 7361

cc: Mr. Bill Coddington  
Secretary-Treasurer  
Taxpayers Audit Group