ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 29, 2011

Ms. Martha S. Dickie
Almanza, Blackburn & Dickie, LLP
2301 South Capital of Texas Highway, Building H
Austin, Texas 78746

OR2011-09250

Dear Ms. Dickie:

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# 422167.

The City of Georgetown (the "city"), which you represent, received a request for three complete sets of performance evaluations of the city attorney and all related material from November 1, 2010, to the date of the request as well as information pertaining to a lawsuit or threatened lawsuit brought by the city attorney against the city or the city council. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.109, and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.[1] We have considered your arguments and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

[1]Although you also raise section 552.022 of the Government Code, section 552.022 is not an exception to disclosure, but is a provision in the Act that lists categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022. Further, although you also raise section 552.102 of the Government Code, you have not submitted any arguments explaining how this exception applies to the submitted information. Therefore, we presume you have withdrawn this exception. *See* Gov't Code §§ 552.301, .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). We note the performance evaluations, which you have submitted as Exhibit B, constitute completed evaluations and are, therefore, subject to section 552.022(a)(1). 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 552.103, 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 Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* 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), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103, 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 Exhibit B under these sections. However, the Texas Supreme Court has held 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. We will also consider your claim under section 552.109 of the Government Code, which constitutes "other law" for purposes of section 552.022. We will also consider your argument under section 552.107 for the information not subject to section 552.022.

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:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (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;
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> (D) between representatives of the client or between the client and a representative of the client; or
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> (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 completed evaluations document communications between the city's attorney and city representatives concerning issues on which the city attorney advised the city's mayor, council and/or the city manager, "as client[s], including document review and monitoring litigation." You further inform us the communications were not intended to be disclosed to third parties. Based on your representations and our review, we find the city has established some of Exhibit B, which we marked, is protected by the attorney-client privilege. Thus, the city may withhold this marked information pursuant to rule 503 of the Texas Rules of Evidence. However, we find you have failed to demonstrate the remaining information at issue is protected by the attorney-client privilege. Therefore, we conclude Texas Rule of Evidence 503 is not applicable to the remaining information at issue in Exhibit B.

You also raise section 552.109 of the Government Code for the remaining information at issue in Exhibit B. Section 552.109 excepts from public disclosure "[p]rivate correspondence or communications of an elected office holder relating to matters the disclosure of which would constitute an invasion of privacy[.]" Gov't Code § 552.109. This

office has held the test to be applied to information under section 552.109 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code.[2]

In *Industrial Foundation*, the Texas Supreme Court held information is protected by common-law privacy if it: (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person; and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy). Upon review, we find you have failed to demonstrate how any of the remaining information at issue in Exhibit B is highly intimate or embarrassing information of no legitimate public interest. Therefore, none of the remaining information at issue in Exhibit B may be withheld under section 552.109 of the Government Code.

We next turn to your argument under section 552.107 of the Government Code for Exhibit C, which is not subject to section 552.022 of the Government Code. Section 552.107 protects information that comes within the attorney-client privilege. The test for determining whether information is protected under the attorney-client privilege under section 552.107 is the same as that discussed above under Texas Rule of Evidence 503. First, a governmental body must demonstrate the information constitutes or documents a communication. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Lastly, the attorney-client privilege applies only to a confidential communication, meaning it was "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." ORD 676.

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[2]Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

You state Exhibit C documents attorney-client communications pertaining to litigation matters. However, Exhibit C consists of a letter from an individual who is representing the city attorney in connection with his employment. We note our review of the submitted information indicates the city has interests adverse to the city attorney in regards to his employment in this instance. Thus, the individual who is representing the city attorney did not render professional legal services to the city in this matter. Consequently, we find you have failed to demonstrate the applicability of the attorney-client privilege to any portion of Exhibit C, and none of it may not be withheld under section 552.107 of the Government Code.

In summary, the city may withhold the information we marked in Exhibit B under Texas Rule of Evidence 503. The remaining information 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, 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,

Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/bs

Ref: ID# 422167

Enc. Submitted documents

c: Requestor
(w/o enclosures)