



THE ATTORNEY GENERAL  
OF TEXAS

JIM MATTOX  
ATTORNEY GENERAL

August 3, 1989

Mr. Robert E. Shaddock  
General Counsel  
State Department of Highways  
and Public Transportation  
DeWitt C. Greer State Highway Bldg.  
11th & Brazos  
Austin, Texas 78701-2483

Dear Mr. Shaddock:

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# 6880; this decision is OR89-232.

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 State Department of Highways and Public Transportation received a request for appraisal information that substantiates the department's position on the market value of certain property that is currently involved in a right of way project subject to continuing negotiations and possible eminent domain proceedings if negotiations are not successful. You enclose various documents the department considers responsive to this request, including a real estate appraisal report, photographs and plats or diagrams of the real property, comprehensive appraisal reviews and comparable sales data. You seek to withhold the requested information under section 3(a)(5), which excepts from required disclosure

information pertaining to the location of  
real or personal property for public purposes

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prior to public announcement of the project, and information pertaining to appraisals or purchase price of real or personal property for public purposes prior to the formal award of contracts therefor.

Section 3(a)(5) is a narrow exception and clear on its face. It is designed to protect a government body in its planning and negotiating position in regard to particular property transactions. Open Records Decision No. 222 (1979). Ongoing good faith negotiations involving property purchases are protected from disclosure by this exception. See Open Records Decision No. 5 (1973). All of the information responsive to this request that you have provided to this office for review may be withheld under section 3(a)(5) as it directly relates to the appraisal of real property that is the subject of current negotiations concerning its purchase for public purposes and for which no contract has, as yet, been awarded. See Open Records Decision No. 234 (1980). As long as the property is under negotiation and no contract has been signed, you may withhold all of the appraisal information. When the transaction has been completed, however, other principles may govern the release of the information. See Open Records Decision No. 222 (1979).

The requestor suggests that while the department is not required by law to divulge the information he seeks, it may do so, i.e. that the exception to disclosure of section 3(a)(5) is permissive and may be waived. Most information excepted from disclosure by sections of the act protecting governmental interests may be released to the public at the discretion of the governmental body, so long as the information is not selectively disclosed. See art. 6252-17a, 14(a); Open Records Decision Nos. 473 (1987); 463 (1987).<sup>1</sup> This discretion does not, of course, extend to information that is deemed confidential by law. Under the act,

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1. See also H.B. 1285, Acts 1989 71st Leg., ch. \_\_\_\_\_, § \_\_\_\_\_, effective September 1, 1989, amending section 3(c) to read as follows:

The officer for public records may in any instance within his discretion make public any information protected under the exceptions contained within Section 3, subsection (a) that is not deemed confidential by law.

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confidential information cannot be released. See art. 6252-17a, §10(a), (e).

The information at issue here falls within the exception to disclosure of section 3(a)(5) and need not be released. Release of the information may be made at the discretion of the department, provided that once released, the information must be released to any person who requests it, and cannot be selectively disclosed. 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 OR89-232.

Yours very truly,

*Open Government Section  
of the Opinion Committee*

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of the Opinion Committee  
Prepared by David A. Newton  
Assistant Attorney General

DAN/bc

Ref.: ID# 6880

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