



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 13, 2005

Ms. Sharon Alexander  
Associate General Counsel  
Texas Department of Transportation  
125 East 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2005-11193

Dear Ms. Alexander:

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# 238005.

The Texas Department of Transportation (the "department") received two requests from the same requestor for information relating to an expansion of the Katy Freeway in the vicinity of a particular parcel of property in Houston, including (1) letters, bulletins, notices, and other correspondence between a named business entity and the department; (2) sign-in sheets for public meetings or oral hearings; (3) information presented at and records of such meetings or hearings; and (4) any other documentation relating to the project. You have submitted a representation sample of information that the department seeks to withhold under sections 552.105 and 552.111 of the Government Code and Texas Rule of Civil Procedure 192.3. We have considered your arguments and have reviewed the submitted information.<sup>1</sup> We note that this information does not appear to be representative of all of the types of information to which the requestor seeks access. We therefore assume that the department has released any other types of information that are responsive to these requests, to the extent

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

that such information existed when the department received the requests.<sup>2</sup> If not, then the department must release any such information immediately. *See* Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We initially note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108. Gov't Code § 552.022(a)(1). Thus, the completed appraisal report that you have submitted must be released under section 552.022 unless the information is expressly confidential under other law. Although you seek to withhold this report under sections 552.105 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* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 564 (1990) (statutory predecessor to Gov't Code § 552.105 subject to waiver), 470 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). As such, sections 552.105 and 552.111 are not other law for purposes of section 552.022. Accordingly, the department may not withhold any of the information that is subject to section 552.022 under section 552.105 or section 552.111.

You also contend, however, that the information in question constitutes a consulting expert report that the department may withhold under the consulting expert privilege found in rule 192.3(e) of the Texas Rules of Civil Procedure.<sup>3</sup> We note that a party to litigation is not required to disclose the identity, mental impressions, and opinions of a consulting expert. *See* TEX. R. CIV. P. 192.3(e). We also note that a "consulting expert" is defined as "an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert." TEX. R. CIV. P. 192.7. You explain that when acquiring property to build or expand highways, the department obtains expert advice from licensed appraisers in preparing for possible eminent domain litigation. You also state that, at this time, the department does not anticipate calling the experts who prepared the information in question here as witnesses. Based on your representations and our review of the information at issue, we find that the information consists of the opinions of a consulting expert. Accordingly, we conclude that the department may withhold the submitted information that is subject to section 552.022 under

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<sup>2</sup>We note that the Act does not require the department to release information that did not exist when it received this request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>3</sup>The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001).

rule 192.3(e) of the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001).

You seek to withhold the rest of the submitted information under section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. This section is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information pertaining to such negotiations that is excepted from disclosure under section 552.105 may be withheld from disclosure so long as the transaction relating to the information is not complete. *See* Open Records Decision No. 310 (1982). A governmental body may withhold information pursuant to section 552.105 "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Thus, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* Open Records Decision No. 564 (1990).

You state that the department has made a good faith determination that the remaining information pertains to the appraisal or purchase price of property that the department intends to purchase. You indicate that the release of the remaining information at this time would impair the department's ability to acquire the property. Based on your representations, we conclude that the department may withhold the rest of the submitted information under section 552.105 of the Government Code.

In summary: (1) the department may withhold the submitted information that is subject to section 552.022 of the Government Code under rule 192.3 of the Texas Rules of Civil Procedure; and (2) the department may withhold the rest of the submitted information under section 552.105 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited

from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

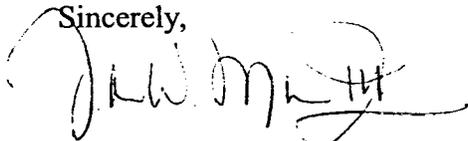
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 238005

Enc: Submitted documents

c: Mr. Charles C. Conrad  
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(w/o enclosures)