



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 30, 2006

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

OR2006-00997

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# 241148.

The Texas Department of Transportation (the "department") received a request for all documents relating to a specific eminent domain acquisition. You claim that the submitted information is excepted from disclosure under sections 552.105 and 552.111 of the Government Code and privileged under Texas Rules of Civil Procedure 192.3. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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

(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 We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The submitted information contains a completed appraisal report and information in an account, voucher, or contract relating to the expenditure of public or other funds by a governmental body. These documents are expressly public under section 552.022 unless they are made confidential under other law. Sections 552.105 and 552.111 of the Government Code are discretionary exceptions under the Act that do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.111), 564 (1990) (governmental body may waive statutory predecessor to section 552.105). Accordingly, the department may not withhold any of this information under either section 552.105 or 552.111 of the Government Code. As you raise no further exceptions for the information subject to section 553.022(a)(3), this information, which we have marked, must be released.

However, you contend that the licensed appraiser's report, which is subject to section 552.022(a)(1), constitutes a consulting expert report that may be withheld from disclosure under the consulting expert privilege found in rule 192.3(e) of the Texas Rules of Civil Procedure.² A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. *See* TEX. R. CIV. P. 192.3(e). 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 land, the department obtains expert advice from licensed appraisers in preparing for possible eminent domain litigation. You state that these appraisers are consulting experts. Upon review, we agree that the appraisal report in Exhibit C constitutes the opinion of a consulting expert. Assuming this expert is not called as a witness at trial, the department may withhold the submitted appraisal reports under rule 192.3(e) of the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001).

² The Texas Supreme Court 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).

Next, we address your assertion of section 552.105 of the Government Code for the remaining information not subject to section 552.022. 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. We note that this provision 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 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* Open Records Decision No. 310. 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.

You inform us that the department "is still in the process of purchasing land [to complete the eminent domain project.]" You state that the department has made a good faith determination that the remaining information in Exhibit B pertains to "the appraisal or purchase price of real property that [the government] intends to purchase" for a public purpose. Based on your representations and our review of the submitted information, we find that section 552.105 is applicable in this instance. Accordingly, we conclude that the department may withhold the remaining submitted information in Exhibit B pursuant to section 552.105 of the Government Code.

In summary, the department must release the information we have marked pursuant to section 552.022(a)(3) of the Government Code. Assuming the consulting expert is not called as a witness at trial, the submitted appraisal report must be withheld pursuant to rule 192.3 of the Texas Rules of Civil Procedure. The department may withhold the remaining 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,



Michael A. Lehmann
Assistant Attorney General
Open Records Division

MAL/sdk

Ref: ID# 241148

Enc. Submitted documents

c: Mr. Gene Turman
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(w/o enclosures)