ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 5, 2006

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

OR2006-10251

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# 258557.

The Texas Department of Transportation (the "department") received a request for the "A-10 appraisal report[s]" for two specific properties, along with the final payment made to each of the condemnees. You inform us that the department does not maintain some of the requested information.[1] You claim that the submitted information is excepted from disclosure under sections 552.105 and 552.111 of the Government Code and privileged

[1]The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

under Texas Rule of Civil Procedure 192.3. We have considered your arguments and reviewed the submitted information.[2]

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

> (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:
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> > (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 includes completed licensed appraiser's reports and a closing statement. This information is expressly public under section 552.022 unless it is made confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Sections 552.105 and 552.111 of the Government Code are discretionary exceptions under the Act that do not constitute "other laws" 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); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Accordingly, the department may not withhold this information under either section 552.105 or section 552.111 of the Government Code. As you raise no other exceptions for the closing statement, it must be released.

However, you contend that the submitted reports in Exhibit B are consulting expert reports that may be withheld from disclosure under the consulting expert privilege found in rule 192.3(e) of the Texas Rules of Civil Procedure. 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). A party to litigation is not required to disclose the identity, mental impressions, and opinions

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[2]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.

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 of your arguments and the information at issue, we agree that the submitted appraiser's reports constitute the opinions of a consulting expert. Therefore, assuming this expert is not called as a witness at trial, the department may withhold the reports in Exhibit B under rule 192.3(e) of the Texas Rules of Civil Procedure. *See Georgetown*, 53 S.W.3d 328.

We now turn to your arguments regarding the remaining document not subject to section 552.022 of the Government Code. Section 552.105(2) of the Government Code excepts from disclosure information relating to "appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." Section 552.105 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 excepted under section 552.105 that pertains to such negotiations may be excepted so long as the transaction is not complete. *See* ORD 310.

However, this office has concluded that information about specific parcels of land acquired in advance of others to be acquired for the same project could be withheld where this information would harm the governmental body's negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (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. Accordingly, 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* ORD 564.

You state that the department has made a good faith determination that the information at issue pertains to the purchase price of real property that the department intends to purchase. You explain that the information at issue can be used to affect the department's ongoing negotiations over the price the state must pay for other property needed to complete the proposed project. Based on your arguments and our review of the remaining information, we find that you have demonstrated the applicability of section 552.105. Accordingly, the

department may withhold the remaining document in Exhibit C pursuant to section 552.105 of the Government Code.[3]

In summary, the department may withhold the reports in Exhibit B under rule 192.3(e) of the Texas Rules of Civil Procedure. The department may withhold the document we have marked in Exhibit C pursuant to section 552.105 of the Government Code. The closing statement must be released.

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

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[3]Because our ruling is dispositive, we need not address your remaining argument.

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,

José Vela III
Assistant Attorney General
Open Records Division

JV/eb

Ref: ID# 258557

Enc. Submitted documents

c: Mr. Justin P. Bierschwale
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(w/o enclosures)