ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2009

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

OR2009-11637

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# 353037.

The Texas Department of Transportation (the "department") received a request for the right of way plans, right of way parcel maps, and appraisal reports prepared for the department regarding the Loop 20 and SH 59 Interchange Project. You state the department is releasing the responsive right of way plans and maps to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.105 and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.3. We have considered the submitted arguments and reviewed the submitted representative sample of information.[1]

Initially, we note the submitted information consists of a completed appraisal report that 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 excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov't Code § 552.022(a)(1). Sections 552.105 and 552.111 are discretionary exceptions under the Act and do not constitute other laws for purposes of section 552.022. *See* Open Records

[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.

Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 564 (1990) (statutory predecessor to section 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Thus, the submitted information may not be withheld under either section 552.105 or section 552.111 of the Government Code.

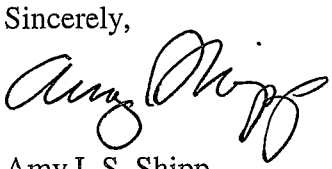
You also contend, however, the submitted information is protected by the consulting expert privilege found in rule 192.3(e) of the Texas Rules of Civil Procedure. The Texas Supreme Court has held "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 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 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." *Id.* 192.7.

You inform us, when acquiring land, the department obtains expert advice from licensed appraisers in preparation for possible eminent domain litigation. You assert these appraisers are, thus, experts consulted in anticipation of litigation. You also state, at this time, the department does not anticipate calling the expert who prepared the submitted report as a trial witness. Based on your representations and our review, we conclude the department may withhold the submitted information under Texas Rule of Civil Procedure 192.3(e).

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 at (512) 475-2497.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/rl

Ref: ID# 353037

Enc. Submitted documents

cc: Requestor
(w/o enclosures)