



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 10, 2010

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

OR2010-18530

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# 402753.

The Texas Department of Transportation (the "department") received a request for all communications with a specified business and/or four named individuals regarding a certain piece of property. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.105, and 552.111 of the Government Code and privileged under rule 192.3 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note the submitted information includes completed reports, invoices, and contracts 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

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<sup>1</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

under other law. Gov't Code § 552.022(a)(1). Section 552.022(a)(3) provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." *Id.* § 552.022(a)(3). You raise section 552.105 for Exhibits B, C, and D and section 552.111 for Exhibit D. Sections 552.105 and 552.111 are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 564 (1990) (statutory predecessor to section 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the department may not withhold the information subject to section 552.022 under these exceptions. However, rule 192.3 of the Texas Rules of Civil Procedure does constitute "other law" for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022). Thus, we will address your arguments under section 552.101 and rule 192.3 for the information subject to section 552.022. Additionally, as information subject to section 552.022 may be withheld under section 552.136 of the Government Code, we will consider the applicability of this exception.<sup>2</sup> We will also address your arguments against disclosure of the information not subject to section 552.022.

The consulting expert privilege is found in rule 192.3(e) of the Texas Rules of Civil Procedure. 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 raise rule 192.3(e) for Exhibit D, which consists of an appraisal report. You inform us that 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 the department does not at this time anticipate calling the experts who prepared the submitted report as trial witnesses. Based on your representations and our review, we conclude the department may withhold Exhibit D under rule 192.3(e) of the Texas Rules of Civil Procedure.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information other statutes make confidential. In addition, a federal regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101 of the Act. *See* Open Records Decision

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception such as section 552.136 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

No. 599 at 4 (1992). You raise section 552.101 in conjunction with part 24 of title 49 of the Code of Federal Regulations, which implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, and pertains to relocation assistance and real property acquisition for federal and federally-assisted programs. Section 24.9 of title 49 of the Code of Federal Regulations states, in part:

(a) Records. The Agency shall maintain adequate records of its acquisition and displacement activities in sufficient detail to demonstrate compliance with this part. These records shall be retained for at least 3 years after each owner of a property and each person displaced from the property receives the final payment to which he or she is entitled under this part, or in accordance with the applicable regulations of the Federal funding Agency, whichever is later.

(b) Confidentiality of records. Records maintained by an Agency in accordance with this part are confidential regarding their use as public information, unless applicable law provides otherwise.

49 C.F.R. § 24.9(a)-(b). You assert the department is an "agency" as understood by this section. "Agency" means a federal agency, state, state agency, or a person that acquires real property or displaces a person from property. *See id.* § 24.2(a)(1). You state the information at issue relates to displacement of a person by a federally assisted program. You inform us the department is required "to maintain adequate records of its acquisition and displacement activities in sufficient detail to demonstrate compliance with part 24." You further state the information in Exhibit C is maintained by the department in accordance with part 24 of title 49 of the Code of Federal Regulations. Based upon your representations and our review, we agree Exhibit C is confidential under section 24.9(b) of title 49 of the Code of Federal Regulations and must be withheld under section 552.101 of the Government Code.

Next, we will address your argument against disclosure of the information in Exhibit B that is not subject to section 552.022 of the Government Code. You assert the remaining information in Exhibit B is excepted from public disclosure under section 552.105 of the Government Code. Section 552.105 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." Gov't Code § 552.105(2). 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 from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See ORD 310.* But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the 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 negotiating position with 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 the department has made a good-faith determination that the remaining information in Exhibit B, which is not subject to section 552.022, relates to the appraisal or purchase price of real property the department intends to purchase. We note, however, the information at issue pertains to real property the department has already purchased. Furthermore, you have not shown the release of this information would harm the department's negotiating position with respect to any other parcel of land. Upon review, we find you have failed to demonstrate the applicability of section 552.105 to the information at issue. Therefore, the department may not withhold any of the remaining information in Exhibit B under section 552.105 of the Government Code.

We note a portion of Exhibit B is subject to section 552.136 of the Government Code, which provides "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the department must withhold the bank account and insurance policy numbers we have marked under section 552.136 of the Government Code.<sup>3</sup>

In summary, the department may withhold Exhibit D under rule 192.3 of the Texas Rules of Civil Procedure. The department must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 24.9(b) of title 49 of the Code of Federal Regulations. The department must withhold the bank account and insurance policy numbers we have marked in Exhibit B under section 552.136 of the Government Code. The department must release the remaining information in Exhibit B.

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.

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<sup>3</sup>This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies, which authorizes withholding of ten categories of information, including a bank account number and an insurance policy number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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](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, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/em

Ref: ID# 402753

Enc. Submitted documents

c: Requestor  
(w/o enclosures)