



September 27, 2001

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

OR2001-4352

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152469.

The Texas Department of Transportation (the "department") received a request for information "pertaining to the transaction between the TXDOT and Long John Silver and also Gulden Glory Shopping Center." You claim that the requested information, attached as exhibit B, is excepted from disclosure under sections 552.103, 552.105, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted documents are 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) 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;

....

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (17). The department must release any requested information that falls within subsections (1), (3), and (17) of section 552.022(a), unless that information is expressly confidential under other law or is part of a completed report, audit, evaluation, or investigation made of, for, or by a governmental body that is protected by section 552.108. *See id.* § 552.022(a)(1). Sections 552.103, 552.105, and 552.111 of the Government Code are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022. Open Records Decision Nos. 663 (1999) (governmental body may waive sections 552.103 and 552.111), 564 (1990) (governmental body may waive statutory predecessor to section 552.105). We have marked the documents that must be released under subsections (1), (3), and (17) of section 552.022(a) unless they are confidential under other law. We next address other laws that deem certain section 552.022 information confidential.

We note that certain information is protected by section 552.136 of the Government Code. The Seventy-seventh Legislature recently added section 552.136 to the Public Information Act, which makes access device numbers confidential.<sup>1</sup> Senate Bill 694 was passed on May 14, 2001, and became effective when it was signed by the Governor on May 26, 2001. It provides as follows:

**Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.**

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

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<sup>1</sup> See Act of May 14, 2001, 77<sup>th</sup> Leg., R.S., ch. 356, § 1, 2001 Tex. Sess. Law Serv. 614 (Vernon) (codified as Gov't Code § 552.136).

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.136). We have marked the information that you must withhold under section 552.136 of the Government Code.

Next, you argue that the appraisals are consulting expert reports, which may be withheld under the consulting expert privilege, found in Rule 192.3(e) of the Texas Rules of Civil Procedure. Recently, 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*, No. 00-0453, 2001 WL 123933, at \*8 (Tex. Feb. 15, 2001). Thus, we will determine whether the appraisals are confidential under Rule 192.3(e).

A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts. *See* Tex. R. Civ. P. 192.3(e). The department explains that when acquiring land, the department obtains expert advice from licensed appraisers in preparing for possible eminent domain litigation. The department further states that it does not anticipate calling these experts as witnesses at this time. We agree that the submitted expert appraisal reports are opinions of consulting experts. Therefore, you may withhold from disclosure the appraisals we have marked under Rule 192.3(e) of the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 2001 WL 123933, at \*11. The rest of the information we have marked that is subject to section 552.022 must be released.

We next address your claimed exceptions for submitted documents that are not subject to section 552.022. Section 552.105 of the Government Code 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.

Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. 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. Open Records

Decision No. 310 (1982). 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. Open Records Decision No. 564 at 2 (1990). 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.'" 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. 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. Open Records Decision No. 564 (1990).

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 request relates to two parcels of land that the department has acquired as part of its ongoing process of acquiring property "for widening parts of NASA Road 1 and relocating parts of the same road." You further explain that "[t]hese parcels have been acquired, but other parcels for the same project have not." Based on your representations and our careful review of the submitted documents, we believe that you have demonstrated the applicability of section 552.105. Except for documents deemed public in this ruling, you may withhold the submitted documents under section 552.105 at this time. Because section 552.105 is dispositive, we do not address your additional arguments.

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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public 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 General Services Commission 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,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/DKB/seg

Ref: ID# 152469

Enc. Marked documents

c: Mr. David Hannah  
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(w/o enclosures)