



October 8, 2001

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

OR2001-4525

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# 152979.

The Texas Department of Transportation (the "department") received a request for copies of various information pertaining to a specified property. You claim that the submitted information is excepted from disclosure pursuant to sections 552.105 and 552.111 of the Government Code and Rule 192.3 of the Texas Rules of Civil Procedure. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that the submitted information contains an appraisal report that 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) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code § 552.022(a)(1). The department must release the completed appraisal report, unless it 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). You claim that the submitted appraisal report is excepted from disclosure pursuant to sections 552.105 and 552.111 of the Government Code.

However, sections 552.105 and 552.111 are discretionary exceptions under the Public Information Act and 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).¹ Accordingly, we do not address your section 552.105 and 552.111 claims with respect to the completed appraisal report. However, you also claim that the appraisal report is excepted from disclosure pursuant to Rule 192.3(e) of the Texas Rules of Civil Procedure. Accordingly, we address the applicability of Rule 192.3(e) to the completed appraisal report.

You claim that the completed appraisal report constitutes a consulting expert report which may be withheld from disclosure under the consulting expert privilege which is 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). 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 completed appraisal report constitutes opinions of a consulting expert. Accordingly, the department may withhold from disclosure the submitted appraisal under Rule 192.3(e) of the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 2001 WL 123933, at *11.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.105 of the Government Code. 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.

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

Gov't Code § 552.105. Section 552.105 of the Government Code 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 pursuant to section 552.105 that pertains to such negotiations may be excepted so long as the transaction relating to those negotiations is not complete. *See* 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. *See* 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. *See* 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 appraisal or purchase price of real property that the department intends to purchase. You explain that the request relates to parcels of land that the department has acquired as part of its ongoing process of acquiring property for "planning a highway improvement project on IH 610 between IH 10 and Westpark." You further explain that "[s]ome parcels have already been acquired, and others are still in the process of being acquired." Based on your representations and our careful review of the remaining submitted information, we find that you have demonstrated the applicability of section 552.105. Accordingly, you may withhold the remaining submitted information from disclosure pursuant to section 552.105 of the Government Code at this time.

In summary, you may withhold from disclosure the completed appraisal report pursuant to Rule 192.3(e) of the Texas Rules of Evidence. You may withhold the remaining submitted information pursuant to 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).

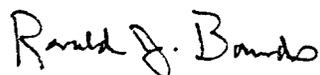
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 152979

Enc. Submitted documents

cc: Mr. Matthew C. Deal
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(w/o enclosures)