



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 18, 2004

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

OR2004-9811

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# 213158.

The Texas Department of Transportation (the "department") received a request for information relating to the purchase of land by the department. You claim that the requested information is protected under Texas Rule of Civil Procedure 192.3 and excepted from disclosure under sections 552.105 and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note that the submitted information contains a completed report prepared for the department. Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. You do not assert that section 552.108 is applicable

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<sup>1</sup>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.

to this report, but you do assert that the report is protected under Rule 192.3(e) of the Texas Rules of Civil Procedure and excepted under sections 552.105 and 552.111 of the Government Code. Sections 552.105 and 552.111 of the Government Code are discretionary exceptions 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). Accordingly, the department may not withhold this information under section 552.105 or 552.111 of the Government Code. However, the Texas Rules of Civil Procedure are other law for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Thus, we will determine whether the submitted report is protected under Rule 192.3.

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). 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. Further, you state that the department does not anticipate calling these experts as witnesses at this time. Based on your representations, we agree that the report constitutes the opinions of consulting experts. Accordingly, the department may withhold the report at issue under Rule 192.3(e) of the Texas Rules of Civil Procedure. See *City of Georgetown*, 53 S.W.3d at 337.

You assert that the remaining information, which is not subject to section 552.022, is excepted under section 552.105 of the Government Code. Section 552.105(2) 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 was designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision No. 564 at 2 (1990). This exception protects information relating to the location, appraisals, and purchase price of property only until the transaction is either completed or aborted. Open Records Decision Nos. 357 at 3 (1982), 310 at 2 (1982). You inform us that the department is still in the process of purchasing the land at issue. Our review of the remaining information at issue shows that it is related to the appraisal of that property for purposes of section 552.105. Therefore, we conclude that you may withhold the remaining information at issue from disclosure under section 552.105.

To conclude, you may withhold under Texas Rule of Civil Procedure 192.3(e) the report prepared by expert witnesses for the department. You may also withhold the remaining information under 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).

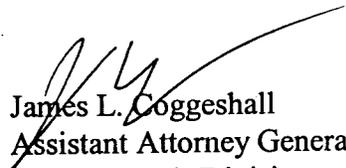
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. 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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/seg

Ref: ID# 213158

Enc. Submitted documents

c: Ms. Ana B. Rausch  
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(w/o enclosures)