



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 3, 2004

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

OR2004-10287

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# 214195.

The Texas Department of Transportation (the "department") received a request for "copies of all appraisals, counter-offers received, counter-offers made and settlement agreements made regarding acquisition of right-of-way for " a specific department project. You claim that the requested information is excepted from disclosure under sections 552.105 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample.¹

Initially, we note that the submitted information includes appraisal reports that are subject to section 552.022 of the Government Code. Section 552.022 provides, in pertinent part, as follows:

¹We 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.

(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). Exhibit B contains completed appraisal reports made for the department, which are made expressly public by section 552.022 and must be released unless expressly made confidential under other law or excepted under section 552.108 of the Government Code. You do not claim that section 552.108 applies to these documents and instead assert that they are protected by sections 552.105 and 552.111. These sections constitute discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 663 (1999) (governmental body may waive Gov't Code § 552.111), 564 (1990) (governmental body may waive statutory predecessor to Gov't Code § 552.105).² Accordingly, the department may not withhold the completed appraisal reports under section 552.105 or 552.111 of the Government Code.

However, we understand you to claim that the appraisal reports constitute consulting expert reports that may be withheld from disclosure under the consulting expert privilege found in Rule 192.3(e) of the Texas Rules of Civil Procedure. The Texas Supreme Court has 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*, 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. *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 and has done so in this instance. We understand you to represent that the appraisal reports at issue reflect the

² 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, Gov't Code § 552.107(1)), 551 (1990) (statutory predecessor to Gov't Code § 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.

identity, mental impressions, and opinions of these experts. Further, you state that the department does not anticipate at this time that it will call these experts as witnesses. Based on your representations, we agree time that the appraisal reports constitute opinions of consulting experts. Accordingly, the department may withhold the submitted appraisal reports under Rule 192.3(e) of the Texas Rules of Civil Procedure. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001).

The remaining information, which is not subject to section 552.022, consists of an offer, counter-offer, and a budgetary projections regarding the purchase of real property by the department. You assert that these records are excepted from public 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.

Gov't Code § 552.105. This section 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 so long as the transaction relating to those negotiations is not complete. *See Open Records Decision No. 310 (1982)*. 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 information at issue "pertains to the appraisal or purchase price of real property that [the department] intends to purchase." Further, we understand you to assert that the release of the remaining documents would harm the department's negotiations for purchase of the property in question. Based on our review of your arguments and the submitted information, we find that section 552.105 is applicable in this instance. Accordingly, we conclude that the department may withhold the remaining submitted information pursuant to section 552.105 of the Government Code.

In summary, the department may withhold the submitted appraisal reports under Rule 192.3(e). The remaining information may be withheld under section 552.105.

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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/seg

Ref: ID# 214195

Enc. Submitted documents

c: Mr. Steve Stark
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(w/o enclosures)