



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2006

Ms. Darlene Woodson Smith
Assistant District Attorney
Dallas County District Attorney's Office
411 Elm Street, Suite 500
Dallas, Texas 75202-3384

OR2006-01840

Dear Ms. Smith:

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# 242933.

Dallas County (the "county") received a request for 1) all data contained in the county's land and commercial comparable sales database; 2) all land and commercial comparable sales found in appraisals of commercial real estate the county received in 2004 and 2005; and 3) any sales data the county maintains with confirmed prices from sales of land and commercial property since January 1, 2003. You state that the county does not maintain a land and commercial comparable sales database.¹ You also claim that the requested information is not subject to disclosure under the Act. Alternatively, you claim that the requested information is excepted from disclosure under sections 552.103, 552.105, and 552.111 of the Government Code and rule 192.3 of the Texas Rules of Civil Procedure. Additionally, you assert that release of the requested information may implicate the proprietary interests of a third party. Pursuant to section 552.305 of the Government Code, you notified CoStar Group, Inc. ("CoStar") and Realtrac Information Systems, Inc. ("Realtrac") of the request and of their opportunity to submit comments to this office. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the arguments and reviewed the submitted information.²

Initially, both the county and CoStar argue that the requested information is not subject to disclosure under the Act because the data is commercially available to the requestor. Section 552.027 of the Government Code provides:

(a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.

(b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.

(c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

Gov't Code § 552.027. This section is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. The information submitted by the county consists of appraisal reports conducted by private appraisers on behalf of the county. The county states that these reports incorporate comparable real estate sales data purchased from third parties, such as CoStar, and argues that the comparable real estate sales data contained within the reports is not subject to the Act because it is commercially available. CoStar has submitted a sample of the types of reports that it provides for sale, and we note that the sample reports submitted by CoStar differ substantially from the appraisal reports submitted by the county. After reviewing the arguments and the submitted appraisal reports, we find that neither the county nor CoStar has demonstrated that the submitted appraisal reports are commercially available. Accordingly, section 552.027 is not applicable to the submitted appraisal reports.

²We 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.

Next, we note that the submitted information is subject to section 552.022 of the Government Code. This section provides in part that

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). In this instance, the submitted information consists of completed appraisal reports made for the county. These completed appraisal reports must be released under section 552.022(a)(1) unless they are expressly confidential by law. You claim that the completed appraisal reports are excepted from disclosure under sections 552.103, 552.105, and 552.111 of the Government Code. However, sections 552.103, 552.105, and 552.111 are discretionary exceptions to public disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.— Dallas 1999, no pet.) (governmental body may waive section 552.103); 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), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver); *see also* Open Records Decision No. 665 (2000) (discretionary exceptions generally). As such, sections 552.103, 552.105, and 552.111 are not "other law" that make information confidential for the purposes of section 552.022, and the county may not withhold the submitted appraisal reports under these exceptions. However, the county claims that the requested information is excepted from disclosure by rule 192.3 of the Texas Rules of Civil Procedure. You also assert that third parties may have a proprietary interest in the requested information. Because both of these claims can constitute compelling reasons to withhold information under the Act, we will address these arguments. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (holding that the Texas Rules of Civil Procedure are 'other law' within the meaning of section 552.022).

The county contends that the appraisal reports constitute consulting expert reports that may be withheld under the consulting expert privilege found in rule 192.3(e) of the Texas Rules of Civil Procedure. We note that a party to litigation is not required to disclose the identity, mental impressions, and opinions of a consulting expert. *See* TEX. R. CIV. P. 192.3(e). We also note that 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 county obtains expert advice from licensed appraisers in preparing for possible eminent domain litigation. You state that these appraisers are consulting experts and that the county does not anticipate calling these experts as witnesses at this time. Based

on your representations and our review, we agree that the requested appraisal reports constitute the opinions of consulting experts. Accordingly, the county may withhold the requested 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. As our ruling on this issue is dispositive, we need not address CoStar's claims under section 552.110.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



José Vela III
Assistant Attorney General
Open Records Division

JV/er

Ref: ID# 242933

Enc. Submitted documents

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