



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 1, 2007

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

OR2007-02463

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# 273251.

The Texas Department of Transportation (the "department") received a request for all records regarding land purchased by the department along "SH 130, US 183-A, and TX 45N," including but not limited to the names of the landowners from whom property was purchased, descriptions of the land purchased, the dates on which the purchases occurred, and the purchase prices. You state that the department does not have any documents responsive to the request for 183-A toll road information. We note that the Act does not require the department to release information that did not exist when it received this request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). You claim that the remaining requested information is excepted from disclosure under sections 552.105, 552.111, and 552.147 of the Government Code and protected under

rule 192.3 of the Texas Rules of Civil Procedure. We have considered the arguments you raise and reviewed the submitted representative sample of information.¹

You first state that some of the information at issue has been previously addressed by this office. In *Open Records Letter No. 2006-04803 (2006)*, the requestor sought the names and addresses of all landowners in Caldwell and Guadalupe counties whose land was lying in the right of way for SH 130. We held that the department may withhold the information at issue pursuant to section 552.105 of the Government Code. In *Open Records Letter No. 2006-07357 (2006)*, the requestor sought “[r]ight-of-way maps showing property owners and parcel numbers for the construction of SH 130 from Caldwell C/L, SW to IH 10 near Seguin.” We again held that the department may withhold the requested information pursuant to section 552.105. We presume that the pertinent facts and circumstances have not changed since the issuance of these prior rulings. Thus, we determine that the department may continue to rely on these prior rulings with respect to any information requested in that instance that is also at issue here. *See Open Records Decision No. 673 (2001)* (governmental body may rely on previous determination when the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). To the extent the requested information was not addressed in *Open Records Letter Nos. 2006-04803 and 2006-07357*, we will address your claims for exception from disclosure.

Next, we note that the submitted information contains a completed appraisal report that is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov’t Code § 552.022(a)(1). Sections 552.105 and 552.111 of the Government Code are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. *See id.* § 552.007; *Open Records Decision Nos. 665 at 2 n.5 (2000)* (discretionary exceptions generally), 564 (1990) (statutory predecessor to section 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Because these sections are not other law that make information confidential for the

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.

purposes of section 552.022, the department may not withhold this report under either section 552.105 or section 552.111.

You also contend, however, that the report is protected by 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, 336 (Tex. 2001). A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts whose mental impressions or opinions have not been reviewed by a testifying expert. *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 inform us that, when acquiring land, the department obtains expert advice from licensed appraisers in preparation for possible eminent domain litigation. You assert that these appraisers are thus experts consulted in anticipation of litigation. You also state that at this time, the department does not anticipate calling the experts who prepared the submitted reports as trial witnesses. Based on your representations, we conclude that the department may withhold the completed appraisal report under Texas Rule of Civil Procedure 192.3(e).

You next assert that the remaining information is excepted under section 552.105. Section 552.105 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.” Gov’t Code § 552.105(2). Section 552.105 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 protected by section 552.105 that pertains to such negotiations may be withheld for so long as the transaction is not complete. *See* Open Records Decision No. 310 (1982). But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the 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 negotiating position with 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 remaining information pertains to the appraisal or purchase price of real property that the department intends to purchase. Based on your representation, we conclude that the

department may withhold the remaining information under section 552.105 of the Government Code.

In summary, the department may continue to rely upon Open Records Letter Nos. 2006-04803 and 2006-07357 to the extent that the requested information is covered by these rulings. To the extent that the requested information is not covered by these rulings, the department may withhold the completed appraisal report under Texas Rule of Civil Procedure 192.3 and the remaining information under section 552.105 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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).

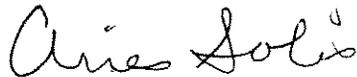
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in cursive script that reads "Aries Solis".

Aries Solis
Assistant Attorney General
Open Records Division

AS/eb

Ref: ID# 273251

Enc. Submitted documents

c: Mr. Sal Costello
10300 Dalea Vista Court
Austin, Texas 78739
(w/o enclosures)