



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 3, 2008

Mr. Jesus Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla Street
Dallas, Texas 75201

OR2008-09056

Dear Mr. Toscano:

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# 313326.

The City of Dallas (the "city") received a request for information pertaining to offers made by the city to acquire property pursuant to the Dallas Floodway Extension project and the Downtown Bypass project.¹ You state that some of the requested information will be provided to the requestor, but claim that the submitted information is excepted from disclosure under sections 552.103, 552.105, and 552.111 of the Government Code and privileged under rules 192.3 and 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted representative sample of information.²

¹The city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

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.

The submitted information contains appraisal reports that you acknowledge, and we agree, are subject to section 552.022 of the Government Code. Under section 552.022(a)(1), 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. Sections 552.103, 552.105, and 552.111 of the Government Code are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. *See 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), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the city may not withhold the appraisal reports under section 552.103, 552.105, or 552.111. However, the Texas Supreme Court has held that the Texas Rules of Civil Procedure are "other law" that makes information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your arguments under rules 192.3 and 192.5 of the Texas Rules of Civil Procedure for the reports.

Texas Rule of Civil Procedure 192.3(e) provides that "[t]he identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable." You state that "the City is acquiring land and has obtained expert advice from two licensed appraisers . . . in preparing appraisal reports for possible eminent domain litigation." You also assert that the city does not anticipate calling those appraisers as witnesses in any litigation at this time, and that the appraisal reports, mental impressions, or opinions of the appraisers have not been reviewed by any testifying expert in preparation for litigation. You state, however, that the submitted information includes "appraisal reports that have been provided to property owners pursuant to section 21.0111 of the Government Code." Section 21.0111(a) provides the following:

A governmental entity with eminent domain authority that wants to acquire real property for a public use shall disclose to the property owner at the time an offer to purchase is made any and all existing appraisal reports produced or acquired by the governmental entity relating specifically to the owner's property and used in determining the final valuation offer.

Prop. Code § 21.0111(a); *see also id.* § 21.012 (if political subdivision wants to acquire real property for public use but is unable to agree with property owner on damages, condemning entity may begin condemnation proceeding by filing petition in proper court). Thus, although rule 192.3(e) provides that a party is not required to disclose the opinions of a consulting expert to an opposing party, section 21.0111(a) provides that appraisal reports subject to that section are required to be provided to property owners, who would be the opposing parties in any eminent domain litigation. Accordingly, we conclude you have not established that the appraisal reports released to property owners pursuant to section 21.0111(a) are privileged under rule 192.3, and the city may not withhold these appraisal reports on this basis. However, we agree that, pursuant to rule 192.3, the city may

withhold the submitted appraisal reports that have not been released to property owners pursuant to section 21.0111(a). We note, however, that the city may not withhold any of these appraisal reports under rule 192.3 once they have been released to the property owners pursuant to section 21.0111(a).

You assert that the appraisal reports released to property owners pursuant to section 21.0111(a) are also protected under rule 192.5 of the Texas Rules of Civil Procedure. For the purpose of section 552.022, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.* Thus, rule 192.5 provides that a party is not required to disclose the core work product of that party's attorney or attorney's representative to an opposing party. You argue that the reports at issue are privileged under rule 192.5 because they were prepared in anticipation of eminent-domain litigation by representatives of the city. However, as we discussed above, because the appraisal reports at issue have already been provided to the property owners pursuant to section 21.0111(a), they are not privileged under rule 192.5. Thus, the city may not withhold the appraisal reports released to property owners pursuant to section 21.0111(a).

You assert that the remaining information, which consists of offer letters, are excepted under section 552.105 of the Government Code, which excepts from disclosure information relating to the following:

- (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. We note that this provision 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 that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. 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 Nos. 357 at 3, 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* ORD 564. You state that the city has made a good-faith determination that the offer letters pertain to the appraisal or purchase price of real property that the city intends to purchase. Further, we understand you to assert that the release of this information would harm the city's negotiations for purchase of the property in question. Based on your representations, we conclude that the city may withhold the offer letters, which we have marked, under section 552.105 of the Government Code.³

Finally, we note that some of the information in the appraisal reports may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

To conclude, the city must release the submitted appraisal reports that were provided to property owners pursuant to section 21.0111 of the Government Code; however, any copyrighted information may only be released in accordance with copyright law. The city may withhold the remaining appraisal reports under Texas Rule of Evidence 192.3. The city may also withhold the offer letters we have marked 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

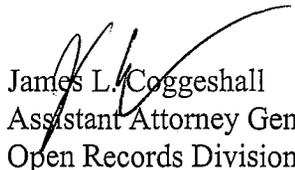
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental 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 challenge 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/jh

Ref: ID# 313326

Enc. Submitted documents

c: Ms. Ashley Stewart
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(w/o enclosures)