ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 11, 2009

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

OR2009-08046

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# 345736.

The Texas Department of Transportation (the "department") received a request for information pertaining to a specified right of way acquisition. You claim that the submitted information is excepted from disclosure under sections 552.105 and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.3. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, we note Exhibit C consists of 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 are discretionary exceptions under the Act and do not constitute other laws for purposes of section 552.022. *See* Open Records

[1]We assume 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 those records contain substantially different types of information than that submitted to this office.

Decision Nos. 665 at 2 n.5 (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). Thus, Exhibit C may not be withheld under either section 552.105 or section 552.111 of the Government Code.

You also contend, however, the completed appraisal 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 "[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 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." *Id.* 192.7.

You inform us, when acquiring land, the department obtains expert advice from licensed appraisers in preparation for possible eminent domain litigation. You assert these appraisers are thus experts consulted in anticipation of litigation. You also state, at this time, the department does not anticipate calling the expert who prepared the submitted report as a trial witness. Based on your representations and our review, we conclude the department may withhold Exhibit C under Texas Rule of Civil Procedure 192.3(e).

You assert Exhibit B is excepted from disclosure under section 552.105 of the Government Code. 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 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. 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* ORD 564 at 2. 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.'" ORD 357 at 3 (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* ORD 564.

You state the department has made a good-faith determination that Exhibit B relates to the appraisal or purchase price of real property that the department intends to purchase. Further, we understand you to assert release of Exhibit B would harm the department's negotiating position when purchasing the property at issue. Based on your representations and our review, we conclude the department may withhold Exhibit B under section 552.105 of the Government Code.[2]

In summary, the department may withhold Exhibit C under Texas Rule of Civil Procedure 192.3(e) and may withhold Exhibit B under section 552.105 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

Greg Henderson
Assistant Attorney General
Open Records Division

GH/rl

Ref: ID#345736

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[2]As our ruling is dispositive, we need not address your remaining argument against disclosure.