



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 27, 2009

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
DeWitt G. Greer State Highway Building
125 East 11th Street
Austin, Texas 78701

OR2009-15243

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# 359448.

The Texas Department of Transportation (the "department") received a request for any correspondence with the department involving four named individuals, including information relating to right of way acquisitions and negotiations. You 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 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 the submitted information in Exhibit B contains court filed documents and Exhibit C consists of completed appraisal reports that are subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a

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.

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). Section 552.022(a)(17) provides that information filed with a court is generally a matter of public record that cannot be withheld from disclosure. *Id.* § 552.022(a)(17); *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992). Sections 552.103, 552.105, and 552.111 are discretionary exceptions under the Act and do not constitute other laws 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); *see Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived) 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, the submitted information in Exhibit C and the information we have marked in Exhibit B may not be withheld under section 552.103, section 552.105, or section 552.111 of the Government Code. As you raise no further exceptions to disclosure of the information subject to section 552.022(a)(17) in Exhibit B, this information must be released. The Texas Supreme Court has held that “[t]he Texas Rules of Civil Procedure [...] are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Thus, we will address your argument under rule 192.3(e) for the information in Exhibit C. We will also address your arguments to withhold the information not subject to section 552.022 in Exhibit B.

The consulting expert privilege is found in rule 192.3(e) of the Texas Rules of Civil Procedure. 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 the submitted information in Exhibit C under Texas Rule of Civil Procedure 192.3(e).

You assert that the information not subject to section 552.022 in Exhibit B is excepted from public 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 the requested information relates to the appraisal or purchase price of real property that the department intends to purchase. Further, we understand you to assert that release of the requested information 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 the information not subject to section 552.022(a)(17) in Exhibit B under section 552.105 of the Government Code.²

In summary, the department may withhold the information in Exhibit C under Texas Rule of Civil Procedure 192.3(e). The department may also withhold the information not subject to section 552.022(a)(17) in Exhibit B under section 552.105 of the Government Code. . The remaining information must be released.

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

²As our ruling for this information is dispositive, we need not address your remaining argument against its disclosure.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "GH", with a long horizontal flourish extending to the right.

Greg Henderson
Assistant Attorney General
Open Records Division

GH/rl

Ref: ID# 359448

Enc. Submitted documents

c: Requestor
(w/o enclosures)