



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2009

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2009-18122

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# 365369.

The Texas Department of Transportation (the "department") received three requests from the same requestor for a variety of information related to billboards at any point in the condemnation process, and any billboard condemnations in which a named individual is or has been involved. You state that certain specified parcels have no billboards and thus, the department has no related information.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.105, 552.107, 552.111, 552.136, and 552.147 of the Government Code and privileged under Texas Rule of Civil Procedure 192.3 and Texas Rule of Evidence 503. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

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.

Initially, we note the submitted information contains completed appraisal reports, invoices, and contracts that are 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). Section 552.022(a)(3) provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." *Id.* § 552.022(a)(3). You raise sections 552.101, 552.105, 552.111, and Texas Rule of Civil Procedure 192.3 against disclosure of the information at issue. Sections 552.105 and 552.111 are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 564 (1990) (statutory predecessor to section 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). However, section 552.101 and Texas Rule of Civil Procedure 192.3 do constitute "other law" for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022). Thus, we will address your arguments under section 552.101 and rule 192.3(e) for the information subject to section 552.022. We will also address your arguments to withhold the information not subject to section 552.022.

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 information in Exhibit C, including the submitted appraisal reports, under Texas Rule of Civil Procedure 192.3(e).

You assert the information in Exhibits D-1 and D-2, including the submitted invoices, are excepted from disclosure under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. In addition, a federal regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101 of the Act. *See* Open

Records Decision No. 599 at 4 (1992). You raise section 552.101 in conjunction with part 24 of title 49 of the Code of Federal Regulations, which implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, and pertains to relocation assistance and real property acquisition for federal and federally-assisted programs. Section 24.9 of title 49 of the Code of Federal Regulations states, in part:

(a) Records. The Agency shall maintain adequate records of its acquisition and displacement activities in sufficient detail to demonstrate compliance with this part. These records shall be retained for at least 3 years after each owner of a property and each person displaced from the property receives the final payment to which he or she is entitled under this part, or in accordance with the applicable regulations of the Federal funding Agency, whichever is later.

(b) Confidentiality of records. Records maintained by an Agency in accordance with this part are confidential regarding their use as public information, unless applicable law provides otherwise.

49 C.F.R. § 24.9(a)-(b). You assert the department is an “agency” as understood by this section. “Agency” means a federal agency, state, state agency, or a person that acquires real property or displaces a person from property. *See id.* § 24.2(a)(1). You state the department is required “to maintain adequate records of its acquisition and displacement activities in sufficient detail to demonstrate compliance” with part 24. You also state the requested documents are maintained by the department in accordance with part 24 of title 49 of the Code of Federal Regulations. Based upon your representations, we agree that the information in Exhibits D-1 and D-2, as well as a portion of the information in Exhibit-B, which we have marked, is confidential under section 24.9(b) of title 49 of the Code of Federal Regulations and must be withheld under section 552.101 of the Government Code.

You assert the information in Exhibits E-1 and E-2 is excepted from disclosure under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals

to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the e-mails and e-mail attachments in Exhibits E-1 and E-2 constitute communications between department staff and department attorneys that were made for the purpose of providing legal advice to the department. You have identified the parties to the communications. You state that these communications were made in confidence and have maintained their confidentiality. Based on your representations and our review, we find the department may withhold the information in Exhibits E-1 and E-2 under section 552.107 of the Government Code.³

You assert that the remaining information, consisting of 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

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

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 a portion of the information not subject to section 552.022(a)(3) under section 552.105 of the Government Code. We have marked this information. We find that the remaining information in Exhibit B does not relate to the appraisal or purchase price of real property for the purposes of section 552.105, and it may not be withheld on this basis. As you raise no further exceptions to disclosure of this information, it must be released.

In summary, the department must release the information we have marked in Exhibit B under section 552.022(a)(3). The department may withhold the information in Exhibit C under Texas Rule of Civil Procedure 192.3(e), and the information we in Exhibits D-1 and D-2, as well as the information we have marked in Exhibit B, under 49 Code of Federal Regulations § 24. The department may withhold the information in Exhibits E-1 and E-2 under section 552.107, and the information we have marked 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 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/sdk

Ref: ID# 365369

Enc. Submitted documents

c: Requestor
(w/o enclosures)