



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 6, 2011

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

OR2011-00347

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# 405143.

The Texas Department of Transportation (the "department") received a request for all documents pertaining to specified properties. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.105, 552.107, and 552.111 of the Government Code and privileged under rule 192.3 of the Texas Rules of Civil Procedure. You also assert that release of the requested information may implicate the interests of the North Texas Tollway Authority ("NTTA"). Accordingly, you inform us you notified NTTA of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from NTTA. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, we note Exhibits D and E include completed reports, invoices, and contracts subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required

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.

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 required disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body" unless the information is expressly confidential under other law. *Id.* § 552.022(a)(3). We note you raise sections 552.105 and 552.111 for the information in Exhibits D and E. These sections, however, are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See* 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). Therefore, the department may not withhold Exhibits D and E under these exceptions. However, rule 192.3 of the Texas Rules of Civil Procedure does 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). Accordingly, we will consider your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.3 for Exhibit E. Additionally, because section 552.101 also constitutes "other law" that makes information confidential for purposes of section 552.022, we will consider your arguments under this section for Exhibit D. We will also address your arguments against disclosure of 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 raise rule 192.3(e) for Exhibit E, which consists of an appraisal report. You inform us that 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 the department does not at this time anticipate calling the experts who prepared the submitted report as trial witnesses. Based on your representations and our review, we conclude the department may withhold Exhibit E under rule 192.3(e) of the Texas Rules of Civil Procedure.

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 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 information at issue relates to displacement of a person by a federally assisted program. You inform us the department is required “to maintain adequate records of its acquisition and displacement activities in sufficient detail to demonstrate compliance with part 24.” You further state the information in Exhibit D is maintained by the department in accordance with part 24 of title 49 of the Code of Federal Regulations. Based upon your representations and our review, we agree Exhibit D 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.

Next, you raise section 552.107(1) of the Government Code for Exhibit C. Section 552.107(1) of the Government Code protects information that comes 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. *See Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate 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. *See 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. *See 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 capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 Exhibit C consists of a communication between the department’s attorneys at the Office of the Attorney General, Transportation Division and department employees for the purpose of providing legal counsel to the department. You state the communication was not intended to be, and has not been, disclosed to third parties. Based on your representations and our review, we conclude Exhibit C consists of a privileged attorney-client communication and may be withheld under section 552.107(1) of the Government Code.

Section 552.105 of the Government Code 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. 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 pertaining to such negotiations that is excepted from disclosure under section 552.105 may be withheld so long as the transaction relating to the negotiations is not complete. *See* ORD 310. Under section 552.105, 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 in regard to particular transactions is a question of

fact. Thus, 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.

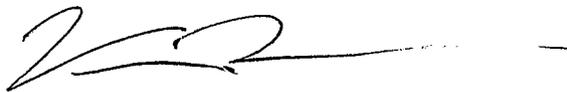
In its ten-day brief, the department raised section 552.105 of the Government Code for the submitted information. In its fifteen-day brief, the department states it has since signed an agreement with NTTA to transfer the project involving the purchase of the specified properties at issue to NTTA. Both the department and NTTA state that the submitted information pertains to the purchase and appraisal price of real property which is part of a larger project, and the release of this information would harm NTTA's negotiating position with respect to the remaining parcels. Further, NTTA states that, as there are still outstanding parcels to be acquired for this project, it has made a good faith determination that the information at issue pertains to the appraisal or purchase price of land that it intends to purchase. Based on these representations and our review, we conclude that the department may withhold Exhibit B under section 552.105 of the Government Code.

In summary, the department may withhold Exhibit E under rule 192.3(e) of the Texas Rules of Civil Procedure. The department must withhold Exhibit D under section 552.101 of the Government Code in conjunction with section 24.9(b) of title 49 of the Code of Federal Regulations. The department may withhold Exhibit C under section 552.107(1) of the Government Code. The department may withhold Exhibit B under section 552.105 of the Government Code. The remaining requested 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 405143

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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