



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 10, 2011

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

OR2011-06473

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# 415410.

The Texas Department of Transportation (the "department") received a request for the seller's name, acreage sold, and selling price for each property acquired by the department for a specified construction project. You claim the submitted information is excepted from disclosure under sections 552.105 and 552.111 of the Government Code and privileged under rule 192.3 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note the submitted information may not be responsive to the request for information, which seeks certain information pertaining to property that has been acquired by the department. We are unable to determine whether the submitted information pertains to property the department has acquired. Accordingly, if the property listed in the submitted tabulation of values report has not been acquired by the department, this document is not responsive to the request. The department is not required to release any non-responsive

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<sup>1</sup>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 that those records contain substantially different types of information than that submitted to this office.

information in response to the request. However, to the extent the interest owner, land area, and value fields in the submitted tabulation of values correspond to the seller's name, acreage sold, and selling price of property that has been acquired by the department, those portions of the submitted information are responsive. We consider your raised exceptions against disclosure of the responsive information.

Next, we note the responsive information is subject to section 552.022 of the Government Code, which provides, in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The responsive information is contained in a tabulation of values, which is a report completed for the department that falls within the purview of section 552.022(a)(1). The department may only withhold information subject to section 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under "other law." *See id.* Although you claim this report is excepted under sections 552.105 and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Open Records Decision Nos. 677 at 8 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 564 (1990) (statutory predecessor to section 552.105 subject to waiver).* As such, sections 552.105 and 552.111 do not constitute "other law" that make information expressly confidential for the purposes of section 552.022. Consequently, the department may not withhold the submitted report under section 552.105 or section 552.111 of the Government Code. You also assert, however, that this information is protected by Texas Rule of Civil Procedure 192.3. The Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your argument under rule 192.3 for the information at issue.

Texas Rule of Civil Procedure 192.3(e) provides "[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." TEX. R. CIV. P. 192.3. 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." TEX. R. CIV. P. 192.7(d).

You explain the department is in the process of acquiring land and has obtained expert advice from licensed appraisers in preparing appraisal reports for possible eminent domain litigation. You state the submitted tabulation of values consists of appraisers' mental impressions and opinions for use in such litigation. However, as previously stated, only the seller's name, acreage sold, and selling price of acquired property is responsive to this request. Thus, the responsive information consists of facts regarding property that has already been acquired by the department, not appraisers' mental impressions or opinions about such properties. Consequently, we find you have failed to demonstrate the applicability of Texas Rule of Civil Procedure 192.3(e) to the responsive information. As you raise no other exceptions, the responsive 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](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,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/sdk

Ref: ID# 415410

Enc. Submitted documents

c: Requestor  
(w/o enclosures)