



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 3, 2011

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

OR2011-11211

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# 426044.

The Texas Department of Transportation (the "department") received a request for eight categories of information related to a specified property during a specified time period. You claim 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 your arguments and reviewed the submitted representative sample of information.¹

Initially, we note the asbestos analysis and negotiator's report in Exhibit B and the real estate appraisal report in Exhibit C are subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for 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). In this instance, the asbestos

¹We 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.

analysis, negotiator's report, and real estate appraisal report are completed reports made of, for, or by the department. Although you seek to withhold this information under sections 552.105 and 552.111 of the Government Code, those sections are discretionary exceptions to disclosure that protect only a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 564 (1990) (statutory predecessor to Gov't Code § 552.105 subject to waiver), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). As such, sections 552.105 and 552.111 are not other law that make information confidential for purposes of section 552.022(a)(1). Therefore, the department may not withhold the reports at issue under section 552.105 or 552.111. As you raise no additional exceptions for the asbestos analysis and negotiator's report in Exhibit B, which we have marked, they must be released to the requestor. However, you also contend Exhibit C is protected by the consulting expert privilege found in Texas Rule of Civil Procedure 192.3(e). The Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" for purposes 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 Exhibit C.

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 explain that in acquiring land for highways, the department relies on the state's power of eminent domain, which permits the department to acquire land through lawsuits that ensure adequate compensation to the landowner. You inform us the department always anticipates and prepares for litigation to acquire needed property. You explain the department obtains expert advice from licensed appraisers in preparation for the litigation, in which the value of the property is generally the only issue. You state the department consults appraisers in anticipation of litigation and does not, at this time, anticipate calling the appraiser who prepared Exhibit C as a witness. Based on your representations and our review, we find Exhibit C is privileged under Texas Rule of Civil Procedure 192.3. We therefore conclude the department may withhold Exhibit C on that basis.

You assert the remaining information in Exhibit B is excepted 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 protects a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564, 357 (1982), 310 (1982). Information protected by section 552.105 that pertains to such negotiations may be withheld for as long as the transaction is not complete. *See* ORD 310. This office also has concluded information about specific parcels of land obtained in advance of other parcels to be acquired for the same project may be withheld under section 552.105 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 under section 552.105

“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 the information in Exhibit B pertains to the appraisal or purchase price of real property the department intends to purchase. You explain the department still needs to acquire property in the same area. You contend release of Exhibit B would harm the department’s negotiating position in the acquisition of as yet unacquired property. Based on your representations, we conclude the department may withhold the remaining information in Exhibit B under section 552.105 of the Government Code.²

In summary, the department must release the information we have marked in Exhibit B under section 552.022(a)(1). The department may withhold Exhibit C under Texas Rule of Civil Procedure 192.3 and the remaining information in 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, toll free at (888) 672-6787.

Sincerely,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/tf

²Because our ruling is dispositive, we do not address your remaining argument against disclosure.

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Enc. Submitted documents

c: Requestor
(w/o enclosures)