



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 20, 2011

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

OR2011-15359

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# 433673.

The Texas Department of Transportation (the "department") received a request for (1) specified agreements between the department and right-of-way services, including Lockwood, Andrews & Newman; (2) agreements with landowners in Collin County where the department has erected sound attenuation or noise walls between Preston Road and the owner's property; (3) noise evaluations and abatement analysis programs and program findings, including the location of the analysis sites and measurements of noise levels, with respect to the noise levels on Preston Road in Collin County; (4) specified computer models projecting noise levels on a specified area on Preston Road; (5) noise abatement criteria used by the department and Federal Highway Administration for the Preston Road project; (6) written criteria used by the department showing the threshold of noise levels necessary for residential areas along Preston Road to meet the established criteria for a noise wall; (7) the video the department is producing or has produced to educate the public about noise walls; and (8) the following information pertaining to the requestor's clients' property: (a) draft and "blue line" architectural drawings; (b) site plans, environmental impact studies or environmental assessments, riparian/hydrology studies, water velocity studies, and drainage studies for abutting property; (c) engineering, architectural, or other documents referring to height or elevation for abutting property; (d) appraisals or written reports pertaining to any parcel within five hundred feet; (e) all written offers made to an owner of real property within five hundred feet; (f) photographs of the clients' property; (g) and photographs of tracts or parcels of land within five hundred feet. You claim the requested information is excepted from disclosure under sections 552.103, 552.105, and 552.111 of the

Government Code and privileged pursuant to rule 192.3 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note you have not submitted for our review any information responsive to the request for specified agreements between the department and right-of-way services, agreements with landowners in Collin County where the department has erected sound attenuation or noise walls between Preston Road and the owner's property, or the video the department is producing or has produced to educate the public about noise walls. Although you state the department submitted a representative sample of information, no portion of the submitted representative sample pertains to the specified agreements between the department and right-of-way services, agreements with landowners in Collin County where the department has erected sound attenuation or noise walls between Preston Road and the owner's property, or the requested video. Thus, we find the submitted information is not representative of the information sought in these parts of the request. Please be advised this open records letter applies to only the types of information you have submitted for our review. Therefore, this letter ruling 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. *See id.* § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed to be public). To the extent information responsive to the remaining categories of requested information existed when the request was received, we assume you have released it. If you have not released any such information, you must do so at this time. *See id.* §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We note some of the submitted information, which we have marked, consists of completed appraisal reports made for the department that 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 expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). You seek to withhold the information at issue under sections 552.103, 552.105, and 552.111 of the Government Code. However, sections 552.103, 552.105, and 552.111 are discretionary in nature and do not constitute "other law" 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); Open Records Decision Nos. 665 at 2 n.5 (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). Thus, the department may not withhold the marked

appraisal reports under section 552.103, section 552.105, or section 552.111 of the Government Code. You also contend, however, the marked appraisal reports are protected by the consulting expert privilege found in rule 192.3(e) of the Texas Rules of Civil Procedure. 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 arguments under rule 192.3(e) for the information subject to section 552.022. We will also consider your arguments under sections 552.103, 552.105, and 552.111 of the Government Code for the information not subject to section 552.022 of the Government Code.

The consulting expert privilege is found in rule 192.3 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.” TEX. R. CIV. P. 192.7.

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 that, at this time, the department does not anticipate calling the experts who prepared the submitted reports as trial witnesses. Based on your representations, we conclude the department may withhold the marked appraisal reports under Texas Rule of Civil Procedure 192.3(e).

We next address your claim under section 552.103 of the Government Code for the information not subject to section 552.022(a)(1) of the Government Code. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that prior to the department's receipt of this request, a lawsuit styled *Texas v. Stanley K. Garrett, et ux*, Cause No. 00418782011, was filed and is currently pending in the County Court at Law No. 4 of Collin County, Texas. You further state the information not subject to section 552.022 is related to the pending litigation because it pertains to the claims in the lawsuit. Accordingly, we find litigation was pending when the department received this request for information and the information at issue relates to the pending litigation. Therefore, we conclude section 552.103 of the Government Code is generally applicable to the information not subject to section 552.022(a)(1) of the Government Code.

However, we note the requestor, who represents the opposing parties in the pending litigation, has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if all the opposing parties have seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Some of the submitted e-mails consist of communications between the department and the requestor. Thus, all the opposing parties have seen or had access to these communications, and they may not be withheld under section 552.103. Accordingly, with the exception of the communications between the department and the requestor, the department may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.¹ We also note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We next address your argument under section 552.105 of the Government Code for the remaining information not subject to section 552.022. 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

¹As our ruling on this information is dispositive, we need not address your remaining arguments against its disclosure.

§ 552.105(2). Section 552.105 is designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982). Information that is 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 the remaining information relates to the appraisal or purchase price of real property the department intends to purchase. You explain the department still needs to purchase property in the area at issue and assert release of the requested information would harm the department's negotiating position with respect to the acquisition of the remaining property. Based on your representations and our review, we conclude the department may withhold the remaining information under section 552.105 of the Government Code.²

In summary, the department may withhold the marked appraisal reports under Texas Rule of Civil Procedure 192.3(e). With the exception of the communications between the department and the requestor, the department may withhold the information not subject to section 552.022(a)(1) of the Government Code under section 552.103 of the Government Code. The department may withhold the remaining information 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,

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

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,

A handwritten signature in black ink, appearing to read "Jennifer Luttrall". The signature is written in a cursive style with a large initial "J".

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 433673

Enc. Submitted documents

c: Requestor
(w/o enclosures)