



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 25, 2012

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

OR2012-09729

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# 457521.

The Texas Department of Transportation (the "department") received a request for information related to real property purchases in Denton County for the past two years and information related to appraisals of department real property that was purchased or may be purchased in Denton County for the past two years. You state the department has released or will release some information to the requestor. 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.¹

Initially, we note that portions of Exhibit B and the entirety of Exhibit C are subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

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.

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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;

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). Exhibit C consists of completed appraisal reports that are subject to subsection 552.022(a)(1) of the Government Code. Exhibit B contains a court-filed document, which we have marked, that is subject to subsection 552.022(a)(17) of the Government Code. You seek to withhold exhibit B under section 552.105 of the Government Code and exhibit C under sections 552.105 and 552.111 of the Government Code. However, sections 552.105 and 552.111 are discretionary exceptions and do not make information confidential under the Act. *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 6-7 (1987) (statutory predecessor to section 552.111 subject to waiver). Thus, the department may not withhold the information subject to section 552.022 under section 552.105 or section 552.111. As you raise no further exceptions to disclosure of the information we have marked in exhibit B, it must be released. You contend, however, exhibit C is also 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 the Texas Rules of Civil Procedure are other law within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will address the applicability of rule 192.3(e) to exhibit C. We will also address the applicability of section 552.105 to the remaining information in exhibit B which is not subject to section 552.022.

We next address your argument under rule 192.3 of the Texas Rules of Civil Procedure for exhibit C. 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." *Id.* 192.7.

You inform us the department relies on the state's power of eminent domain to acquire land to build or expand highways. You state the department always anticipates and prepares for

litigation to acquire land. You further state, in acquiring land, the department obtains expert advice from licensed appraisers to prepare for litigation on the issue of the value of the acquired property. 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 experts who prepared the reports at issue as trial witnesses. Based on your representations, we conclude the department may withhold exhibit C under Texas Rule of Civil Procedure 192.3(e).

Next, we address your claim under section 552.105 of the Government Code for the remaining information in exhibit B that is 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 § 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, 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 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.

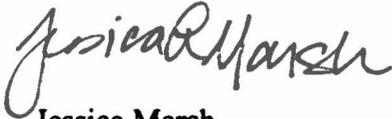
You state the department has made a good-faith determination the information at issue relates to the appraisal or purchase price of real property the department intends to purchase. You explain the department still needs to purchase property in the area at issue and assert release of this information would harm the department’s negotiating position with respect to the acquisition of this nearby property. Based on your representations and our review, we conclude the department may withhold the remaining information in exhibit B under section 552.105 of the Government Code.

In summary, the department must release the information we have marked in exhibit B pursuant to section 552.022(a)(17) of the Government Code. The department may withhold exhibit C under rule 192.3(e) of the Texas Rules of Civil Procedure and may withhold 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,



Jessica Marsh
Assistant Attorney General
Open Records Division

JM/dls

Ref: ID# 457521

Enc. Submitted documents

c: Requestor
(w/o enclosures)