



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 9, 1997

Ms. Kelli Hamm Karczewski
Schwartz & Eichelbaum, P.C.
800 Brazos, Suite 870
Austin, Texas 78701

OR97-1325

Dear Ms. Karczewski:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 106785.

The Bastrop Independent School District (the "district"), which you represent, received a request for the investigation report concerning a grievance filed by the requestor's client, a district employee. Among other things, you claim that the report is excepted from required public disclosure because it consists of attorney work product. We have considered your arguments and have reviewed the report at issue.

This office addressed the attorney work product privilege in Open Records Decision No. 647 (1996). First, in order to claim the privilege, the work product must have been created in anticipation of litigation or for trial. *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993). The supreme court in *National Tank* stated that information is created in anticipation of litigation for purposes of Rule 166b(3) of the Rules of Civil Procedure when

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

Id. at 207; *Henry P. Roberts Inves., Inc., v. Kelton*, 881 S.W.2d 952, 953 (Tex. App.--Corpus Christi 1994, no writ). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *National Tank*, 851 S.W.2d at 204. Thus, a governmental body wishing to withhold attorney work product must first show that the work product was created for trial or in "anticipation of litigation" under the *National Tank* test.

Secondly, a governmental body must show that the work product consists of or tends to reveal the thought processes of an attorney in the civil litigation context. After a review of your arguments and the submitted information, we conclude that you may withhold the submitted information as attorney work product.

In light of our ruling under attorney work product, we need not address your other arguments against disclosure. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/rho

Ref: ID# 106785

Enclosures: Submitted documents

cc: Mr. Karl Tiger Hanner
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(w/o enclosures)