



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 18, 1998

Mr. Paul Sarahan, Acting Director
Litigation Support Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR98-2244

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 118319.

The Texas Natural Resource Conservation Commission (the "commission") received a request for all complaints filed against Griffin Industries, Inc. from 1991 to the present as well as all documents dealing with sanctions and findings against the company. In your first letter to this office you claimed that some of the requested information is excepted from required public disclosure by sections 552.101, 552.107, and 552.111 of the Government Code. You have now withdrawn your assertion that the citizen complaints are protected under section 552.101 and state that you will release this information. You also indicate that you have released other portions of the responsive information. You continue to assert, however, that the remaining information not already released is protected by sections 552.107 and 552.111. We have considered the exceptions you claim and reviewed the sample documents that you have submitted, Attachment C.¹

You contend that the documents in Attachment C may be withheld as attorney work product under section 552.111. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996).

¹In reaching our conclusion here, we assume that 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.

The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) 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 2) the party resisting discovery or release 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. Open Records Decision No. 647 at 4 (1996).

You indicate that the information at issue was drafted by commission attorneys in anticipation of settlement or litigation with Griffin Industries, Inc. in an enforcement action. You state that the matter was resolved through settlement during trial. Thus, it appears that a lawsuit was actually filed. You also argue that the documents "were prepared just before or during" the court proceeding. We find that you have demonstrated in this case that the documents at issue were created in anticipation of litigation. You have established the applicability of both parts of the first prong of the work product test.

The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. You state that the materials "reveal the thought processes of the attorneys involved on behalf of the State of Texas." Having reviewed the information and your arguments, we can easily conclude that some of the information reveals attorney mental impressions, conclusions and strategy. However, much of the information at issue contains other additional information that merely refers to the facts of the case or was intended for parties other than those working on behalf of the state, including the potential opposing party in the enforcement action. This office has stated that the work product privilege does not extend to "facts an attorney may acquire." See Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n. 2 (Tex. 1991)). Moreover, the privilege does not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts. See *Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.--Houston [1st Dist.] 1990, no writ). Based on your statements and our review of the submitted material, we believe that certain portions and some pages in their entirety may be withheld as protected work product. Other portions are merely factual and do not appear to reveal an attorney's mental processes, conclusions, strategies, or legal theories. See *Occidental Chemical Corp. v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995). We have marked the information in Attachment C that may be withheld.

Because we make a determination under section 552.111, we do not address your additional argument against disclosure. We do not believe that section 552.107 would furnish any greater protection from public disclosure than that already provided by the work-product privilege under section 552.111. Tex. R. Civ. Evid. 503(a)(5) (a communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services); Open Records Decision 574 at 5 (1990) (factual communications from attorney

to client, or between attorneys representing the client, are not generally protected by section 552.107).

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,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/nc

Ref: ID# 118319

Enclosures: Marked documents

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(w/o enclosures)