



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 6, 1998

Mr. David R. Gipson
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711-2847

OR98-2368

Dear Mr. Gipson:

You ask whether certain information is subject to required public disclosure under the Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 118324. Your office has assigned this request tracking number TDA-OR-98 00RM.

The Texas Department of Agriculture (the "department") received a request for access "to review several pesticide cases referenced in TDA Enforcement Division reports," and certain specified information concerning "premiums affecting the price of milk or other dairy products . . . since 1994." In response to the request, you submit to this office for review the information which you assert is responsive. You claim that the requested information, submitted as Exhibits B, C, D, and E, is excepted from required public disclosure based on sections 552.101, 552.103, 552.107 and 552.111 of the Government Code.¹ Specifically, the department claims that one TDA incident file is subject to pending litigation and section 552.103, certain marked information is subject to section 552.101, while the remaining TDA incident file records are subject to section 552.107 or section 552.111. We have considered the arguments and exceptions you raise and reviewed the submitted information.

We first address your claim that the requested TDA Incident No. 2424-02-97-0015 file may be withheld as attorney work product, because the pending request for information

¹As you have not raised an applicable exception for Item 2 of the request, concerning milk or other dairy products, we assume that the information responsive to this category of information will be released.

constitutes a request for the "entire litigation file." In fact, you state that "the request on its face is comprehensive and clearly represents a request to review or otherwise obtain the entire litigation file. Therefore, the entire request may be denied in its entirety."

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). 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, submitted as Exhibit B, was gathered or prepared in anticipation of litigation. You explain that the department is authorized to investigate pesticide-related complaints and may assess penalties for violations of chapters 75 and 76 of the Agriculture Code. Agric. Code §§ 12.020, 76.1555(a). You inform us that the requested information was gathered for and concerned an administrative action, initiated by the department, which alleged specific violations of Texas pesticide law. *Id.* at § 76.1555(h); *cf.* Open Records Decision No. 588 at 7 (1991) (contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103). We find that you have demonstrated in this case that the documents at issue were gathered or prepared 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 cite to *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), for the proposition that a request for an "entire litigation file is not subject to discovery because organization and selection of contents reveals attorney's thought processes." In *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994), the Texas Supreme Court held that a request for an "entire file" was "too broad" and that, citing *National Union Fire Insurance*, "the decision as to what to include in [the file] necessarily reveals an attorney's thought processes concerning the prosecution or defense of the case." *Curry*, 873 S.W.2d at 380. Because the pending request encompasses the entire litigation file, we conclude that you withhold Exhibit B in its entirety.

We next consider the applicability of the claimed exceptions for the records submitted as Exhibit C. Although you appear to raise the work product privilege in the context of section 552.107, this office has determined that this privilege is more appropriately raised under either section 552.103 or 552.111 of the Government Code. Open

Records Decision No. 647 at 4 (1996). As discussed above, the initial requirement that must be met to consider information “attorney work product” is that the information must have been created for trial or in anticipation of litigation. *See National Tank*, 851 S.W.2d at 207. You have explained that the “case summaries . . . are attorney work product prepared as an aid to the department attorney assigned to the case and/or for the purpose of summarizing the department’s legal position regarding proof of violations of state or federal pesticide laws in an administrative, civil, or criminal hearing or trial.” The second requirement that must be met is that the work product “consists of or tends to reveal the thought processes of an attorney in the civil litigation process.” Open Records Decision No. 647 at 4 (1996). Having reviewed the information and your arguments, we can conclude that some of the information reveals attorney mental impressions, conclusions and strategy. However, some information at issue merely refers to the facts of a case. 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*, 818 S.W.2d at 750 n. 2). 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). However, in *Leede*, the court noted that the attorney notes did not show how the attorney would use the facts, if at all, nor did the notes suggest trial strategy or indicate the lawyer’s reaction to the facts. *See id.* at 687. Accordingly, we believe that it is possible for an attorney’s selection and organization of facts of a case to reveal the attorney’s mental impression and strategy of the case. *See Marshall v. Hall*, 943 S.W.2d 180 (Tex. App.--Houston [1st Dist.] 1997, no writ); *Leede Oil & Gas, Inc.*² You have explained that “[t]he attorney work product and attorney-client communications documents identified within Exhibit C, including the interagency summary and correspondence . . . are selected and ordered by the department’s legal staff . . . such recitations are non-neutral, rather than purely factual.” Upon review of the information contained in Exhibit C and your arguments, we agree that such facts are also attorney work product excepted from disclosure under section 552.111. Therefore, you may withhold the submitted information, Exhibit C, under section 552.111, as we have determined that the requirements recited in *National Tank* and Open Records Decision No. 647 (1996) have been met.

With respect to Exhibit D, you explain that the responsive records contain “certain memoranda prepared by or at the direction of department attorneys for the purpose of communication or discussing litigation recommendations with the department’s General Counsel.” Section 552.111 excepts “an interagency or intraagency memorandum or letter

²The privilege does not apply where the party seeking to discover information shows that the information is 1) hidden in the attorney’s file and 2) essential to the preparation of one’s case. *Hickman v. Taylor*, 329 U.S. 495 (1947); *see Marshall v. Hall*, 943 S.W.2d 180, 183 (Tex. App.--Houston [1st Dist.] 1997, no writ). While the open records context provides no opportunity for the requestor to make such a showing, we assume that in the usual case, the documents the department releases to the requestor contain the facts of the case.

that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. After careful review, we agree that the submitted documents, in Exhibit D, may be withheld under section 552.111.

Finally, we consider whether the marked information, in Exhibit E, must be withheld under section 552.101 in conjunction the Medical Practice Act (the “MPA”), article 4495b of Vernon’s Texas Civil Statutes, which protects from disclosure “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” V.T.C.S. art. 4495b, § 5.08(b). Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* V.T.C.S. art. 4495b, § 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. Certain portions of the submitted documents include medical record information access to which is governed by provisions outside the Open Records Act. *Id.* We have marked the information, submitted as Exhibit E, that is subject to the MPA. The department may only release this information in accordance with the MPA.

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,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref: ID# 118324

Enclosures: Submitted documents

cc: Mr. Royce Meyer
1401 Nueces Street
Austin, Texas 78701
(w/o enclosures)