



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 12, 1998

Mr. Rick Perry
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR98-2672

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 119741.

The Texas Department of Agriculture (the "department") received an open records request for "any new complaints filed since March of 1997 to the present on" three named pilots and companies. You state that the department has released to the requestor all information contained in three case files pertaining to possible violations of state or federal pesticide laws. You seek to withhold certain documents contained in two similar files pursuant to sections 552.101, 552.103, 552.107(1), and 552.111 of the Government Code.

You first seek to withhold certain documents contained in case file 2424-05-97-0038 pursuant to section 552.103 of the Government Code. To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 at 1 (1991). In this instance, you have made the requisite showing that the requested information relates to pending litigation for purposes of section 552.103. See Open Records Decision No. 588 (1991) ("litigation" includes a contested case under Administrative Procedures Act

before administrative agency). The department therefore may withhold these particular records at this time pursuant to section 552.103.¹

You next seek to withhold from case file 2424-05-97-0051 one intra-office memorandum as “attorney work product” pursuant to section 552.111 of the Government Code. The first 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. In order for this office to conclude that information was created in anticipation of litigation, we must be satisfied that

- 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.

See National Tank v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). 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.” *Id.* at 204. After reviewing the totality of the circumstances surrounding the department’s investigation, we believe that both of these tests have been met in this instance.

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). Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to a neutral recital of facts obtained by the attorney. *Id.* and authorities cited therein. After reviewing the memorandum at issue, we do not believe that this document contains a neutral recital of facts. Accordingly, we conclude that the department may withhold this record as attorney work product pursuant to section 552.111 of the Government Code.²

¹Because we resolve this aspect of your request under section 552.103, we need not address the other exceptions you raise for these documents. In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

²Because we resolve this aspect of your request under section 552.111, we need not address your other arguments for withholding this record.

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/RWP/nc

Ref.: ID# 119741

Enclosures: Submitted documents

cc: Mr. Jamie Gonzales
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(w/o enclosures)