



May 18, 1999

Ms. Susan Combs
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR99-1376

Dear Ms. Combs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 124222.

The Texas Department of Agriculture (the "TDA") received a request for TDA investigative report, incident number 2425-05-98-0010. You indicate that you will release most of the requested information to the requestor. However, you seek to withhold a single document prepared by TDA's legal staff, which you contend is excepted from public disclosure by sections 552.101, 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the document at issue.

You inform us that the requested investigative materials concern a case that was subject to contested case procedures under section 12.020 of the Agriculture Code and chapter 2001 of the Government Code, but that is now closed. You assert that the information at issue is attorney work product. Section 552.111 of the Government Code is the proper exception under which to claim protection for attorney work product once the litigation for which the work product was prepared has concluded. Open Records Decision No. 647 at 2-3 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749 (Tex. 1991)). We shall therefore limit our discussion to this provision of the Government Code. Section 552.111 exempts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This office has stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must show that the material 1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See id.* When showing that the documents at issue were created in anticipation of litigation for the first prong of the work product test, a governmental body's task is twofold. The 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 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 id.* at 5.

You state that the information at issue was collected and prepared by TDA for the purpose of proving violations of state or federal pesticide laws in an administrative, civil or criminal hearing or for trial. *See generally* Agric. Code ch. 76. We conclude that the department has met the first prong of the work product test.

We now consider whether the information reveals the attorney's mental processes, conclusions and legal theories. Having reviewed the information and your arguments, we note that the document contains legal advice or conclusions, as well as summaries of the facts of the 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's 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. We believe that an attorney's selection and organization of facts of a case may reveal the attorney's mental impression and strategy of the case. *See Marshall fcv. Hall*, 943 S.W.2d 180 (Tex. App.--Houston [1st Dist.] 1997, no writ); *Leede Oil & Gas, Inc.* 789 S.W.2d at 686.¹

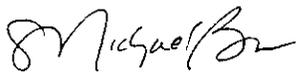
With regard to the facts that appear in the subject document, you state that: "the facts have been selected and ordered by the agency attorney for the purpose of determining and communicating the legal basis and strategy for the proposed action." We have reviewed the

¹The 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.

information and your arguments. Based on your representation that the attorney selected and included the facts in the summaries, we believe the facts would reveal the attorney's impressions and strategy. We therefore agree that such facts are attorney work product excepted from disclosure under section 552.111. Accordingly, you may withhold the submitted document as attorney work product under section 552.111.

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.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 124222

encl. Submitted documents

cc: Mr. Barry Dickerson
107 Laurel Drive
Weslaco, Texas 78596
(w/o enclosures)