



September 22, 1999

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

OR99-2639

Dear Ms. Combs:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 127968.

The Texas Department of Agriculture (the "department") received a request for copies of records from two recent cases in which the department imposed a fine on a farm operation for inadvertent or non-intentional spraying of pesticides on farm workers. The department has identified TDA Incident Nos. 2424-01-96-0039 and 2424-05-95-0044 as responsive to the request. You contend that three of the requested documents are excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code and the Medical Practice Act, V.T.C.S. article 4495b (the "MPA"). We have considered the exceptions you claim and reviewed the documents at issue.

You contend that a case summary and some attorney notes are excepted from disclosure under section 552.111 as attorney work product. Section 552.111 excepts from disclosure attorney work product that 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 information at issue was 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 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. ORD 647 at 4. 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. *Id.* Having carefully considered your arguments, we conclude that you have met the work product test for the case summary and the attorney notes. Therefore, the department may withhold these documents from disclosure under section 552.111.

You contend that portions of the third document at issue, a toxicology memorandum, are confidential under the MPA. Section 5.08 of the MPA provides:

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

V.T.C.S. art. 4495b, § 5.08. Section 5.08(j)(3) 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). Thus, access to medical records is governed by the MPA, not the Public Information Act. Open Records Decision No. 598 (1991). 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). We agree that the information you have marked is subject to the MPA. The department may only release this information in accordance with the MPA. Open Records Decision Nos. 598 (1991), 546 (1990); *see* V.T.C.S. art. 4495b, §§ 5.08 (c), (j), (k).

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,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 127968

Encl. Submitted documents

cc: Ms. Leah Beth Ward
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(w/o enclosures)