



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

September 5, 1996

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

Open Records Decision No. 647

Re: Whether attorney work product regarding civil litigation may be excepted from disclosure under chapter 552 of the Government Code once the litigation for which the requested information was created has concluded (ORQ-4)

Dear Commissioner Perry:

The Texas Department of Agriculture (the "department") has received a request for certain records relating to a civil action involving the department and Voluntary Purchasing Groups, Inc. You explain that a final judgment has been entered in the case and that you intend to release some of the requested information to the requestor. You do not raise any particular exception to required public disclosure under the Texas Open Records Act (the "act" or "TORA"). You claim, however, that the records submitted for our review are excepted from required public disclosure because they consist of attorney work product. On the basis of recent Texas Supreme Court decisions defining the attorney work product doctrine, we conclude that section 552.111 of the Government Code may protect the submitted records from required public disclosure.

There is no question that during the pendency of litigation, work product of an attorney in a civil proceeding is protected from disclosure by section 552.103 of the Government Code so long as the exception is timely raised. Open Records Decision No. 575 (1990). In Open Records Decision No. 575 (1990), stating that records privileged from discovery were confidential only to the extent that a particular judge in a particular case deemed them as such, this office explicitly overruled Open Records Decision No. 304 (1982), which had concluded that a governmental body could withhold attorney work product under the predecessor to section 552.101. This office further stated that we did not believe "that this is the type of information that section 3(a)(1) was intended to protect as information deemed confidential by law." As work product is necessarily "related" to litigation because by its definition it must be created for litigation, this office concluded in

Open Records Decision No. 575 (1990) that work product was more properly categorized as information excepted from disclosure under section 552.103, but only if a governmental body otherwise met the section 552.103 test.

To secure the protection of section 552.103(a), the litigation exception, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision Nos. 638 (1996) at 2, 588 (1991) at 1. The litigation exception prevents the use of the Open Records Act as a method of avoiding the rules of discovery. Attorney General Opinion JM-1048 (1989) at 4. That exception enables a governmental body to protect its position in litigation by "forcing parties seeking information relating to that litigation to obtain it through discovery." Open Records Decision No. 551 (1990) at 3. Thus, section 552.103 recognizes the importance of the discovery process by providing a temporary exception for requests for information that relate to pending or anticipated litigation so that disputes regarding the availability of the information in particular litigation may be properly resolved by a court. However, section 552.103 does not provide an exception to disclosure for litigation related information once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Thus, information consisting of attorney work product prepared for civil litigation which has concluded may not properly be withheld under current interpretations of section 552.103. In addition, although such information may be privileged in the civil discovery context, it may not be withheld under section 552.101 of the Government Code. Open Records Decision No. 575 (1990). Therefore, a governmental body generally has no exception under which to withhold attorney work product once the civil litigation for which it was created has terminated.

In 1991, the Texas Supreme Court first recognized that attorney work product continues to be protected in the context of civil discovery once the litigation for which it was prepared has concluded. *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749 (Tex. 1991). *Owens-Corning* involved a discovery dispute in asbestos litigation in which the plaintiff sought production of thousands of documents from previous asbestos cases defended by Owens-Corning. The Texas Supreme Court addressed the question of whether work product protected during litigation by rule 166b(3)(a) of the Texas Rules of Civil Procedure could be invoked by a defendant in a subsequent related case. The court held that work product protection under rule 166b(3)(a) extended to subsequent civil litigation. *Owens-Corning*, 818 S.W.2d at 752. As discussed below, other supreme court decisions have reached the same conclusion. Thus, to continue to view section 552.103 and its express time limitations as the only exception applicable to attorney work product would contradict

several supreme court decisions interpreting the duration of the work product privilege. Because of this anomaly, we conclude that, if civil litigation for which attorney work product was created has concluded, such information may be withheld under section 552.111 of the Government Code. If, however, the litigation is currently anticipated or pending, we believe that the information may be withheld under either section 552.103 or section 552.111.

For a variety of reasons, we believe that section 552.111 is the proper exception under which to claim the attorney work product privilege once litigation for which the information was created has concluded. Section 552.111 excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." Previous open records decisions have recognized that section 552.111 encompasses information that is protected by civil discovery privileges. Open Records Decision Nos. 615 (1993), 308 (1982), 251 (1980). Moreover, in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), the court of appeals noted that section 552.111 of the Government Code is patterned after Exemption 5, in the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(5). *Gilbreath*, 842 S.W.2d at 412. The court held that section 552.111, like exemption 5 of FOIA "exempts those documents, and only those documents, normally privileged in the civil discovery context."¹ *Gilbreath*, 842 S.W.2d at 412; *Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455 (Tex. App.--Houston [14th Dist.] 1996, writ requested) (agreeing with *Gilbreath*). The court further concluded that since all parties to the litigation had stipulated that the documents which were the subject of the TORA litigation were not privileged in the civil discovery context, the records were not excepted from required public disclosure under section 552.111. *Gilbreath*, 842 S.W.2d at 412. Thus, based on recent case law and open records decisions, we conclude that section 552.111 of the Government Code is the proper exception under which to claim protection for attorney work product once the civil litigation for which the work product was prepared has concluded.

Having determined that work product created for litigation that has concluded may be withheld under section 552.111, we address the requirements governmental bodies must comply with in order to withhold such information under that exception. First, in order to

¹ See generally, *F.T.C. v. Grolier*, 462 U.S. 19 (1983) (discussing the applicability of exemption 5 to attorney work product requested under FOIA). The work product doctrine under the federal discovery rules is somewhat different from the work product doctrine under Texas law. See *National Tank v. Brotherton*, 851 S.W.2d 193, 201 (Tex. 1993) (citing Alex W. Albright, *The Texas Discovery Privileges: A Fool's Game?*, 70 Tex. L. Rev. 781, 831 (1992)). The federal rule distinguishes between ordinary and opinion work product while the Texas rule does not. *National Tank*, 851 S.W.2d at 203n.11. Because Texas has well developed jurisprudence in this area, we rely only on Texas case law construing the attorney work product privilege.

claim the privilege, the work product must have been created in anticipation of litigation or for trial. *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993). The supreme court in *National Tank* stated that information is created in anticipation of litigation for purposes of Rule 166b(3) of the Rules of Civil Procedure when

- 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.

Id. at 207; *Henry P. Roberts Inves., Inc., v. Kelton*, 881 S.W.2d 952, 953 (Tex. App.--Corpus Christi 1994, no writ). Thus, a governmental body wishing to withhold attorney work product under section 552.111 of the Government Code must first show that the work product was created for trial or in "anticipation of litigation" under the *National Tank* test.

Secondly, a governmental body must show that the work product consists of or tends to reveal the thought processes of an attorney in the civil litigation context. The court in *Owens-Corning* held that "the primary protection of the work product privilege was to shelter the mental processes, conclusions, and legal theories of the attorney." *Owens-Corning*, 818 S.W.2d at 750. However, the court expressly stated that the privilege did not extend to "facts the attorney may acquire." *Id.* at n.2; *see also Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686, 687 (Tex. App.--Houston [1st Dist.] 1990 no writ) (work product privilege did not protect memoranda prepared by an attorney that contained only "neutral recitals" of fact). The Texas Supreme Court in *National Tank* noted with approval its decision in *Owens-Corning* that the primary purpose of the work product doctrine is to "shelter the mental processes, conclusions and legal theories of the attorney," and "does not extend to the facts acquired."² *National Tank*, 851 S.W.2d 193 at 202-203 n.11. Other supreme court decisions have elaborated on this premise. In *Occidental Chemical Corporation v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995) the court held that the attorney work product privilege primarily "protects the attorney's thought process, which includes strategy decisions and issue formulation, and notes or writings evincing those mental

²The court noted, however, that it is unclear whether the term "work product" in Rule 166b(3)(a) encompasses both opinion and ordinary work product. *National Tank*, 851 S.W.2d at 203 n.11. The court further noted that although no Texas court has distinguished between opinion and ordinary work product, that it was unnecessary to make that determination in the instant case, but, at any rate, the work product rule does not extend to facts. *Id.*

processes.” Secondly, citing to *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993), the court held that “the privilege protects the mechanical compilation of information to the extent such compilation reveals the attorney’s thought processes.”

In *National Union Fire Insurance Co. v. Valdez*, one of the parties to the litigation had served a subpoena on the opposing party for its attorney’s litigation file from a related, previously resolved case. The court, noting that the organization of an attorney’s litigation file necessarily reflects the attorney’s thought processes concerning the litigation and is the very core of the work product privilege, held that a request for an attorney’s files is “objectionable under the attorney work product exemption from discovery.” *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993). The court also concluded, however, that a specific document is not automatically considered to be privileged simply because it is a part of an attorney’s litigation file. *Id.* Thus, a party to litigation may request specific documents or categories of documents that are relevant to the pending case without necessarily implicating the work product privilege. The party opposing discovery in such a case has the burden of explaining the applicability of the privilege. *Id.*

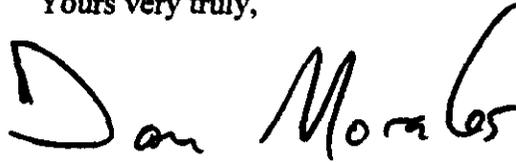
Thus, with respect to a request for information under the Open Records Act, much depends on the kind of information sought. If a requestor asks for the attorney’s work file regarding particular litigation, we believe that such a request may be denied in its entirety based on the supreme court’s holding in *National Union*. If, however, specific documents are requested, we believe that a governmental body has the burden of explaining how those documents are protected as attorney work product in order to withhold the information under section 552.111. The governmental body must explain 1) that the information was created either in anticipation of litigation under the test articulated in *National Tank* or after a lawsuit was actually filed, and 2) that the requested documents consist of or tend to reveal an attorney’s “mental processes, conclusions, and legal theories.”

In this case, the requestor seeks certain enumerated documents held by the department. Because we have articulated a new standard and exception under which the department may withhold attorney work product, we are returning the files so that you may apply the standards outlined in this decision. If you wish to withhold the requested information as attorney work product under section 552.111, you must return the documents within 14 days of receipt of this ruling and explain how the documents may be withheld under the test articulated in this decision.

SUMMARY

During the pendency of civil litigation, a governmental body may withhold attorney work product under sections 552.103 or 552.111 of the Government Code. Once civil litigation has concluded, attorney work product may be withheld under section 552.111 if it 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.

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive, slightly slanted style.

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

LAQUITA A. HAMILTON
Deputy Attorney General for Litigation

SANDRA L. COAXUM
Chief, Open Records Division

Prepared by Loretta R. DeHay
Deputy Chief, Open Records Division