



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 10, 1996

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

OR96-2337

Dear Commissioner Perry:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 102422.

The Texas Department of Agriculture (the "department") received a request for "documents, reports, and/or files relating to an alleged Chlordane (pesticide) misapplication in April of 1987." You explain that the requested information consists of over one thousand pages. You say you anticipate that the Medical Practice Act ("MPA"), V.T.C.S. article 4495b, common-law privacy and Government Code sections 552.101, 552.107 and 552.111 may apply to some of the information. You submitted a representative sample of the type of medical information at issue, which you labeled as Exhibit B, and information you say is possible attorney work product, which you labeled as Exhibit C.<sup>1</sup>

The MPA makes confidential two types of information: 1) "communications between" a licensed physician concerning "any professional services as a physician to a patient," and 2) "records of the identity, diagnosis, evaluation, or treatment of a patient by a physician created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(a), (b).

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

The MPA does not govern the release of Exhibit B. Exhibit B is a department pesticide incident investigation report that contains the symptoms which four named individuals reported as having been experienced on a certain day. It does not contain a communication between a physician and a patient. Nor is it a physician's record of a physician's diagnosis, evaluation, or treatment of a patient.

However, Exhibit B does contain some information that we believe is exempted from public disclosure because it is private. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (establishing standard for withholding information pursuant to Gov't Code § 552.101 and common-law right to privacy); *see* Open Records Decision No. 478 (1987). We have marked Exhibit B accordingly.

We turn to Exhibit C, a memorandum from the department's General Counsel to an agency attorney and staff member, which you refer to as "possible work product." Section 552.111 exempts 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." This office recently stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must first show that the work product 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). Open Records Decision No. 647 (1996) at 4, 5. The department has failed to show that Exhibit C was created for trial or in anticipation of litigation under the *National Tank* test. Accordingly, the department may not withhold Exhibit C from disclosure based on section 552.111.

We are resolving this matter with this 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 may 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,



Kay Guajardo  
Assistant Attorney General  
Open Records Division

KHG/rho

Ref.: ID# 102422

Enclosures: Marked documents

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