



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 19, 1997

Mr. David R. Gipson
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR97-1141

Dear Mr. Gipson:

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# 106633.

The Texas Department of Agriculture (the "department") received an open records request for all documents pertaining to a certain investigation of an alleged violation of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(t-v). You state that because the department's investigation of the alleged violation is now closed, the department is making available to the requestor most of the information contained in the department's case file. You contend, however, that certain other documents are excepted from required public disclosure pursuant to sections 552.101, 552.107, and 552.111 of the Government Code.

You claim that the information you have submitted for our review is protected from disclosure as "attorney work product" under section 552.111. 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. There are two prongs to this requirement, each of which must be met. 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 prongs have been met with regard to the records you have submitted to this office.

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 (1996) at 4. 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 facts obtained by the attorney. *Id.* and authorities cited therein.

We note, however, that in Open Records Decision No. 647 (1996), this office concluded that pursuant to the rationale set forth in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993), a request for an attorney’s entire litigation file may be denied under section 552.111 of the Government Code. Open Records Decision No. 647 (1996) at 5. In this instance, the current open records request encompasses the departmental staff attorney’s entire case file from which the documents you submitted to this office were obtained. We therefore conclude that the department may withhold the documents at issue as attorney work product pursuant to section 552.111 of the Government Code.¹

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,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/RWP/glg

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¹Because we resolve your request under section 552.111, we need not address the applicability of the other exceptions you raise.

Enclosures: Submitted documents

cc: Mr. Don Ross Malone
P.O. Box 953
Vernon, Texas 76385
(w/o enclosures)

