



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 6, 1998

Ms. Nancy Barbour
Legal and Compliance, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR98-0042

Dear Ms. Barbour:

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# 111715.

The Texas Department of Insurance (the "department") received a request for

any formal or informal opinion, policy, or guideline the Texas Department of Insurance established or relied upon in determining what offenses constitute a crime of moral turpitude.

You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code and the attorney work product doctrine.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. You contend that section 552.101 encompasses the protection of the attorney work product doctrine. We note that chapter 552 of the Government Code differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. Attorney General Opinion JM-1048 (1989); *see* Open Records Decision No. 575 (1990) (section 552.101 does not encompass discovery privileges); Gov't Code § 552.006 (chapter 552 does not authorize withholding public information or limit availability of public information to public except as expressly provided by chapter 552). However, attorney work product may be excepted from disclosure under sections 552.103 or 552.111. Open Records Decision No. 647 (1996).

¹We note that the department asserted an exception under section 552.103 in its initial brief, which it has subsequently withdrawn.

You assert that the submitted documents are excepted from disclosure under section 552.111 both as attorney work product and as internal memoranda. We consider first whether the documents constitute work product. In Open Records Decision No. 647 (1996), this office established the requirements for withholding information as attorney work product under section 552.111. For information to be considered "attorney work product," a governmental body must first show that the information was created for trial or in anticipation of litigation. 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 Co. v. Brotherton, 851 S.W.2d at 207. 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.

Second, the governmental body must show 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. You state that the information at issue was not developed in preparation for any particular litigation. We therefore conclude that you have not demonstrated how these documents meet the requirements set forth in *National Tank* and Open Records Decision No. 647 (1996). Therefore, the department may not withhold the documents as attorney work product under section 552.111.

Now we consider whether the submitted documents are excepted from disclosure under section 552.111 as internal memoranda. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Section 552.111 does not, however, except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. We have marked those portions of the submitted documents that constitute opinions expressed within the context of the department's policymaking processes. The department may withhold the marked portions from disclosure under section 552.111.

Finally, we do not specifically address section 552.107 because it would not protect any information not already marked as excepted from disclosure under section 552.111. *See* Open Records Decision No. 574 (1990) at 2, 5 (section 552.107 protects confidential communications from client to attorney and attorney's legal advice and opinions, but does not protect purely factual information).

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/alg

Ref.: ID# 111715

Enclosures: Submitted documents

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(w/o enclosures)