



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 11, 1998

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

OR98-0420

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# 113837 (TDA-OR-98-0001).

The Texas Department of Agriculture (the "department") received an open records request for the "complete file of case number 02-97-0047." You state that most of the requested records have been released to the requestor. You seek to withhold, however, one intra-office memorandum as "attorney work product" pursuant to section 552.111 of the Government Code.

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. 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 of these tests have been met in this instance.

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 a neutral recital of facts obtained by the attorney. *Id.* and authorities cited therein. After reviewing the memorandum at issue, we do not believe that this document contains a neutral recital of facts. Accordingly, we conclude that the department may withhold this record 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KHH/RWP/rho

Ref.: ID# 113837

Enclosure: Submitted document

cc: Mr. Jack H. Roach
20061 CR 4118
Lindale, Texas 75771
(w/o enclosure)

¹Because we resolve your request under section 552.111, we need not address your other arguments for withholding this record.