



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 23, 1998

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

OR98-2280

Dear Mr. Perry:

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# 118335.

The Texas Department of Agriculture (the "department") received a request for information related to incident number 2424-05-95-0074. The department has assigned this request tracking number TDA-OR-98-0027. You claim that some of the requested information, submitted as Exhibit C, is excepted from required public disclosure by sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You contend that the requested document may be withheld as attorney work product under section 552.111. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material 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. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) 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 2) the party resisting discovery or release 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. Open Records Decision No. 647 at 4 (1996).

You indicate that the information at issue was gathered or prepared in anticipation of litigation. You explain that the department is authorized to investigate pesticide-related complaints and may assess penalties for violations of chapters 75 and 76 of the Agriculture Code. Agric. Code §§ 12.020, 76.1555(a). You inform us that the requested information was gathered for and concerned an administrative action, initiated by the department, which alleged specific violations of Texas pesticide law. You explain that an administrative penalty has been assessed and paid. The case is now closed. Proceedings conducted after assessment of a department penalty are subject to the Administrative Procedure Act. *Id.* at § 76.1555(h); cf. Open Records Decision No. at 7 588 (1991) (contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103). We find that you have demonstrated in this case that the document at issue was created in anticipation of litigation. You have established the applicability of both parts of the first prong of the work product test.

The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. You state that the "materials represent the summary of the case presented to the client agency for the purposes of rendering legal advice and determining the client agency's litigation goals." Having reviewed the information and your arguments, we can easily conclude that most of the information reveals attorney mental impressions, conclusions and strategy. However, the information at issue contains other additional information that merely refers to the facts of a case. This office has stated that the work product privilege does not extend to "facts an attorney may acquire." See Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n. 2 (Tex. 1991). Moreover, the privilege does not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts. See *Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.--Houston [1st Dist.] 1990, no writ). However, in *Leede*, the court noted that the attorney notes did not show how the attorney would use the facts, if at all, nor did the notes suggest trial strategy or indicate the lawyer's reaction to the facts. See *id.* at 687. Thus, we believe that it is possible for an attorney's selection and organization of facts of a case to reveal the attorney's mental impression and strategy of the case. See *Marshall v. Hall*, 943 S.W.2d 180 (Tex. App.--Houston [1st Dist.] 1997, no writ); *Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.--Houston [1st Dist.] 1990, no writ).¹

With regard to the facts that appear in the submitted document, you state:

¹The privilege does not apply where the party seeking to discover information shows that the information is 1) hidden in the attorney's file and 2) essential to the preparation of one's case. *Hickman v. Taylor*, 329 U.S. 495 (1947); see *Marshall v. Hall*, 943 S.W.2d 180, 183 (Tex. App.--Houston [1st Dist.] 1997, no writ). While the open records context provides no opportunity for the requestor to make such a showing, we assume that in the usual case, the documents the department releases to the requestor contain the facts of the case.

These facts are selected and ordered by the department's legal staff from existing sources, rather than directly acquired, as part of the legal analysis of the investigation and for the purpose of aiding the attorney or for rendering legal advice to the client agency. Because the facts have been selected from investigation materials by the attorney and ordered for the purpose of determining or communicating the legal basis for alleged violation(s), such recitations are non-neutral, rather than purely factual or basically factual, summaries or communications. Disclosure of such recitations would tend to reveal the attorney's mental impressions and strategy regarding the anticipated litigation and represent the attorney's implied or express opinion regarding the importance or necessity of specific facts in proving the alleged violation(s).

We have reviewed the information and your arguments. Based on your statement that the attorney made the decision to include the facts in the summaries, we believe the facts would reveal the attorney's impressions and strategy. We agree that such facts are also attorney work product excepted from disclosure under section 552.111. Therefore, you may withhold Exhibit C under section 552.111.

Because we make a determination under section 552.111, we need not address your additional arguments against disclosure. 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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref.: ID# 118335

Enclosures: Submitted documents

cc: Ms. Sylvia Ellis
6006 Trejo
Robstown, Texas 78380
(w/o enclosures)