



March 5, 1999

Mr. David R. Gipson
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711-2847

OR99-0638

Dear Mr. Gipson:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request, tracking number TDA-OR-98-00JB, was assigned ID# 122507.

The Texas Department of Agriculture (the "department") received a request for all complaints, investigations, and correspondence concerning Poast and Poast Plus from 1990 to the present. You indicate that the request encompasses information concerning department investigations into possible violations of state or federal pesticide laws. You inform us that the department has released to the requestor most of the documents from the requested files. You assert that the remainder of the files is excepted from disclosure based on sections 552.101, 552.107 and 552.111 of the Government Code. You have submitted to this office the information requested.

You inform us that the requested investigative materials concern cases that were subject to contested case procedures under section 12.020 of the Agriculture Code and chapter 2001 of the Government Code, but that are now closed. You assert that the information at issue is attorney work product, excepted from disclosure under section 552.111 of the Government Code. Section 552.111 is the proper exception under which to claim protection for attorney work product once the litigation for which the work product was prepared has concluded. Open Records Decision No. 647 at 2-3 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749 (Tex. 1991)). Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This office has stated that if a governmental body wishes to withhold attorney work product under section 552.111, it must show that the material 1) 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), and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *See id.* When showing that the documents at issue were created in anticipation of litigation for the first prong of the work product test, a governmental body's task is twofold. The 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 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 id.* at 5.

You state that the information at issue was collected and prepared by the department and/or the Environmental Protection Agency for the purpose of proving violations of state or federal pesticide laws in an administrative, civil or criminal hearing or for trial. *See generally* Agric. Code ch. 76. We conclude that the department has met the first prong of the work product test.

We now consider whether the information reveals the attorney's mental processes, conclusions and legal theories. Having reviewed the information and your arguments, for the bulk of the information, we conclude that the information reveals attorney mental impressions, conclusions and strategy. However, the information at issue contains summaries and other information that 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*, 818 S.W.2d at 750 n.2). 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's 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. We believe that an attorney's selection and organization of facts of a case may reveal the attorney's mental impression and strategy of the case. *See Marshall fcv. Hall*, 943 S.W.2d 180 (Tex. App.--Houston [1st Dist.] 1997, no writ); *Leede Oil & Gas, Inc.* 789 S.W.2d at 686.¹

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

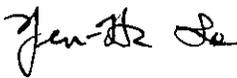
With regard to the facts that appear on certain documents in the case files, you state:

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 attorney's theory of and opinions regarding the case, 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). [Footnotes omitted.]

We have reviewed the information and your arguments. Based on your representation that the attorney selected and included the facts in the summaries, we believe the facts would reveal the attorney's impressions and strategy. We therefore agree that such facts are attorney work product excepted from disclosure under section 552.111. Accordingly, you may withhold Exhibits B, C, and D as attorney work product under section 552.111.

In light of our conclusions under section 552.111, we need not address your other claims at this time. 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.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 122507

the case.

Enclosures: Submitted documents

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