



July 26, 1999

Ms. Katherine Cary
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR99-2102

Dear Ms. Cary:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125266.

The Office of the Attorney General received a request for information relating to environmental matters at a specific site. You seek to withhold a portion of the information responsive to the request under sections 552.101, 552.107 and 552.111 of the Government Code. You submitted representative samples of the records at issue.¹

Section 552.111 of the Government Code excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993). In Open Records Decision No. 647 (1996), this office concluded that a governmental body may withhold "attorney-work product" information under section 552.103 or section 552.111 of the Government Code if the governmental body can show (1) that the information was created for trial or in anticipation of litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a lawsuit is filed, and (2) that the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 (1996) (citing *United States v. Nobles*, 422 U.S. 225, 236 (1975)).

¹In reaching our conclusion, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

It appears that the submitted documents, numbers 2, 11, and 25, were created either in anticipation of or during the pendency of the litigation in *State of Texas v. Gibraltar Chemical Resources, Inc.*, 241st District Court, Smith County, Texas, cause number 92-2671-C. You may withhold document numbers 11 and 25 in their entirety as attorney work-product under section 552.111 since, in our opinion, they reveal the “mental processes, conclusions, and legal theories” of your staff attorneys in connection with that litigation. We have marked a portion of document number 2 which you may similarly withhold as work product under section 552.111.

The remaining portion of document number 2, however, despite your claim that document 2 was “written by an attorney,” does not appear to have been written by an attorney. Nor have you established that it reveals attorneys’ “mental processes, conclusions, and legal theories.” Therefore, it may not be withheld as work product under section 552.111. Similarly, document number 72 does not appear to have been created in connection with litigation to which the state was a party and may not be withheld as work product under section 552.111.

Nor, in our opinion, have you established that the last document, -- “Confidential documents” -- was created in connection with litigation to which the state was a party. It may not be withheld as work product under section 552.111 either, and, since you have claimed no other exceptions for it, must be released.

Section 552.107(1) incorporates the attorney-client privilege. It protects information “that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.” *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney’s legal advice and confidential attorney-client communications. *Id.* Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. *See also* Open Records Decision No. 589 (1991) (protected information in attorney billing statements) (*overruling to extent of conflict* Open Records Decision No. 304 (1982)).

In our opinion, you have not established how the portion of document number 2 which we found, *supra*, not to be protected attorney work-product, constitutes privileged attorney-client communications protected by section 552.107(1). You must release this portion of document number 2. We have marked the portions of document number 72 which we believe are protected under section 552.107(1). The remaining portions of these records must also be released.

Section 552.101 requires withholding, *inter alia*, information made confidential by statute. You claim that document number 44 is made confidential by section 154.073 of the Civil Practice and Remedies Code, which, with exceptions which do not appear to apply here, makes confidential "a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure." *Id.* § 154.073(a). *See generally* Civ. Prac.& Rem. Code chapter 154 ("Alternative Dispute Resolution Procedures"). We have examined document number 44 and conclude that you must withhold it in its entirety under section 154.073(a).

To summarize, you may withhold document numbers 11 and 25, and the marked portion of document number 2, as work-product. You may withhold the marked portions of document number 72 under the attorney-client privilege. You must withhold document number 44 under section 154.073 of the Civil Practice and Remedies Code. Otherwise, you must release the submitted 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 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# 125266

Encl: Marked documents

cc: Mr. Charles R. Southerland
Vice President
Entrix, Inc.
5252 West Chester, Suite 250
Houston, Texas 77005
(w/o enclosures)