



December 3, 1999

Ms. Susan Combs
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711-2847

OR99-3479

Dear Ms. Combs:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130364.

The Texas Department of Agriculture (the "department") received a request for the department's file regarding incident number 02-94-0021. The department claims that while a small portion of the requested information has been released to the requestor, the remaining information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

You inform us that the requested materials concern a case that was subject to contested case procedures under section 12.020 of the Agriculture Code and chapter 2001 of the Government Code, but that is 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.

¹The types of information submitted is described in the department's letter dated October 19, 1999. The information generally consists of intraagency memoranda, notes, and caselaw.

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 for the purpose of enforcing state and federal pesticide laws by seeking penalties for violators 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 a summary and other information that refers to the facts of the 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). 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 v. Hall*, 943 S.W.2d 180 (Tex. App.--Houston [1st Dist.] 1997, no writ); *Leede Oil & Gas, Inc.* 789 S.W.2d at 686.²

With regard to the facts that appear on certain documents in the case files, the department states:

The facts are selected and ordered for the purpose of aiding the attorney in his or her evaluation of the anticipated litigation and in rendering legal advice to the client agency. Because the facts have been selected and ordered by the agency attorney for the purpose of determining or communicating the legal basis and strategy for the proposed action, 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, thought processes, and legal strategy regarding the anticipated litigation. The recitations also 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 summary, 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 the documents submitted as B1 through B42 as attorney work product under section 552.111.

As to the documents submitted as B43 and B44, the department contends that these documents contain information obtained from confidential medical records. The department argues, therefore, that such information contained within these documents must be withheld under section 552.101 of the Government Code in conjunction with the Medical Practice Act (the "MPA"), V.T.C.S. art. 4495b, § 5.08. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Accordingly, section 552.101 covers confidentiality provisions such as the MPA. The MPA provides:

²The 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.

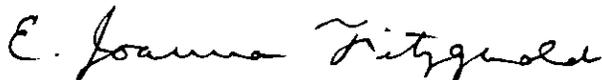
(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(3) also requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* V.T.C.S. art. 4495b, § 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991). We agree that the portions of B43 and B44 that the department has marked are subject to the MPA. The department may release these portions of the documents only in accordance with the MPA.³

As sections 552.101, in conjunction with the MPA, and 552.111 are dispositive of this matter, we do not discuss other arguments that the department raises. 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,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

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³See V.T.C.S. art. 4495b, § 5.08(h)(5) (providing that otherwise confidential medical information may be released to a person who bears a written consent of the patient, subject to certain requirements).

Ref: ID# 130364

Encl: Submitted documents

cc: Ms. Helen Allen
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(w/o enclosures)