



April 18, 2000

Ms. Susan Combs, Commissioner
Texas Department of Agriculture
Post Office Box 12847
Austin, Texas 78711

OR2000-1555

Dear Ms. Combs:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 135438.

The Texas Department of Agriculture (the "department") received a request for information relating to complaints or violations filed against Tru Green Chem Lawn in the Dallas-Fort Worth area during the past five years. The department has assigned this request tracking number TDA-PIR2000-059. You state that the responsive information consists of three case files which relate to department investigations into possible violations of state or federal pesticide laws for which litigation, in the form of a contested case, was anticipated. You argue that two of the responsive documents, exhibits B and C, are excepted from public disclosure as attorney work product pursuant to sections 552.101, 552.107, and 552.111 of the Government Code. We assume the remaining responsive documents have been disclosed to the requestor. We have considered the exceptions you claim and reviewed the submitted information.

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. *See* Open Records Decision No. 647 at 3 (1996) (citing *Owens-Corning Fiberglas 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 Ins. 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 Open Records Decision No. 647 at 4 (1996).*

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 Texas Agriculture Code. *See Agric. Code §§ 12.020, 76.1555.* You state that the documents at issue are case analyses and litigation recommendations prepared by the department's legal staff as part of investigations into possible violations of state or federal pesticide laws. We conclude that you have demonstrated that the documents at issue were created in anticipation of litigation. You have established the applicability of both parts of the first prong of the work product test.

We next consider whether the information reveals the attorney's mental processes, conclusions and legal theories. Having reviewed the information and your arguments, we conclude that a portion of the information reveals attorney mental impressions, conclusions and strategy. However, the information at issue also 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. *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.¹ *See Marshall v. Hall*, 943 S.W.2d 180 (Tex. App.--Houston [1st Dist.] 1997, no writ); *Leede*, 789 S.W.2d at 686.

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. *See Hickman v. Taylor*, 329 U.S. 495 (1947); *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.

With regard to the facts that appear within the documents, you state:

These facts were 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. 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. The facts are otherwise available within the investigation report which is not being withheld.

Because the facts have been selected and ordered by the agency attorney for the purpose of determining and 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). Such non-neutral factual recitations cannot be disclosed without revealing the attorney's mental impressions, thought processes, opinions, and strategy.

(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 and C as attorney work product under section 552.111. In light of our conclusions under section 552.111, we need not address your other claimed exceptions.

This letter ruling is limited to the particular records at issue in this request and to the facts as presented to us. Therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Julie Reagan Watson
Assistant Attorney General
Open Records Division

JRW/cwt

Ref: ID# 135438

Encl. Submitted Documents

cc: Ms. Becky Oliver
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(w/o enclosures)