



July 25, 2000

Ms. Julie Joe
Assistant Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2000-2800

Dear Ms. Joe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137612.

The Office of the Attorney General (the "OAG") received a request for all information regarding two specified individuals. You assert that the requestor has been provided some of the responsive information including the final report of the OAG. You claim that portions of the requested information are 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 representative samples of information.¹

You assert that the submitted information is attorney work product that is excepted from disclosure under section 552.111. A governmental body may withhold attorney work product from disclosure 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

¹In reaching our conclusion here, 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 Nos. 499 (1988), 497 (1988). 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.

investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996) (citing *National Tank v. Brotherton*, 851 S.W.2d 193, 200 (Tex. 1993)).

You assert that the submitted information concerns the formulation of a report prepared by the OAG on behalf and at the request of a client agency. Further, you assert that at the time the submitted information was created the client and the OAG anticipated litigation. Upon careful review of your arguments and the submitted information, we believe you have demonstrated that the handwritten notes and an e-mail were created for trial or in anticipation of litigation under the test articulated in *National Tank*.

Further, we agree that most of this information consists of or tends to reveal the attorneys' mental processes, conclusions, and legal theories. You acknowledge, however, that some of the information contains recitals of fact. 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); see also *Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.—Houston [1st Dist.] 1990, no writ)(the attorney work product privilege does not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts). As to the facts contained in the submitted information, you state that the facts have been so intertwined with the attorneys' thoughts as to become the attorneys' work product. Further, you claim that the submitted information no longer contains neutral facts but the facts have "taken on a non-neutral/opinionated nature." You further argue that release of the submitted information would reveal the attorneys' thought processes. Based on these representations, we agree that the recitals of fact are also protected by the attorney work product privilege. Accordingly, you may withhold the marked information in its entirety as information protected by the attorney work product privilege as incorporated into section 552.111 of the Government Code.

You also assert that the submitted information is excepted under section 552.107. Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). A "confidential communication" is a communication "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Tex. R. Evid. 503(a)(5). When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion

or advice. *Id.* at 3. In addition, purely factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.*

You assert that release of the submitted information would improperly reveal client confidences. Based on this representation and upon review of the information, we conclude that the drafts and e-mails constitute confidential communications as defined by Rule 503 of the Texas Rules of Evidence. Therefore, you may withhold the drafts and e-mails under section 552.107(1). In conclusion, you may withhold the submitted information under sections 552.107(1) and 552.111.

This letter ruling is limited to the particular records at issue in this request and limited 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.

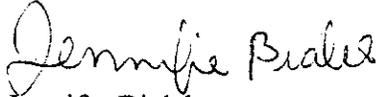
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge 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,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB\nc

Ref: ID# 137612

Encl: Submitted documents

cc: Mr. Stephen N. Lisson
Initiate!!
P.O. Box 2013
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(w/o enclosures)