Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 11, 1997

Mr. Rick Perry
Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR97-1565

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 106946.

The Texas Department of Agriculture (the "department") received a request for a copy of case #03-95-0066. You state that some of the information in the case file will be released to the requestor. You have submitted the remaining documents from the file to this office for review. You contend that these documents are excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.

You assert that the submitted documents are excepted from disclosure under section 552.111 as attorney work product. Section 552.111 excepts from disclosure attorney work product that 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). We note that although section 552.103 and the work-product aspect of section 552.111 may cover similar information, the tests for withholding information under these sections are different. A governmental body must make the required demonstration that corresponds to the claimed exception *each time* it invokes the exception. Gov't Code § 552.301(b)(1); *see* Open Records Decision Nos. 647 (1996) (governmental body's burden under attorney work product aspect of section 552.111), 638 (1996) (governmental body's burden under section 552.103).

The first prong of the work product test, which requires a governmental body to show that the information at issue was 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 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. Open Records Decision No. 647 (1996) at 4. We conclude that you have met both parts of the first prong of the work product test with your June 5 letter to this office. As for part one of the first prong, you have cited the department's authority to enforce laws relating to the use of pesticides, demonstrated that the department has proposed an enforcement action in this case, and explained that the subject of the enforcement action is entitled to a hearing governed by the Administrative Procedure Act. As for part two of the first prong, we were able to determine from the content of the documents at issue and your notations on the accompanying cover sheets that the attorney assigned to the case believed in good faith, at the time the documents were created, that litigation would ensue and conducted his investigation for the purpose of preparing for such litigation. In the future, you may assert in your brief to this office that the attorney assigned to the case held this good faith belief at the time the documents at issue were created.

The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. In your June 5 letter, you explain how the information contained in the documents at issue constitutes the protected mental processes of the attorney. Because you have met your burden under the work product test announced in Open Record Decision No. 647 (1996), we conclude that you may withhold the submitted documents from disclosure under section 552.111 of the Government Code.[1]

Finally, we note that if a requestor seeks an attorney's entire litigation file and a governmental body seeks to withhold the entire file and demonstrates that the file was created in anticipation of litigation, we will presume that the entire file is excepted from disclosure under section 552.111. Open Records Decision No. 647 (1996) at 3. If however, it is not clear that the governmental body is seeking to withhold the entire litigation file, the governmental body must demonstrate how the selected documents that it does wish to withhold reveal the attorney's thought processes. Here, the request encompasses the department's entire *investigation* file, and you indicate that some documents from the file have been released to the requestor. Of course, if the documents selected to be withheld comprise the entire *litigation* file, the department need only so indicate in the future, and upon showing that the file was created in anticipation of litigation, the department will be entitled to the presumption that the entire litigation file is protected under section 552.111.

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

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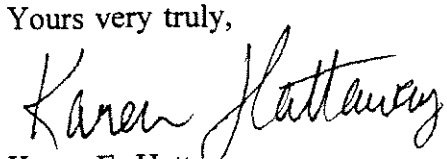
[1]Because we are able to resolve this matter under section 552.111, we need not address your other arguments against disclosure.

regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 106946

Enclosures: Submitted documents

cc: Mr. Ron Gonyea
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(w/o enclosures)