



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 24, 1998

Mr. David R. Gipson  
Assistant General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR98-1527

Dear Mr. Gipson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 116174. Your office's tracking numbers for this request are TDA-OR-98-0014 (Rodriguez) and TDA-OR-98-0015 (Olivarez).

The Texas Department of Agriculture received two requests for the "complete set of your investigation files" concerning incident number 2424-05-98-0003. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You contend that the requested documents may be withheld as attorney work product under sections 552.103 and 552.111. A governmental body may withhold attorney work product from disclosure under section 552.111 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 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.

You indicate that the information at issue was gathered or prepared in anticipation of litigation. 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 Agriculture Code. Agric. Code §§ 12.020, 76.1555(a). You inform us that the requested information was gathered for and concerns pending "administrative actions, initiated by the department, alleging specific violations of Texas pesticide law and seeking administrative penalties."

Proceedings conducted after assessment of a department penalty are subject to the Administrative Procedure Act. *Id.* at § 76.1555(h); *cf.* Open Records Decision No. 588 (1991) at 7 (contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103). We find that you have demonstrated in this case 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.

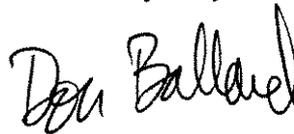
The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. You argue, among other things, that

by requesting 'a complete set of [the department's] investigation files,' the request on its face is comprehensive and represents a request for the entire litigation file, not a request for specific documents or categories of documents. Therefore, the department believes that the request may be denied in its entirety.

Generally, when a requestor asks for an attorney's work file regarding particular litigation, release would necessarily reflect the attorney's thought processes concerning the litigation. Open Records Decision No. 647 (1996) at 5 (citing *National Union Fire Ins. Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993)). If a requestor asks for the attorney's work file regarding particular litigation, we believe that such a request may be denied in its entirety based on the supreme court's holding in *National Union*. If, however, specific documents are requested, we believe that a governmental body has the burden of explaining how those documents are protected as attorney work product in order to withhold the information under section 552.111. Based on this particular request and your arguments, we find that you have established the second prong of the work product test. You may withhold the requested information as attorney work product under section 552.111.

Because we make a determination under section 552.111, we need not address your additional arguments against disclosure at this time. 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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Don Ballard  
Assistant Attorney General  
Open Records Division

JDB/rho

Ref.: ID# 116174

Enclosures: Submitted documents

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