



June 15, 1999

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

OR99-1667

Dear Ms. Combs:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 124939.

The Texas Department of Agriculture (the "department") received a request for records pertaining to TDA Incident Number 2424-03-98-0010, including the "first report." The department has assigned this request tracking number TDA-OR-99-0041. You state that most of the requested information will be released to the requestor. You seek to withhold, however, an internal case summary, submitted as Exhibit B, pursuant to, *inter alia*, section 552.111 of the Government Code.

You contend that the requested document may be withheld as attorney work product under section 552.111. A governmental body may withhold attorney work product from public disclosure under section 552.111 if it demonstrates that the material 1) was 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 investigation for the purpose of preparing for such litigation. *Id.* at 4

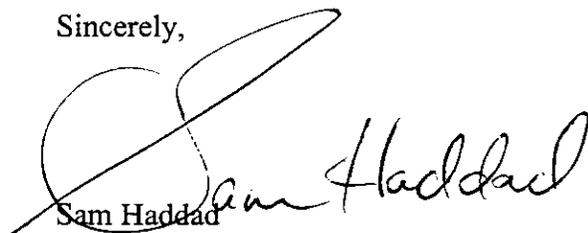
You indicate that the information at issue was gathered or prepared in anticipation of litigation. You explain that the department is authorized to investigate pesticide-related

complaints and may assess penalties for violations of chapter 76 of the Agriculture Code. Agric. Code §§ 12.020, 76.1555(a). You inform us that the requested information was gathered for and concerned an administrative action, initiated by the department, which alleged specific violations of chapter 76. You explain that an administrative penalty has been assessed and paid. Proceedings conducted after assessment of a department penalty are subject to the Administrative Procedure Act, chapter 2001 of the Government Code. *Id.* at § 76.1555(h); *cf* Open Records Decision No. 588 at 7 (1991) (contested cases conducted under the Administrative Procedure Act are considered litigation under section 552.103). We find that you have demonstrated in this case that the document at issue was created in anticipation of litigation.

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 state that the materials represent the summary of the case presented to the client agency, including litigation recommendations, for the purposes of rendering legal advice and determining the client agency's litigation goals. Having reviewed the information and your arguments, we conclude that the information reveals attorney mental impressions, conclusions and strategy. Although the document at issue contains factual information, based on your representation that the attorney made the decision to include the facts in the summary, we conclude that the presentation of those facts would reveal the attorney's impressions and legal strategy. We therefore agree that such facts are also attorney work product excepted from disclosure under section 552.111. The department, therefore, may withhold Exhibit B in its entirety pursuant to section 552.111.¹

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,

A handwritten signature in black ink, appearing to read "Sam Haddad", is written over a printed name "Sam Haddad". The signature is fluid and cursive, with a large loop at the beginning.

Sam Haddad
Assistant Attorney General
Open Records Division

¹Because we resolve your request under section 552.111, we need not address the other exceptions you raise.

SH/RWP/nc

Ref.: ID# 124939

Encl: Submitted documents

cc: Mr. Pete Aguilar
1110 West Noel
Memphis, Texas 79245
(w/o enclosures)