



September 10, 1999

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

OR99-2520

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# 127291.

The Texas Department of Agriculture (the "department") received a request for information relating to TDA incident number 2424-01-98-0019. The department has assigned this request tracking number TDA-OR-99-0062. You claim that the submitted documents are excepted from disclosure under sections 552.101, 552.107(1), and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted documents.

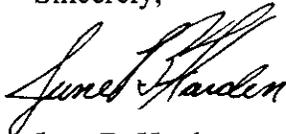
You contend that Exhibit B may be withheld as attorney work product under section 552.111. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists 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 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 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 documents submitted as Exhibit B were gathered for and concerned an administrative action, initiated by the department, which alleged specific violations of Texas pesticide law. You explain that an administrative penalty has been assessed and the investigation is now closed. 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 at 7 (1991) (contested cases conducted under 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 requirement that must be met is that the work product “consists of or tends to reveal the thought processes of an attorney in the civil litigation process.” Open Records Decision No. 647 at 4 (1996). Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to a neutral recital of facts obtained by the attorney. *Id.* and authorities cited therein. After reviewing your arguments and the documents at issue, we agree that the documents contain non-neutral factual recitations that reveal the mental processes, conclusions, and legal theories of an attorney. Accordingly, we conclude that the department may withhold Exhibit B as attorney work product pursuant to section 552.111 of the Government Code

Because we are able to make a determination under section 552.111, we need not address your other claimed exceptions. 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.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref: ID# 127291

Encl. Submitted documents

cc: Ms. Bertie Houck
Gore's Feed & Fertilizer
P.O. Box 724
Comanche, Texas 76442
(w/o enclosures)