



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

March 20, 1989

Mr. Hilary B. Doran, Jr.
Chairman
Texas Racing Commission
P. O. Box 12080
Austin, Texas 78711-2080

Open Records Decision No. 522

Re: Whether information in
applications for licenses
for pari-mutuel racetracks
is available to the public
(RQ-1628)

Dear Mr. Doran:

The Texas Racing Commission received several requests under the Texas Open Records Act, article 6252-17a, V.T.C.S., for racetrack license applications submitted to the commission. As a general rule, all information held by governmental bodies is public unless at least one of the Open Records Act's specific exceptions protects the information from required public disclosure. The Open Records Act recognizes and incorporates protection for information deemed confidential by specific statutes. Art. 6252-17a, § 3(a)(1). You ask about specific provisions of the Racing Commission Act, article 179e, V.T.C.S., and the exceptions to disclosure embodied in sections 3(a)(4) and 3(a)(10) of the Open Records Act.

The Texas Racing Act authorizes the commission to issue licenses for four types of racetracks. V.T.C.S. art. 179e, §§ 6.02(a), 6.04(d); see Attorney General Opinion JM-971 (1988). No person may conduct greyhound or horse race meetings with wagering on the race outcomes without a racetrack license. Id. § 6.01. The act states that the commission must require applicants for racetrack licenses to provide certain information, including: specific identifying and criminal history information about individuals, the proposed location for race meetings, ownership information about the proposed racing facility, a financial statement of the applicants' assets and liabilities, the kind of racing planned, applicants' proof of residency, and copies of management and concession contracts. Id. § 6.03(a)(1)-(9). Additionally, the act authorizes the commission to require that the applicant submit other information. Id. § 6.03(a)(10). You indicate that, in addition to the

specific information listed above, the commission requires that applicants submit economic and social projections, "operations information," a business plan, and safety and security information.

Several provisions of the Texas Racing Act address the public availability of information held by the commission. The first of these, section 2.15 of article 179e, provides:

All records of the commission that are not made confidential by other law are open to inspection by the public during regular office hours. The contents of the investigatory files of the commission, however, are not public records and are confidential except in a criminal proceeding or in a hearing conducted by the commission. (Emphasis added.)

You note that section 303.10(a) of the Texas Racing Commission Rules requires establishing an investigatory file on each applicant.

You contend in your request letter that section 2.15 protects applications as investigatory files:

[a]n application filed by an applicant is automatically a part of the investigatory file for that applicant.

The protection for investigatory files, however, protects primarily the commission's investigatory efforts and work product. Although the protection may include information submitted by outside sources, see, e.g., V.T.C.S. art. 179e, § 3.12 (anonymous reports of violations), it does not include information submitted by the individual or entity subject to investigation. An apparent purpose for the provision is to prevent individuals and entities subject to investigation from obtaining information that would enable them to thwart the investigation. Moreover, section 2.15's protection for investigative files does not apply when the investigation results in a commission hearing or in criminal proceedings. The requestors here seek applications that the commission plans to discuss in administrative hearings.

The next provision of the Texas Racing Act addressing public access to records governs the public availability of criminal history information. Section 5.04 of the act authorizes the commission to obtain criminal history information regarding applicants from the Texas Department

of Public Safety, the Federal Bureau of Investigation, or any other law enforcement agency. See also id. § 6.03(a) (1)-(3) (applicants must submit criminal history information), § 6.03(a)(9) (management and concessionaire contractors must submit criminal history information). Subsection (c) of section 5.04 provides:

The criminal history record information received under this section is for the exclusive use of the commission and is privileged and confidential. The criminal history record information may not be released or otherwise disclosed to any person or agency except on court order or with the consent of the applicant.

Consequently, criminal history information obtained from law enforcement agencies under section 5.04 is not public.

The final provision of the act that addresses the public availability of records protects management and concession contracts. Id. § 6.03(b). Subdivision (9) of section 6.03(a) requires applicants to submit copies of each management and concession contract for the applicants' proposed racing locations. Subsection (b) of section 6.03 provides:

When the commission receives a copy of a management and concession contract for review under Subdivision (9) of Subsection (a) of this section, the commission shall review the contract in an executive session. Documents submitted to the commission under this section by an applicant are subject to discovery in a suit brought under this Act but are not public records and are not subject to Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252-17a, Vernon's Texas Civil Statutes). (Emphasis added.)

Subsection (b) refers to documents submitted under "this section." Read in isolation, the phrase "this section" appears to refer to section 6.03 rather than to subdivision (9) of subsection (a) of section 6.03. This construction would exempt the entire application.

The sentence at issue in subsection (b) cannot, however, be interpreted in isolation. The sentence is part of a provision that protects management and concession contracts. The first sentence of subsection (b) protects

management and concession contracts from disclosure during meetings of the commission by authorizing an executive session. The apparent purpose of the second sentence is to provide parallel protection for copies of the contracts under the Open Records Act. The second sentence of subsection (b) must be considered in context.

Moreover, a primary rule of statutory construction is that statutes must be interpreted as a whole. State v. Terrell, 588 S.W.2d 784 (Tex. 1979). Interpreting subsection (b) to apply to the entire application would render the specific protection for criminal history information in the applications meaningless. It would also create a conflict with section 2.15, which designates as public all records of the commission except investigatory files and records made confidential by law. A statute must be interpreted so that its various parts are consistent and reasonable. See Singleton v. Pennington, 568 S.W.2d 367 (Tex. Civ. App. - Dallas 1977), rev'd on other grounds, 606 S.W.3d 682 (Tex. 1980). Further, your request letter indicates that the commission interprets subsection (b) to apply only to management and concession contracts. Consequently, subsection (b) protects from required disclosure only management and concession contracts submitted as part of racetrack license applications.

No provisions of the Texas Racing Act protect the remainder of the applications. Nevertheless, you contend that sections 3(a)(4) and/or 3(a)(10) of the Open Records Act protect the applications from required disclosure. Section 2.15 expressly makes public information "not made confidential by other law." The issue is whether the Open Records Act's exceptions to disclosure themselves make information confidential within the meaning of section 2.15 of the Racing Act. The Open Records Act contains protection for information "deemed confidential by law," V.T.C.S. art. 6252-17a, § 3(a)(1), and prohibits the disclosure of this information. Id. § 10(a); see Open Records Decision No. 501 (1988). The Open Records Act also contains a number of "permissive exceptions" to disclosure that protect information that may be disclosed at the discretion of governmental bodies, so long as they do so in an even-handed fashion. See Open Records Decision Nos. 473, 470 (1987); 48 (1974). Permissive exceptions do not make information confidential within the meaning of section 10(a) of the Open Records Act, which prohibits the disclosure of confidential information.

Resolution of this issue depends on the legislative intent revealed in the Racing Act as a whole. See City of Sherman v. Public Utility Commission, 643 S.W.2d 681, 684

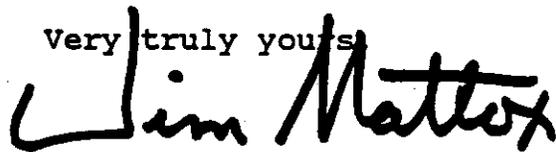
(Tex. 1983); State v. Terrell, supra. When the language of the statute is ambiguous, interpreting the statute requires consideration of the old law, the evil to be remedied, and the remedy provided by the new law. Id. Section 2.15 expressly provides that "[a]ll records of the commission that are not made confidential by other law" are public. The absence of a confidentiality provision for entire applications when the legislature expressly included protection for certain information on applications indicates the legislature's intent that the remainder of the applications constitute public records. In subsection (b) of section 6.03, which designates management and concession contracts protected from public disclosure, the legislature specifically referred to the Open Records Act. If the legislature had intended to allow racetrack license applications to be withheld under the permissive exceptions to the Open Records Act, it would have done so expressly. The Open Records Act does not authorize withholding information another statute expressly deems a public record. Open Records Decision Nos. 275 (1981) (health maintenance organization's application for certificate of authority); 8 (1973) (application for limited sales tax permits public). For this reason, none of the Open Records Act's exceptions apply and we need not address your claims regarding sections 3(a)(4) and 3(a)(10). See Open Records Decision No. 275 (1981); see also Open Records Decision No. 45 (1974).¹

1. We note that trade secrets are also privileged from civil discovery under Rule 507 of the Texas Rules of Civil Evidence. This privilege may constitute "confidential information" within the meaning of section 2.15 of article 179e, V.T.C.S. You do not show, however, how the information on applications for racetrack licenses would constitute a trade secret. Nor do you explain why the privilege, if any, would not be waived when submitted as part of an application for a racetrack license. See TEX. RULE CIV. PROC. 511.

S U M M A R Y

Neither the Texas Racing Act, article 179e, V.T.C.S., nor the Texas Open Records Act, article 6252-17a, V.T.C.S., authorizes the Texas Racing Commission to withhold from public disclosure entire racetrack license applications. Specific provisions of the Racing Act authorize withholding (1) criminal history information obtained from law enforcement agencies and (2) management and concession contracts submitted as part of racetrack license applications. The protection in section 2.15 for the commission's investigatory files does not apply to racetrack license applications; it applies to the commission's investigatory efforts.

Very truly yours,



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