



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 19, 2007

Mr. Mark Fenner  
General Counsel  
Texas Racing Commission  
P.O. Box 12080  
Austin, Texas 78711-2080

OR2007-14364A

Dear Mr. Fenner:

This ruling examines Open Records Letter No. 2007-14364 (2007) and whether certain information is subject to required public disclosure under chapter 552 of the Government Code.

The Texas Racing Commission (the "commission") received a request for information relating to the investigation and subsequent resignation of a former employee. In the commission's original request for a decision in this matter, the commission claimed that the requested information was excepted from disclosure under sections 552.101, 552.107 and 552.111 of the Government Code. In Open Records Letter No. 2007-14364, this office determined that the commission must withhold Exhibit A under section 2.15 of article 179e of Vernon's Texas Civil Statutes. However, the commission may not withhold Exhibit B under sections 552.107 and 552.111 of the Government Code because it failed to submit a copy of the written request for information to this office pursuant to section 552.301 of the Government Code.<sup>1</sup>

In your request for reconsideration you provide a copy of the written request for information. You also supply a sworn affidavit stating that the commission's previous request for a decision from this office contained a copy of the request. Based on this representation, we conclude the commission timely submitted the request for information and we will correct

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<sup>1</sup>In its original request for a decision, the commission labeled the information as Exhibit B. In its request for reconsideration, the commission labeled the information as Exhibits D-1 through D-5. We will refer to the information as Exhibit B.

the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued November 1, 2007.

Section 552.101 excepts from required public disclosure “information that is confidential by law, either constitutional, statutory, or by judicial decision.” Accordingly, it encompasses confidentiality provisions such as section 2.15 of article 179e of Vernon’s Civil Statutes. Article 179e, the “Texas Racing Act,” regulates horse racing and greyhound racing in Texas. Section 2.15 states in relevant part:

All records of the commission that are not made confidential by other law are open to inspection by the public during regular office hours. All applications for a license under this Act shall be maintained by the commission and shall be available for public inspection 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, in a hearing conducted by the commission, on court order, or with the consent of the party being investigated.

V.T.C.S. art. 179e, § 2.15. You state that Exhibit A consists of the commission’s investigatory file. You indicate that none of the exceptions to section 2.15 apply in this instance. Based upon your representations, we agree that the information in Exhibit A is confidential under section 2.15 of article 179e of Vernon’s Civil Statutes. Therefore, the commission must withhold Exhibit A under section 552.101 of the Government Code.

Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This section encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. Tex. R. Civ. P. 192.5; ORD 677

at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

- a) 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 b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7. You inform us that Exhibit B consists of attorney work product prepared by the general counsel in relation to legal issues surrounding the investigation of the former employee at issue and a possible enforcement action as well as the possibility of an appeal to the State Office of Administrative Hearings concerning the former employee’s termination. After review of your argument and the submitted information, we conclude that the commission may withhold Exhibit B as attorney work product under section 552.111 of the Government Code. Open Records Letter No. 2007-14364 is overruled to the extent it conflicts with this ruling.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general’s Open Government Hotline,

toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Henisha D. Anderson  
Assistant Attorney General  
Open Records Division

HDA/mcf

Ref: ID# 300094

c: Mr. Gary West  
Fort Worth Star-Telegram  
c/o Mr. Mark Fenner  
Texas Racing Commission  
P.O. Box 12080  
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(w/o enclosures)