



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 4, 2008

Ms. Charla Ann King  
Executive Director  
Texas Racing Commission  
P.O. Box 12080  
Austin, Texas 78711-2080

OR2008-15090

Dear Ms. King:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 326916.

The Texas Racing Commission (the "commission") received a request for several categories of information pertaining to the drug testing policies and procedures of the commission, including information relating to a specific trainer and incident. You state that some of the submitted information will be released to the requestor.<sup>1</sup> You claim that the remaining submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received comments from the requestor. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

As a preliminary matter, we note that you have failed to fully comply with section 552.301 of the Government Code. Under section 552.301(b), a governmental body that receives a request for information that it wishes to withhold from public disclosure must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. The commission received this request on August 19, 2008. Therefore,

---

<sup>1</sup>In your September 10, 2008 letter to this office, you inform us that you no longer seek to withhold pages 1-175 of Exhibit C of your initial submission and that you will release this information to the requestor.

you were required to submit your request for a decision, stating the exceptions that apply, by September 3, 2008. Although you timely submitted your initial request for a decision to this office, you did not raise section 552.107 of the Government Code until September 4, 2008. Section 552.107 is a discretionary exception that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general). In this instance, we find that you did not timely raise section 552.107 and have therefore waived this exception.

You assert that the remaining submitted information is excepted from disclosure under section 552.103 of the Government Code, which provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us and provide documentation showing that prior to the commission's receipt of the request for information, the commission was named as a defendant in a lawsuit filed in Travis County District Court. We therefore agree that litigation was pending when the commission received the request. You also assert that the litigation pertains to the drug testing process generally and to the particular incident at issue in the submitted information. Thus, we agree that the submitted information is related to the pending litigation. Based on

your representations and our review of the submitted information, we conclude that the commission may generally withhold the submitted information under section 552.103.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We note that the opposing party has previously had access to portions of the submitted e-mail correspondence. Accordingly, while most of the submitted information may be withheld under section 552.103, any information that has been previously seen by the opposing party may not be withheld under this exception. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We now turn to your argument under section 552.111 of the Government Code for the information that is not excepted by section 552.103. 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." Gov't Code § 552.111. This section encompasses the attorney work product privilege found at rule 192.5 of the Texas Rules of Civil Procedure. See TEX. R. CIV. P. 192.5; *City of Garland*, 22 S.W.3d at 360; Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines attorney work product as consisting of

- (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.

TEX. R. CIV. P. 192.5. A governmental body that seeks to withhold information on the basis of the attorney work product privilege under section 552.111 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. See *id.*; ORD 677 at 6-8. You claim the work product privilege under section 552.111 for the remaining information. You have not demonstrated, however, that any of the information at issue consists of material prepared or mental impressions developed in anticipation of litigation or for trial by a party or a representative of a party. Likewise, you have not shown that any of the remaining information consists of a communication made in anticipation of litigation or for trial between a party and a representative of a party or among a party's representatives. See TEX. R. CIV. P. 192.5. We therefore conclude the commission may not withhold any of the

remaining information on the basis of the attorney work product privilege under section 552.111 of the Government Code.

In summary, the commission may generally withhold the submitted information under section 552.103 of the Government Code; however, any information that has been previously seen by the opposing party may not be withheld under this exception and must be released to the requestor.

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). If the governmental body does not file suit over 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 challenge 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,

A handwritten signature in black ink, appearing to read 'ME' followed by a stylized flourish.

Matt Entsminger  
Assistant Attorney General  
Open Records Division

MRE/jb

Ref: ID# 326916

Enc. Submitted documents

c: Ms. Karen A. Murphy, Esq.  
76 Phelps Road  
Old Chatham, New York 12136  
(w/o enclosures)