



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 5, 1993

Mr. James R. Wilson
Director
Texas Department of Public Safety
P. O. Box 4087
Austin, Texas 78773-0001

Open Records Decision No. 613

Re: Whether, under V.T.C.S. article 179e, section 2.16, an applicant for a racetrack license has a right of access to a background check on himself or herself (RQ-451)

Dear Mr. Wilson:

The Texas Department of Public Safety (DPS) has received a request for a copy of the background investigatory report that DPS prepared on the requestor, a stockholder in an applicant for a class 1 racetrack license. You contend that sections 3(a)(1), incorporating section 2.16 of the Texas Racing Act (the act),¹ and 3(a)(8) of the Open Records Act, V.T.C.S. article 6252-17a, authorize DPS to withhold the requested information from the requestor. We conclude that section 2.16 of the act provides the requestor with a right of access to information about himself in the investigatory file; thus, neither section 3(a)(1) nor 3(a)(8) of the Open Records Act authorizes DPS to withhold the information from the requestor.

Section 3(a)(1) of the Open Records Act excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." Thus, information that another statute deems confidential also is confidential pursuant to section 3(a)(1) of the Open Records Act. On the other hand, a governmental body may not use the Open Records Act to withhold information that another statute expressly makes public. Open Records Decision No. 525 (1989).

Article 6 of the act prohibits a person from conducting greyhound or horse race meetings with wagering unless the person has a racetrack license, V.T.C.S. art. 179e, § 6.01, and requires applicants for racetrack licenses to complete detailed application forms. *See id.* § 6.03. Additionally, section 6.031 of the act requires the Texas Racing Commission (the commission) to "require a complete personal, financial, and business background check of . . . any person owning an interest in . . . an applicant for a racetrack license, . . . [including] the stockholders." If the commission determines, in its sole discretion, that the background check indicates "anything which might be detrimental to the public interest or the racing industry," the commission must deny the license application. *Id.*

¹The Texas Racing Act is codified as V.T.C.S. article 179e.

Pursuant to its authority under section 6.06 of the act, the commission has adopted a rule requiring it to maintain an investigatory file on each applicant and each licensee. 16 T.A.C. § 303.10(a). We understand, however, that the commission does not conduct the background investigations; rather, by agreement with the commission, DPS conducts the necessary background investigations. See Open Records Decision No. 567 (1990) at 2. Consequently, DPS' Criminal Intelligence Service collects background information, conducts interviews, and evaluates the information about each applicant or person owning an interest in an applicant. See *id.* Upon completion of the investigation, DPS submits its investigatory report to the commission, and the commission keeps its copy of the report in its investigatory file on the applicant. See V.T.C.S. art. 179e, § 2.16(b). Records relating to these investigations are governed by the act whether in the custody of the commission or DPS. Open Records Decision No. 567.

The legislature amended section 2.15 and added section 2.16, the section about which you specifically inquire, to the act in 1991. See Acts 1991, 72d Leg., ch. 386, §§ 5, 6, at 1446. These sections provide as follows:

Sec. 2.15. RECORDS. 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.

Sec. 2.16. DEPARTMENT OF PUBLIC SAFETY RECORDS. (a) Except as otherwise provided by this Act, the files, records, information, compilations, documents, photographs, reports, summaries, and reviews of information and related matters that are collected, retained, or compiled by the Department of Public Safety in the discharge of its duties under this Act² are confidential and are

²The act expressly provides DPS with two duties: The first relates to the applicant's fingerprints, the second relates to an applicant's criminal history record information. Section 5.03(a) of the act requires DPS to classify an applicant's fingerprints, check the prints against the DPS' fingerprint files, and report to the commission its finding concerning the criminal record of the applicant or the lack of such a record. Section 5.04(a) authorizes the commission to obtain criminal history record information that relates to an applicant for a license from DPS. Any criminal history record information the commission receives pursuant to section 5.04 from a law enforcement agency that requires the information to be kept confidential remains privileged and confidential although the information is in the hands of the commission. V.T.C.S. art. 179e, § 5.04(c). The commission may not release such information to any person or agency except in a criminal proceeding, in a hearing conducted by the commission, on court order or with the consent of the applicant. *Id.* Of course, the commission must disclose to the public information that is in a form available to the public. *Id.*

not subject to public disclosure, but are subject to discovery by a person that is the subject of the files, records, information, compilations, documents, photographs, reports, summaries, and reviews of information and related matters that are collected, retained, or compiled by the Department of Public Safety in the discharge of its duties under this Act.

(b) An investigation report or other document submitted by the Department of Public Safety to the commission becomes part of the investigative files of the commission and is subject to discovery by a person that is the subject of the investigation report or other document submitted by the Department of Public Safety to the commission that is part of the investigative files of the commission.

(c) Information that is in a form available to the public is not privileged or confidential under this section and is subject to public disclosure. [Footnote added.]

You specifically ask whether the term "discovery," as section 2.16 uses it, refers exclusively to the litigation context. If so, you believe that the subject of the background investigatory files could access the information only if the subject was involved in litigation. If, on the other hand, section 2.16 uses "discovery" in a broader sense (what you refer to as the "normal, everyday usage" of the term), you believe that the subject could access the information at any time.

On its face, section 2.16 does not answer your question. Additionally, we were unable to locate any legislative history indicating the meaning that the legislature intended to assign to the term. We believe, however, that a comparison of section 2.15 and section 2.16, particularly subsection (b), indicates the sense in which the legislature intended to use the word "discovery."

The 1991 amendments to section 2.15 provided the subject of the background investigation with the power to consent to the disclosure of the background investigatory files when the files are in the possession of the commission. *See Acts 1991, 72d Leg., ch. 386, § 5, at 1446.* The subject's power to consent to release of the commission's investigatory file implicitly provides the subject a right of access to the file under section 2.15. *See Hutchins v. Texas Rehabilitation Comm'n, 544 S.W.2d 802, 804 (Tex. Civ.*

(footnote continued)

While the act expressly confers on DPS only those duties stated in sections 5.03(a) and 5.04(a), we do not believe that an applicant's fingerprint records and criminal history record information are the only records which section 2.16 deems confidential. Instead, we believe that the broad language of section 2.16, including "files, records, information, compilations, documents, photographs, reports, summaries, and reviews of information," implicitly incorporates the documents that DPS compiles in the background investigative check that it performs, by agreement with the commission, on each applicant for a license.

App.--Austin 1976, no writ). Section 2.15 does not limit the subject's right of access to a litigation context.

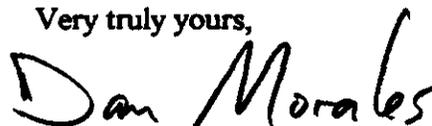
Thus, once DPS has completed its background investigation and has submitted its report to the commission, section 2.15 of the act provides the subject of the investigation with a right to access, at any time, the commission's copy of the investigative report. Section 2.16(b) provides the subject of the information with a similar right of access to the commission's copy of the investigative report, except that subsection (b) provides that the report is "subject to discovery" by the subject of the report. If we are to read section 2.16(b) consistently with section 2.15, we must construe the word "discovery," as section 2.16(b) uses the term, to indicate that the subject of the investigatory report has a right to access the commission's copy of the report not solely in the context of litigation, but at any time. See Attorney General Opinion V-723 (1948) at 6 (stating that, in statutory construction, inconsistencies are to be avoided if possible). Logically, section 2.16(a) must use the word "discovery" in the same sense. Thus, the subject of an investigation has a right to access, at any time, information in DPS' investigative file that pertains to the subject.

You have submitted copies of the documents that you claim are responsive to the request. We note that the documents you have submitted contain background information not only about the requestor but also about other stockholders in the same racetrack. Because section 2.16 expressly provides the requestor with a right to information about himself, neither section 3(a)(1) nor section 3(a)(8) of the Open Records Act can impinge on that right. However, section 2.16, incorporated into section 3(a)(1) of the Open Records Act, deems confidential information relating to other applicants or stockholders. Thus, DPS must release to the requestor only that information in the investigative report pertinent to the investigation of his background; DPS must withhold from the requestor information in the investigative report that concerns other stockholders in the racetrack.

S U M M A R Y

Section 2.16 of the Texas Racing Act, V.T.C.S. article 179e, provides the subject of a background investigation that the Department of Public Safety has conducted with a right of access to all information that DPS has compiled or maintained in the course of the investigation. The subject's right of access is not limited to discovery in the course of litigation; rather, the subject has a right to access the information pertaining to DPS' investigation of his or her background at any time.

Very truly yours,



DAN MORALES
Attorney General of Texas

WILL PRYOR

First Assistant Attorney General

MARY KELLER

Deputy Assistant Attorney General

RENEA HICKS

Special Assistant Attorney General

MADELEINE B. JOHNSON

Chair, Opinion Committee

Prepared by Kymberly K. Oltrogge

Assistant Attorney General