



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 27, 1995

Mr. A. K. Eugster  
Executive Director  
Texas Veterinary Medical Diagnostic Laboratory  
Drawer 3040  
College Station, Texas 77841-3040

OR95-1288

Dear Mr. Eugster:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 23031.

The Texas Veterinary Medical Diagnostic Laboratory (the "agency") received an open records request for three categories of information. The requestor first seeks

Recheck Sheets, TLC Worksheets, Sample Logs, Maintenance Logs, Immunoassay/HPLC Recheck Form, and copies of photographs of all positive and suspicious samples containing the substance Polyethylene Glycol (PEG).

You contend that this information comes under the protection of section 552.101 of the Government Code in conjunction with section 2.15 of article 179e, V.T.C.S. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 2.15 of article 179e provides:

All records of the [Texas Racing 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, in a hearing conducted by the commission, on court order, or with the consent of the party being investigated.* [Emphasis added.]

You explain that the Texas Racing Act (the "act") charges the agency with the duty of performing medication and drug testing on race animals for the Texas Racing Commission (the "commission"). See V.T.C.S. art. 179e, § 3.07(d). The act specifically charges the agency to conduct these tests on behalf of the commission to detect the presence of medication, stimulants, or depressants in race animals for the purpose of determining whether there has been an attempt to illegally influence the outcome of a race. *Id.* §§ 3.07(d), 14.03(a), (b). Consequently, because the agency acts as the commission's agent in conducting such tests, all records of such tests that the agency holds are in the constructive possession of the commission. *Cf.* Open Records Decision No. 567 (1990) (investigative materials that the Department of Public Safety gathers on behalf of commission confidential under section 2.15).

The act does not define "investigatory files," nor does it describe the types of records to be contained in "investigatory files." However, you explain that

The TVMDL conducts approximately 35,000 substance tests per year which include testing for PEG. The agency has been performing these tests for four years. Approximately one in every one-thousand tests have resulted in positive PEG levels. Tests which result in suspicious, borderline levels of PEG are not forwarded to the Commission; nor are they filed separately from negative-PEG test files. The TVMDL has approximately 150 to 200 files dating back four years which include PEG-positive results among other data not requested.

The PEG-positive tests are forwarded to the Commission, which in turn, in accordance with the Racing Act, takes appropriate action against owners of the animals.

In our opinion, because the agency routinely conducts tests for PEG without any independent allegation of wrongdoing, see 16 T.A.C. § 319.361, a formal "investigation" does not begin until the agency finds an unusually high level of the chemical and refers those test results to the commission. We believe that only those PEG-positive test records that the agency refers to the commission, and that therefore become the subject of an active commission investigation into an alleged attempt illegally to influence the outcome of a race, are confidential under section 2.15. Accordingly, the agency must withhold pursuant to section 552.101 of the Government Code only those laboratory reports that it has referred to the commission unless those records have otherwise become public as provided in section 2.15 of article 179e. The agency must release all remaining test results coming within the ambit of the request.

The requestor also seeks "the rules and procedures for quantifying drugs that are legal in certain levels." You have submitted to this office as responsive to this request two "procedures" for quantifying drugs in test specimens. You first contend that section 2.15 makes these procedures confidential. We disagree. Section 2.15 makes confidential the contents of the agency's *investigatory files*. We do not read the confidentiality provision of section 2.15 so broadly as to include all records that relate to the agency's testing procedures. Even assuming, *arguendo*, that copies of these procedures are contained in the agency's investigatory files, the confidentiality afforded by section 2.15 would not extend to the same information found outside of those files. Further, you have not demonstrated that these procedures exist only within investigatory files. Accordingly, section 2.15 is inapplicable here.

You next contend that the procedures constitute "trade secrets" and thus come under the protection of section 552.110 of the Government Code. Section 552.110 excepts from required public disclosure

[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it.

RESTATEMENT OF TORTS § 757 cmt. b (1939). There are six factors to be assessed in determining whether information qualifies as a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is known by employees and others involved in [the company's] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and

- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Id.*; see also Open Records Decision No. 232 (1979). This office must accept a claim that information is exempted as a trade secret if the holder of the information makes a prima facie case for exemption and this office receives no other argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. However, where the holder of the information submits no evidence of the factors necessary to establish a trade secret claim, we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983). In this instance you have not demonstrated how each of these factors apply to the information at issue. Because you have not established a prima facie case that this information is a trade secret under common law, the agency may not withhold this information under section 552.110 of the Government Code.

You also contend that section 51.914 of the Education Code makes the quantifying procedures confidential. Section 51.914 provides in pertinent part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under [the Open Records Act], or otherwise:

- (1) all information relating to a . . . process, the application or use of such a . . . process, and all technological and scientific information . . . developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee.

The purpose of section 51.914(1) is to protect the "actual or potential value" of technological and scientific information developed in whole or in part at a state institution of higher education. See Open Records Decision No. 497 (1988) at 6 (interpreting former Education Code section 51.911). You contend the requested procedures are confidential under section 51.914 of the Education Code because the procedures were

devised, developed and employed by [agency] personnel exclusively in Racing Commission investigations. The unpublished formula was developed by Dr. Allen C. Ray and members of his [agency] Drug Testing Laboratory staff. The procedure is one-of-a-kind and includes internal standards known only to Dr. Ray and others conducting the drug tests in the highly-secured environment of the drug testing laboratory. To make the process public or a matter of public information would severely compromise the commercial value of the process in that it would be rendered useless.

With regard to the procedures at issue, the requirements for confidentiality under section 51.914(1) are threefold: the information must 1) relate to a process, 2) be developed in whole or in part at a state institution of higher education, and 3) have a potential for being sold, traded, or licensed for a fee. Based on your representations, the requested procedures clearly meet the first two requirements under section 51.914(1). You have made no showing, however, that the requested procedures have any true commercial value and thus have "a potential for being sold, traded, or licensed for a fee."<sup>1</sup> Absent such a showing, this office cannot conclude that this information is confidential under section 51.914(1) of the Education Code. However, we recognize that the procedures may nevertheless be confidential under section 51.914(1); accordingly, this office will grant you an additional ten days to submit a supplemental brief to this office explaining more fully why this information is confidential under section 51.914(1). Absent our timely receipt of your brief, we rule that the agency must release this information to the requestor.

Finally, the requestor seeks "a list of names of personnel working on samples of horses racing in Texas and a list of those that no longer are working in that capacity." You contend that because the agency possesses no such lists, it need not comply with this request. The Open Records Act does not require a governmental body to prepare new information in response to an open records request, Open Records Decision No. 342 (1982), or to prepare existing information in the form requested by a member of the public, Open Records Decision No. 145 (1976); *see also* Open Records Decision No. 347 (1982). On the other hand, a governmental body may not disregard a request for information simply because a citizen does not specify the exact documents he desires. When a requestor seeks information that the agency holds, the governmental body should make a good-faith effort to advise the requestor of the type of documents available so that the requestor may narrow the request. *See* Open Records Decision No. 87 (1975). Section 552.022(2) of the Government Code specifically makes public the names and dates of employment of public employees. Once you have informed the requestor of the agency records that contain the requested information and the requestor has identified the records he seeks, the agency must release those records.<sup>2</sup>

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<sup>1</sup>Although you assert that "[t]o make the process public or a matter of public information would severely compromise the commercial value of the process in that it would be rendered useless," you do not explain why this is the case or why this is a factor this office should consider in determining the applicability of section 51.914(1).

<sup>2</sup>In Attorney General Opinion JM-672 (1987), the attorney general indicated that the Open Records Act may require a minimal computer search for existing information stored in computers. Whether certain programming constitutes the creation of new material, and is therefore not required, is a factual determination this office cannot reach. However, if the requested names and dates of employment exist in computer records, and if the agency easily can compile this information, you may want to consider releasing the information in this form.

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 may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kimberly K. Oltrogge". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Kimberly K. Oltrogge  
Assistant Attorney General  
Open Records Division

KKO/RWP/rho

Ref.: ID# 23031

Enclosures: Submitted documents

cc: Mr. Ted D. Sudderth  
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Bandera, Texas 78003  
(w/o enclosures)