



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 19, 2013

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

OR2013-06424

Dear Mr. Fenner:

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# 484522.

The Texas Racing Commission (the "commission") received a request for information pertaining to a specified civil law suit.¹ You state the commission has released some of the responsive information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. Further, you state release of portions of the submitted information may implicate the proprietary interests of Churchill Downs, Inc./Churchill Downs Technology Initiative Company d/b/a Twinspires.com ("Churchill Downs"). Accordingly, you state, and provide documentation showing, you notified Churchill Downs of the request for information and of its right to submit arguments to this office as to why its information should not be released. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and

¹We note the commission sought and received clarification of the information requested. *See Gov't Code § 552.222* (providing if request for information is unclear, governmental body may ask requestor to clarify request).

explain applicability of exception in the Act in certain circumstances). We have received comments from Churchill Downs. We have considered the submitted arguments and reviewed the submitted information.

Initially, we address the submitted arguments under Texas Revised Civil Statutes Article 179e (the "Texas Racing Act"), which provides for the regulation and control of horse and greyhound racing in Texas. *See* V.T.C.S. art. 179e, § 1.02. Section 6.03 of the Texas Racing Act regulates the application process for a racetrack license and provides in relevant part the following:

(a) The commission shall require each applicant for an original racetrack license to pay the required application fee and to submit an application, on a form prescribed by the commission, containing the following information:

...

(11) a copy of each management, concession, and totalisator contract dealing with the proposed license at the proposed location in which the applicant has an interest for inspection and review by the commission; the applicant or licensee shall advise the commission of any change in any management, concession, or totalisator contract; all management, concession, and totalisator contracts must have prior approval of the commission; the same fingerprint, criminal records history, and other information required of license applicants pursuant to Sections 5.03 and 5.04 and Subdivisions (1) through (3) of this subsection shall be required of proposed totalisator firms, concessionaires, and managers and management firms[.]

...

(b) When the commission receives a plan for the security of a racetrack facility, or a copy of a management, concession, or totalisator contract for review under Subdivision (11) of Subsection (a) of this section, the commission shall review the contract or security plan in an executive session. Documents submitted to the commission under this section by an applicant are subject to discovery in a suit brought under [the Texas Racing] 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).²

²Article 6252-17a is the predecessor to the Act.

Id. § 6.03(a)(11), (b). The commission states Exhibit E.3 consists of an agreement to simulcast Churchill Down's races at the Sam Houston Race Park, including totalisator contracts, submitted for commission review under section 6.03 of the Texas Racing Act. Based on these representations and our review of the information at issue, we agree portions of Exhibit E.3 consist of documents submitted to the commission under section 6.03(b) of the Texas Racing Act by an applicant or information obtained directly from such documents. Accordingly, we find the information we have marked in Exhibit E.3 is not subject to the Act and need not be disclosed in response to the request for information.³ *See id.* § 6.03(b). However, we find the commission has not demonstrated how the remaining information in Exhibit E.3 consists of information submitted by an applicant for commission review under section 6.03(a)(11) of the Texas Racing Act for purposes of section 6.03(b). Accordingly, we find the remaining information at issue is subject to the Act, and must be released unless the information is subject to an exception to disclosure under the Act. *See Gov't Code* §§ 552.006, .021, .301, .302. We will consider the submitted arguments against disclosure of the remaining submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses section 2.15 of the Texas Racing Act, which regulates horse racing and greyhound racing in Texas. Section 2.15 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. All applications for a license under [the Texas Racing] 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. Section 2.15 makes investigatory files of the commission confidential. *See Open Records Decision* Nos. 567 (1990), 548 (1990). You state that Exhibits E.1 and E.2 consist 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 Exhibits E.1 and E.2 is confidential under section 2.15 of

³As our ruling for this information is dispositive, we need not address Churchill Down's submitted arguments against disclosure of this information.

article 179e of Vernon's Civil Statutes. Therefore, the commission must withhold Exhibits 1 and 2 under section 552.101 of the Government Code.⁴

Section 552.103 of the Government Code provides in part:

(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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state, and have provided a pleading demonstrating, that a lawsuit styled *Churchill Downs dba Twin Spires.com v. Texas Racing Comm'n*, civil case no. 1:12-cv-00889-LY, was filed in the United States District Court for the Western District of Texas, prior to the receipt of this request for information. Upon review, we find the information in Exhibits E.4 and E.5 is related to this pending litigation. We therefore conclude section 552.103 of the Government Code is generally applicable to Exhibits E.4 and E.5.

However, we note the opposing party in the pending litigation has seen or had access to some of the information in Exhibit E.5. The purpose of section 552.103 is to enable a

⁴As our ruling for this information is dispositive, we need not address the remaining arguments against its disclosure.

governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the commission may not withhold the information the opposing party has seen or accessed, which we have marked, under section 552.103. Accordingly, with the exception of the information we have marked for release, the commission may withhold the remaining information in Exhibits E.4 and E.5 under section 552.103. We also note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note the remaining information in Exhibits E.3 and E.5 contain personal e-mail addresses subject to section 552.137 of the Government Code.⁵ Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code. § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the commission must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, pursuant to section 6.03 of the Texas Racing Code, the marked information within Exhibit E.3 is not subject to the Act and need not be disclosed in response to this request. The commission must withhold Exhibits E.1 and E.2 under section 552.101 of the Government Code in conjunction with section 2.15 of the Texas Racing Code. With the exception of the information we have marked for release, the commission may withhold Exhibits E.4 and E.5 under section 552.103 of the Government Code. The commission must withhold the marked personal e-mail addresses under section 552.137 of the Government Code, unless the owners consent to public disclosure. The commission must release the remaining information.

This letter ruling is limited to the particular information 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 information or any other circumstances.

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 484522

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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