

Austin American-Statesman

How many racing dogs failed drug tests? In Texas, that's confidential

STATE-GOVERNMENT By [Eric Dexheimer](#) - American-Statesman Staff



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Posted: 1:00 a.m. Sunday, November 06, 2016

Why would a state agency voluntarily publish information for years – and then, when directly asked for the same material, suddenly decide it's confidential? That's what the Texas Racing Commission did last month, in what open records experts describe as the latest example of the erosion of laws the public depends on to pry essential information from the government.

The Texas Public Information Act is a basic tool of journalists, detailing what government records must be made public and, if necessary, providing a framework for forcing dawdling or obstructionist agencies to cough up the goods. Yet many others use the act, too — for advocacy work, policy research or simply just out of curiosity.

It was advocacy that led Carey Theil to send a public information request to the racing commission, the agency that regulates horse and dog racing in Texas. As executive director of the Massachusetts-based anti-greyhound racing organization GREY2K USA, Theil often submits requests to regulators in search of information useful to his organization's mission of watchdogging the dog racing industry.

In August, when Theil submitted his request for the number of times dogs had tested positive for a banned drug, he didn't think it would be a big deal. After all, [through 2011, the commission itself had published the data](#) in its annual reports.

An agency spokesman, Robert Elrod, said the commission stopped publishing the drug testing summaries [in 2012](#) not for any legal or public policy reason, but simply in an effort to streamline its documents. Positive drug tests among racing dogs also were uncommon, he added. In 2011, for example, agency inspectors tested 6,195 dog urine samples and found 14 suspicious results.

To Theil, however, the low numbers were immaterial. The test results at the very least prove the regulatory agency is adequately performing one of its most basic jobs, he said. They also could show any doping trends important for the public to know, he said.

So he was surprised to learn that the commission had kicked his request to the Office of the Attorney General to ask if the test result information could be

withheld from GREY2K. The state attorney general's office is the first line of appeal in open records disputes.

Kelley Shannon, executive director of the Freedom of Information Foundation of Texas, said in recent years her organization has observed a steady increase among government agencies seeking such attorney general opinions as a tactic to withhold information or delay its release. "We see a lot seeking attorney general rulings at the drop of a hat," she said.

Another reason, she suspects, is a flurry of higher court decisions that has had the effect of making confidential records once considered open and available to anyone who asked. As a result, open records laws "are being chipped away at. There seems to be a tendency of closing up information and keeping it off limits to the public," Shannon said.

In its [letter seeking to deny releasing the numbers to GREY2K](#), the commission argued that the dog drug test results were considered part of its investigations, and that the Texas Racing Act regards any information related to an investigation as confidential. [According to the agency's rules](#), the records become public only if a suspicious test results in a criminal proceeding, is discussed by the commission in a hearing or if the person being investigated gives his or her permission to release the information.

Yet GREY2K wasn't looking for test results from a particular dog or owner, but rather aggregate annual industrywide figures for Texas – exactly what the agency had previously published. Other states – notably Florida, which boasts most of the country's dog tracks — routinely release such information, Theil said.

By refusing to release such information, "If you're following (the Texas Racing Commission's) argument, they shouldn't even be telling us how many drug tests there are," he said.

Two weeks ago, Attorney General Ken Paxton's office [issued its opinion](#): The agency could legally withhold the test result numbers from GREY2K – and, now, from anyone else who asked for them in the future.

Elrod said the ruling confirms that the commission's rules prohibit it from releasing the information. "I don't know why the information was previously printed in the annual report," he said. "But its presence there prior to 2012 wouldn't excuse its improper release now."

Theil has another view. "When a racing regulator won't even tell the public how many positive drug tests there were – that's crazy," he said. "It is inherently bad public policy for them to be hidden from the public."