

CHAPTER III. ADMINISTRATION

PART 5400. PUBLIC INFORMATION

5400.1 Public inspection of records

In accordance with chapter 578 of the Laws of 1974, the Freedom of Information Law, the following procedures are prescribed for making available to the public for inspection and copying all of the records and materials mandated by such law for such purposes.

(a) Application shall be made on printed forms prescribed by the board and submitted either personally or by mail to: New York State Racing and Wagering Board, 400 Broome Street, New York, NY 10013, Attention Records Access Officer.

(b) The person to whom such request shall be made and from whom such records or copies thereof may be obtained and certified shall be the individual appointed by the Chairman, who shall be deemed the "records access officer" of the board. In cases where the fiscal officer is required to furnish certain records, requests shall nevertheless be made through the records access officer, who will inform the fiscal officer to make the necessary arrangements. The duties of the records access officer shall be:

(1) assist the applicant in identifying the record or records sought;

(2) determine whether the record is available for inspection;

(3) search for the identified record and, upon locating the record, take one of the following actions:

(i) review such record and delete any information which would constitute an unwarranted invasion of personal privacy, and thereafter make the record promptly available for inspection or schedule an appointment for inspection; or

(ii) deny access to the record;

(4) upon request, for copies of records, make copies available upon payment of the established fees;

(5) certify, upon request, to the correctness of the copies of the records;

(6) if the record cannot be located, take one of the following actions:

(i) certify in writing that the corporation is not the legal custodian for such records; or

(ii) certify in writing that the record of which the corporation is a legal custodian cannot be found;

(7) if access is denied, advise the applicant of the right to appeal to the authorized representative of the board; and

(8) compile and update, not less than semiannually, a reasonably detailed list, by subject matter, of any records required by the Freedom of Information Law to be made available for public inspection and copying.

(c) Applications will be entertained during the hours of 10 a.m. to 4 p.m. on each business day.

(d) The records access officer shall respond to the applicant, within five days of a request for inspection or copying of records, by:

(1) appointing a time for inspection or copying the requested records;

(2) providing a written statement of denial, which shall include notice of the right to appeal to the records access appeals officer, together with the name, title, business address and telephone number of the records access appeals officer; or

(3) informing the applicant that his request for inspection or copying of records has been reported to the person, association, corporation or other legal entity which filed the records requested with the board, so that such person, association, corporation or legal entity may have an opportunity to protest the inspection or copying of such records as not being available pursuant to the exception provisions of the Public Officers Law.

(e) If more than five days are required to produce records, an explanation shall be sent within five days of the request to the applicant, indicating the reason for and extent of the delay anticipated. If access to records is neither granted nor denied within 10 business days after the date of acknowledgment of receipt of request, the request may be construed as a denial of access that may be appealed.

(f) Inspection shall take place in a room designated by the board, and in the presence of such board representatives as may be designated.

(g) If feasible to the operations of the business of the board, the board may furnish copies of such materials at a price of 25 cents per page, up to size 8 1/2 inches by 14 inches per page. If not feasible, the board may arrange by private contract for such copying to be performed, the cost to be borne by the applicant.

(h) All charges for copying must be paid in advance to the board.

(i) The records access appeals officer is the counsel.
5400.2 Appeals of denial of access to records

(a) Any person who has been denied access to records by the records access officer may appeal such denial to the records access appeals officer.

(b) The appeal must be made within 30 days of the denial of access.

(c) The time for deciding on an appeal by the records access appeals officer shall commence upon receipt by him of the written appeal, which shall identify:

(1) the date and location of requests made for records;

(2) the records to which the applicant was denied access; and

(3) the name and return address of the applicant.

(d) The records access appeals officer shall, within seven business days of the receipt of a written appeal, review the matter and affirm, modify or reverse the denial.

(e) If the records access appeals officer determines that the denial of access was erroneous, he shall instruct the records access officer to allow the prompt inspection or copying of the records as requested.

(f) If the records access appeals officer affirms or modifies the denial, he shall communicate his reasons in writing by either first class mail or certified mail, return receipt requested, to the person making the appeal and inform such person of his right of judicial appeal.

PART 5401. PERSONAL INFORMATION

5401.1 Access to personal information

In accordance with chapter 652 of the Laws of 1983, the Personal Privacy Protection Law, the following procedures are prescribed by which members of the public may assert rights granted by the Personal Privacy Protection Law:

(a) Applications shall be made on printed forms prescribed by the board and submitted either personally or by mail to the New York State Racing and Wagering Board, 400 Broome Street, New York, NY 10013, Attention: Privacy Compliance Officer.

(b) The person to whom such requests shall be made, and from whom such records or copies thereof may be obtained and certified, shall be the individual(s) designated by the chairman to the board's Privacy Compliance Officer(s). The duties of the Privacy Compliance Officer shall be:

(1) assisting data subject in identifying and requesting personal information, if necessary;

(2) describing the contents of systems records orally or in writing in order to enable a data

subject to learn if a system of records includes a record or personal information identifiable to a data subject requesting such record or personal information;

(3) taking one of the following actions upon locating the record sought:

(i) make the record available for inspection, in a printed form without codes or symbols, unless an accompanying document explaining such codes or symbols is also provided;

(ii) deny access to the record in whole or in part and explain in writing the reasons therefor;

(iii) make a copy available, upon request, upon payment of established fees, if any, or permitting the data subject to copy the records; and

(4) (i) upon request, certifying that copy of the record is a true copy; or

(ii) certifying, upon request, that:

(a) the agency does not have possession of the record sought;

(b) the agency cannot locate the record sought after having made a diligent search; or

(c) the information sought cannot be retrieved by use of the description thereof, or by use of the name or other identifier of the data subject without extraordinary search methods being employed by the agency.

(c) Records shall be made available at the main office of the agency, which is located at 400 Broome Street, New York, NY 10013.

(d) The agency shall accept requests for records and produce records during the hours of 10 a.m. to 4 p.m. on each business day.

(e) Proof of identity. (1) When a request is made in person, or when records are made available in person following a request made by mail, the agency may require appropriate identification, such as driver's license, an identifier assigned to the data subject by the agency, a photograph or similar information that confirms that the record sought pertains to the data subject.

(2) When a request is made by mail, the agency may require verification of a signature or inclusion of an identifier generally known only by a data subject, or similar appropriate identification.

(3) Proof of identity shall not be required regarding a request for a record accessible to the public pursuant to article 6 of the Public Officers Law.

5401.2 Request for records

- (a) All requests shall be made in writing, except that the agency may make records available upon an oral request made in person after the applicant has demonstrated proof of identity.
- (b) A request shall reasonably describe the record sought. Whenever possible, the data subject should supply identifying information that assists the agency in locating the records sought.
- (c) Within five business days of the receipt of a request, the agency shall provide access to the record, deny access in writing, explaining the reasons therefor, or acknowledge the receipt of the request in writing, stating the approximate date when the request will be granted or denied, which date shall not exceed 30 days from the date of the acknowledgment.

5401.3 Amendment of records

(a) Within 30 business days of a request from a data subject for correction or amendment of a record or personal information that is reasonably described and that pertains to the data subject, the agency shall:

(1) make the amendment or correction in whole or in part and inform the data subject that, on request, such correction or amendment will be provided to any person or governmental unit to which the record or personal information has been or is disclosed pursuant to paragraph (d), (i) or (1) of subdivision 1 of section 96 of the Public Officers Law; or

(2) inform the data subject in writing of its refusal to correct or amend the record, including the reasons therefor.

(b) Denial of a request for records or amendment or correction of a record or personal information:

(1) shall be in writing, explaining the reasons therefor; and

(2) identifying the person to whom an appeal may be directed.

(c) A failure to grant or deny access to records within five business days of the receipt of a request, or within 30 days of an acknowledgment of the receipt of a request, or a failure to respond to a request for amendment or correction of a record within 30 business days of receipt of such a request, shall be construed as a denial that may be appealed.

(d) Any such denial may be appealed to:

Privacy Compliance Law Appeals Officer

c/o Counsel

New York State Racing and Wagering Board

400 Broome Street

New York, NY 10013

5401.4 Appeal

(a) Any person denied access to a record or denied a request to amend or correct a record or personal information pursuant to section 5401.3 of this Part may, within 30 days of such denial, appeal to the board's counsel, who is designated as the Personal Privacy Compliance Appeals Officer.

(b) The time for deciding an appeal shall commence upon receipt of an appeal that identifies:

(1) the date and location of a request for a record or amendment or correction of a record or personal information;

(2) the record that is the subject of the appeal; and

(3) the name and return address of the appellant.

(c) Within seven business days of an appeal of a denial of access, or within 30 days of an appeal concerning a denial of a request for correction or amendment, the person determining such appeals shall:

(1) provide access to or correct or amend the records or personal information; or

(2) fully explain in writing the factual and statutory reasons for further denial, and inform the data subject of the right to seek judicial review of such determination.

(d) If, on appeal, a record of personal information is corrected or amended, the data subject shall be informed that, on request, the correction or amendment will be provided to any person or governmental unit to which the record or personal information has been or is disclosed pursuant to paragraph (d), (i) or (l) of subdivision 1 of section 96 of the Public Officers Law.

(e) The agency shall forward to the Committee on Open Government a copy of any appeal made pursuant to this Part upon receipt, the determination thereof and the reasons therefor at the time of such determination.

5401.5 Statement of disagreement by data subject

(a) If correction or amendment of a record or personal information is denied in whole or in part upon appeal, the determination rendered pursuant to the appeal shall inform the data subject of the right to:

(1) file with the agency a statement of reasonable length setting forth the data subject's reasons for disagreement with the determination;

(2) request that such a statement of disagreement be provided to any person or governmental unit to which the record has been or is disclosed pursuant to paragraph (d), (i) or (l) of subdivision 1 of section 96 of the Public Officers Law.

(b) Upon receipt of a statement of disagreement by a data subject, the agency shall:

(1) clearly note any portions of the record that are disputed; and

(2) attach the data subject's statement as part of the record.

(c) When providing a data subject's statement of disagreement to a person or governmental unit in conjunction with a disclosure made pursuant to paragraph (d), (i) or (l) of subdivision 1 of section 96 of the Public Officers Law, the agency may also include a concise statement of its reasons for not making the requested amendment or correction.

5401.6 Fees

(a) Unless otherwise prescribed by statute, there shall be no fee charged for:

(1) inspection of records;

(2) search for records; or

(3) any certification pursuant to this Part.

(b) Unless otherwise prescribed by statute, copies of records shall be provided:

(1) at a rate of 25 cents per photocopy up to 9 by 14 inches; or

(2) upon payment of the actual cost of reproduction, if the record or personal information cannot

be photocopied.

(c) The actual cost of reproduction shall be based upon the average unit cost for copying a record, excluding fixed costs of the agency, such as operator salaries and overhead.

Part 5402. ADJUDICATORY PROCEEDINGS

5402.1 Applicability

This Part applies to all adjudicatory proceedings held by the board commenced on or after the effective date of this Part or an applicable amendment thereto.

5402.2 Definitions

(a) The term board shall mean the New York State Racing and Wagering Board. The board is an agency authorized by law to make final determinations in adjudicatory proceedings and is an "agency" within the meaning of Executive Order No. 131 dated December 4, 1989.

(b) The term adjudicatory proceeding shall mean any activity in which a determination of legal rights, duties or privileges of named parties thereto is required by law to be made, only on a record and after an opportunity for a hearing provided however, that such term shall not apply to a rule making proceeding or an employee disciplinary action or other personnel action.

(c) The term chairman shall mean the chairman of the New York State Racing and Wagering Board.

(d) The term hearing officer shall mean a person designated by the chairman as such and assigned by the chairman to conduct an adjudicatory proceeding.

(e) The term hearing officer report shall mean the findings, conclusions and recommendations, if any, issued by the hearing officer.

5402.3 Notice of adjudicatory proceedings

(a) An adjudicatory proceeding shall be commenced by service of a notice of hearing or order to show cause. A hearing in any matter as to which the board is required to hold an adjudicatory hearing or otherwise determines to do so shall be held upon reasonable notice to each party, and shall be conducted at such place as the board shall determine. Notice of such hearing, may be served on the party or provided by certified mail addressed to the party involved at the party's last known address.

(b) (1) Such notice or order to show cause shall contain:

(i) a statement of the time, place and nature of the hearing;

- (ii) a statement of the legal authority and jurisdiction under which the hearing is to be held;
- (iii) a reference to the particular section of the statutes and rules involved;
- (iv) a short and plain statement of matters asserted;
- (v) a statement that interpreter services shall be made available to deaf persons at no charge;
- (vi) information concerning circumstances under which an adjournment may be granted;
- (vii) the consequence of a failure to appear for a scheduled hearing or proceeding; and
- (viii) a statement informing the parties of the right of each party to be represented by counsel, to testify, to produce witnesses, to present documentary evidence, and to examine opposing witnesses and evidence.

(2) Such notice or order to show cause may be amended or superseded:

- (i) prior to the commencement of the hearing; or
- (ii) after commencement of the hearing, as authorized by the hearing officer.

(3) A notice of appearance by any attorney representing the party shall be filed with the counsel to the board. A written answer to the charges, if demanded in the notice, or at the option of the party notified, shall be filed at least five days before the hearing commences.

5402.4 Disclosure

(a) When the hearing seeks the revocation of a license previously granted by the board, either the board or any party may, upon written demand and at least seven days prior to the hearing, require disclosure of the evidence that the other party intends to introduce at the hearing, including documentary evidence and identification of witnesses; provided, however, that a party shall not be required to disclose information or material otherwise protected by law from disclosure, including information and material protected because of privilege or confidentiality. If, after such disclosure, a party determines to rely upon other witnesses or information, the party shall, as soon as practicable, supplement its disclosure by providing the names of such witnesses or the additional documents.

(b) If a party fails to disclose evidence sought pursuant to subdivision (a) of this section, the hearing officer may, in his discretion, impose sanctions which may include preclusion of said evidence from introduction at the hearing.

5402.5 Procedure for adjudicatory hearing

(a) General procedure. At the hearing, the case may be presented by a party either personally or

by an attorney. Each party will be afforded a reasonable opportunity to present evidence, examine, and cross examine witnesses. The hearing officer shall conduct the hearing in a fair and impartial manner. Each witness shall testify under oath or by affirmation. The hearing officer may examine witnesses. The hearing officer shall not be bound by the technical rules of evidence, or by formal rules of procedure. The hearing officer may exclude irrelevant or unduly repetitive testimony or evidence from any hearing. Official notice may be taken of all facts of which judicial notice can be taken and of other facts within the specialized knowledge of the board. When official notice is taken, every party shall be given notice thereof and shall on timely request be afforded an opportunity prior to the decision to dispute the fact or its materiality. Briefs as to the facts and law may be submitted and the hearing officer may order a brief to be submitted in any proceeding and fix the time when briefs may be filed.

(b) Adjournments. The hearing may be adjourned at the discretion of the hearing officer for good cause shown upon request of any party or upon consent of all parties. Adjournments on consent of all parties shall be subject to the approval of the hearing officer. However, adjudicatory proceedings shall be conducted in an expeditious manner, with due regard for the rights of the parties concerned.

5402.6 Hearing officer

(a) The chairman shall assign the hearing officer.

(b) All hearings shall be conducted by the hearing officer who shall have the powers and authority of presiding officers or hearing officers as defined by section 303 of the State Administrative Procedure Act (SAPA), any other pertinent statute, and these regulations.

(c) A hearing officer is authorized to:

(1) administer oaths or affirmations;

(2) issue subpoenas in the name of the board, at the request of any party or the direction of the board, requiring attendance and testimony by witnesses and/or the production of books, papers, documents and other evidence. Subpoenas shall be regulated by the Civil Practice Law and Rules. Nothing herein contained shall affect the authority of an attorney for a party to issue subpoenas under the provisions of the Civil Practice Law and Rules;

(3) regulate the course of the hearings, set the time and place for continued hearings and determine the time for filing of briefs and other documents;

(4) direct the parties to appear and confer to consider the simplification or settlement of the issues by consent of the parties; and

(5) examine and call witnesses.

(d) If so directed in the assignment of the chairman, the hearing officer shall prepare findings of fact and make recommendations to the board.

(e) The report of the hearing officer shall be based upon the testimony, the briefs, and the exhibits received at the hearing. It shall be in the form of a written recommendation to the board and shall be filed with the secretary to the board together with the record of the proceeding.

(f) Unless otherwise authorized by law and except as provided in subdivision (g) of this section, a hearing officer shall not communicate, directly or indirectly, in connection with any issue that relates in any way to the merits of an adjudicatory proceeding pending before the hearing officer with any person except upon notice and opportunity for all parties to participate.

(g) A hearing officer may consult on questions of law with supervisors, agency attorneys or other hearing officers, provided that such supervisors, hearing officers or attorneys have not been engaged in investigative or prosecuting functions in connection with the adjudicatory proceeding under consideration or a factually related adjudicatory proceeding. Hearing officers may also consult with supervisors, other hearing officers, support staff or court reporters on ministerial matters such as scheduling or the location of a hearing. The chairman shall strictly enforce the prohibition set forth herein and in subdivision (f) of this section.

5402.7 Disqualification of hearing officer

(a) A party may request the removal of a hearing officer by filing an affidavit of personal bias or disqualification with the board. The affidavit shall state the specific reasons why the hearing officer should no longer preside over the case under consideration. The board shall determine the matter as part of the record of such case, and the hearing may continue during the time that the board considers the request for removal of the hearing officer. A party must file said motion within 48 hours of the date when the party knew or should have known of the basis for disqualification.

(b) Whenever a hearing officer is disqualified or it becomes impracticable for the hearing officer to continue the hearing, another hearing officer may be designated to continue with the case unless it is shown that substantial prejudice to the party will result.

5402.8 Determination of the board

(a) All orders, decisions and determinations of the board shall be in writing or stated in the record and shall include such findings of fact, conclusions of law, reasons for the decision or determination, as may be made by the board, and when appropriate, such direction of specific action as may be ordered by the board. Orders, decisions and determinations shall be issued over the signature of the Secretary to the board or the chairman of the board, or his/her designee.

(b) After determination of the board, a copy of the final decision or determination of the board together with any report of the hearing officer shall be made available to the parties to the hearing or proceeding, and shall be delivered or mailed forthwith to each party and to its representative of record.

(c) The board may not order or otherwise direct a hearing officer to make any specific findings

of fact, to reach any specific conclusions of law, or to make or recommend any specific disposition of a charge, allegation, question or issue, except by remand, reversal, or other decision on the record of the proceeding. The board may confirm, modify, or reject any recommendation of the hearing officer. If the board issues a decision that includes findings of fact or conclusions of law that conflict with any findings of fact, conclusions, or recommended decision of the hearing officer, the board shall set forth in writing the reasons why the board reached a conflicting decision.

5402.9 Record

(a) The board shall cause to be made a complete record of all adjudicatory proceedings. Any party to the adjudicatory proceeding may inspect the record. Upon request, the board shall furnish a copy of the record including exhibits and transcripts or any part thereof to any party, and the board may charge that party not more than its cost for the preparation and furnishing of such record or transcript or any part thereof, or in the alternative, the board may charge the rate specified in its contracts with a private hearing stenographer. A party also shall be entitled to obtain at its own cost a copy of the transcript from the hearing stenographer.

(b) The board shall maintain an index by name and subject of all written final decisions, determinations and orders rendered by the board in adjudicatory proceedings. Such index and the text of any such written final decision, determination or order shall be available for public inspection and copying.

5402.10 Application to reopen

(a) The hearing officer may reopen an adjudicatory proceeding upon his own initiative or upon written application made by a party prior to the board's determination.

(b) The board may reopen an adjudicatory proceeding, on its own initiative or upon written application made by a party, subsequent to the board's determination.

(c) Such applications shall be determined in accordance with the following:

(1) Where a party other than the board, failed to appear at the hearing, the party making the application to reopen must establish that there were valid reasons for having failed to appear and that there is a meritorious defense on behalf of such party.

(2) Where a party has appeared at the hearing, the party must establish that there is newly discovered evidence which, despite due diligence by the party, was not available at the time of the hearing, or establish other compelling reasons for reopening. This paragraph shall also apply to counsel to the board.

5402.11 Penalties

All penalties imposed by the board, and all license suspensions, fines, exclusions and other sanctions imposed by the board upon any person charged shall continue in full force and effect

until the determination of the board is rendered, unless otherwise directed in writing by the board. In this regard, the board may reduce, increase, modify, or substitute any penalty, license suspension, fine, exclusion, or other sanction after review of the record of the administrative proceeding. In addition, the board may assess an additional penalty, upon notice and opportunity to be heard at a hearing, if it finds that any appeal taken from a ruling was frivolous, which are those appeals commenced in bad faith for purposes of delay, or which are unreasonable and without substance or merit.