



STATE OF ARIZONA

Structural Pest Control Commission

Janet Napolitano
Governor

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Lisa Gervase
Executive Director

COMMISSION MEETING FRIDAY, May 11, 2007 9:00 A.M. MINUTES

I. Call to order (9:04A.M.), Commissioner roll call

Commissioners Present: Patrick Black, Dan DeVere, Debra Runbeck,
Paul Baker, Dave Burns, Dave O'Neal

Commissioners Absent: Bert Putterman

Staff Present: Vince Craig, Lisa Gervase, Mike Francis,
Robert Tolton, Magdalena Vazquez, Lorena
Villela, Keely Verstegen, Assistant Attorney
General

II. Call to the public

Ken Frederick from the Arizona Pest Professional Organization (AzPPO) appeared before the Commission. Mr. Frederick said AzPPO has held three meetings since March of 2007 to discuss the sunset review and to obtain input from industry members. Mr. Frederick encouraged members of the public to visit the AzPPO website and to provide their opinion regarding the sunset review. Mr. Frederick said he has received several positive responses from members of the industry.

III. Communication with Commissioners

None

IV. Summary of Current Commission Events, Activities, Notices

Ms. Gervase provided the update as reflected on the agenda.

V. Consent Agenda

A. Applications for New Business License Activating Qualifying Party License

<u>Business</u>	<u>Qualifying Party</u>
1. Gary B's Pest Control	Gary W. Brown ("B1")
2. Nichols & Sons Landscaping	James G. Ferrier ("B3", "B5")

Pulled by Commissioner Burns. David Dickson and James G. Ferrier were present. Mr. Ferrier said he is currently employed by Los Caballeros Golf course and will be the QP for Nichols and Sons. He will be supervising the licensed applicator and the pest control work. Los Caballeros is aware that Mr. Ferrier will be the QP and will allow him to conduct those duties even if an emergency arises.

MOTION: *To approve the application for new business license in the "B3" and "B5" categories by Commissioner Black.
Seconded by Commissioner DeVere.*

VOTE: *6 – 0 Motion carried.*

3. Royal Weed Control	Richard A. Turney ("B3")
4. Executive High Reach Maintenance	Richard Mead ("B1")
5. Bee Bustin, LLC.	Christopher W. Brinton ("B1" and "B2")
6. Arizona Golf Resort & Conference Center	Larry W. Brooks ("B3" and "B5")

B. Applications to activate Qualifying Party for Existing Business License

<u>Qualifying Party</u>	<u>Business</u>
1. Larry G. Winter	Horticulture West II ("B3")

Pulled by Commissioner Baker. Mr. Winter appeared. Mr. Winter said he was before the Commission to reactivate his license.

MOTION: *To approve the application to activate Qualifying Party for Existing Business License in the “B3” category by Commissioner Baker.
Seconded by Commissioner Black.*

VOTE: *6 – 0 Motion carried.*

- 2. **William H. Golightly** Gopher Guys (“B1”)
- 3. **John T. Royalty** TruGreen Chemlawn (“B3”)
- 4. **Abel J. Bustos, Jr.** Cromley Exterminating (“B2”)
- 5. **Reginald E. Moorby** DTR1, LLC. (“B3”)
- 6. **Brady Bruce** Moxie Pest Control (“B1”)

Pulled By Commissioner Baker. Commissioner Baker asked about the office location. Mr. Bruce said his office is located in Tucson, but he does work in Phoenix.

MOTION: *To approve the application to activate the Qualifying Party for Existing Business license in the “B1”category by Commissioner Baker.
Seconded by Commissioner O’Neal.*

VOTE: *6 – 0 Motion carried.*

- 7. **Thomas S. Grab** Arrowhead Exterminating (“B1”, “B2” and “B8”)
- 8. **Ronald D. Felix** Felix Pest & Inspection Services, LLC. (“B7”)

C. Applications for Qualifying Party License

- 1. **Keith E. Currens** “B3”
- 2. **Don E. Davis** “B3”, “B5”
- 3. **Terry L. Whipple** “B2”, “B8”
- 4. **Jedsmond M. Maglanoc** “B1”

Pulled by Commissioner Burns. Mr. Maglanoc appeared before the Commission. Commissioner Burns asked when Apocalypse Pest Control

went into business as he questioned the applicant's amount of practical experience. Mr. Tolton said that they began in June 2005, as a sole proprietorship then became an LLC in August 2005; however, the principals remained the same. Commissioner DeVere asked if it was normal to have more than one QP for one business. Ms. Gervase said businesses can have more than one QP, but a QP cannot qualify more than one business.

MOTION: To approve the application for a Qualifying Party license in the "B1" category by Commissioner O'Neal. Seconded by Commissioner Black.

VOTE: 6 – 0 Motion carried

5. Jousty M. Maglanoc "B8"

Same discussion as with C4. Mr. Maglanoc appeared.

MOTION: To approve the application for a Qualifying Party license in the "B8" category by Commissioner O'Neal. Seconded by Commissioner Black.

VOTE: 6 – 0 Motion carried

6. Daniel J. Manasan "B2"

Same discussion as with C4. Mr. Manasan appeared.

MOTION: To approve the application for a Qualifying Party license in the "B2" category by Commissioner O'Neal. Seconded by Commissioner Black.

VOTE: 6 – 0 Motion carried.

7. Steve Griffin "B1"

Pulled by Commissioner Baker. Mr. Griffin appeared before the Commission. Commissioner Baker said the record reflects he has not taken any recent CEs. Mr. Griffin did not need any last year.

MOTION: To approve the application for a Qualifying Party license in the "B1" category by Commissioner Baker. Seconded by Commissioner Black.

VOTE: 6 – 0 Motion carried.

8. Bruce A. Winters "B3"

9. Robert L. Weymouth "B3" and "B5"

Pulled by Commissioner Burns. Mr. Weymouth appeared before the Commission. Mr. Tolton said the Commission conducted a background investigation and found arrests but no convictions. Mr. Weymouth was unable to obtain any records from California. Mr. Weymouth said one issue was that he was drunk in public and the other issue was that he kicked in someone's door because they owed him money. He said he was arrested for a night but the charges were dropped.

MOTION: *To approve the application for a Qualifying Party license in the "B3" and "B5" categories by Commissioner Burns.
Seconded by Commissioner O'Neal.*

VOTE: *6 – 0 Motion carried.*

10. Edward W. Schroeder "B2", "B3" and "B8"

11. William R. Stewart "B2" and "B8"

Pulled by Commissioner Burns. Mr. Stewart was not present. Commissioner Burns said he was uneasy with the verifications of experience because they were signed by the same person and the same notary on the same day. Mr. Tolton clarified that the companies were owned by the same family and the person who verified the experience was a family member. Mr. Charles Stewart said he would submit to Mr. Tolton the verification of experience; however, he never provided the verification. Mrs. Stewart was the office manager for both companies at the time and she did have first-hand knowledge of the experience.

MOTION: *To approve the application for a Qualifying Party in the "B2" and "B8" categories by Commissioner Burns.
Seconded by Commissioner DeVere.*

VOTE: *6 – 0 Motion carried.*

D. Business License Name Change Request

None

End of Consent Agenda

MOTION: *To accept the Consent Agenda with the exception of the items pulled for discussion (A2, B1, B6, C4, C5, C6, C7, C9, C11) by Commissioner O’Neal. Seconded by Commissioner DeVere.*

VOTE: *6 – 0 Motion carried.*

VI. Applications not on Consent Agenda

A. Request for Temporary Qualifying Party License and Renewals

1. William R. Stewart “B2” and “B8”

Mr. Tolton said the Commission has had Mr. Stewart’s application for a long time, awaiting experience verification from a QP. Since that did not arrive, Ms. Stewart was able to verify the information.

MOTION: *To approve the request for temporary QP renewal by Commissioner Burns. Seconded by Commissioner Baker.*

VOTE: *6 – 0 Motion carried.*

2. Jedsmond M. Maglanoc “B1”, “B2” and “B8”

MOTION: *To approve the request for temporary QP renewal by Commissioner Black. Seconded by Commissioner DeVere.*

VOTE: *6 – 0 Motion carried.*

B. Application to activate Qualifying Party for New or Existing Business License

None

C. Application for Qualifying Party License

None

D. Business License Name Change Requests

None

VII. Complaints

A. The Killer Bug Man (BL)/Timothy Dean Waggoner (QP & APP) - Case No. 2006- 053

Mr. Waggoner was present before the Commission. Ms. Gervase said staff's recommendations were based on not receiving any response from Mr. Waggoner to attempts to reach him about this complaint and to discuss options. The Commissioners requested that Mr. Waggoner provide the Commission with an updated address and phone number. Mr. Craig offered to hold a settlement conference now that Mr. Waggoner has appeared. Commissioner Black said he was clear on what he wanted.

MOTION: *To dismiss the complaint without prejudice and suspend the Business License and Qualifying Party License for nonpayment of renewal fees (automatic revocation after one year), and do the same for the Applicator License if it is not renewed by 6/30/07 by Commissioner Black.
Seconded by Commissioner O'Neal.*

VOTE: *5 – 1 Motion carried. (Commissioner Runbeck opposed).*

B. Riggs Pest Control, LLC (unlicensed)/Christopher Riggs (APP) – Case No. 2006-032

Mr. Riggs was not present. Commissioner Burns said he wanted to make it part of the record that Mr. Riggs claimed he did a ride-along with one of the Burns pest control technicians and that Burns Pest does not allow non-Burns employees to do ride-alongs.

MOTION: *To impose a Cease & Desist Order and a \$1,000 civil penalty against the business; dismiss the complaint without prejudice against the Applicator License and Suspend the Applicator License, if it is not renewed by 6/30/07, for nonpayment of renewal fees (automatic revocation after one year) by Commissioner Black.
Seconded by Commissioner Baker.*

VOTE: *6 – 0 Motion carried.*

C. Steritech (BL)/Judith Black (QP) – Case No. 2006-047

Ms. Black was not present. Commissioner Black asked if this was dismissed, if it would remain on the company's record. Ms. Gervase said it would. Commissioner Black asked if a consumer calls and asks how many complaints there are against a company, would the dismissed complaint be disclosed. Ms. Gervase said it would. Commissioner Burns said that this information isn't provided by telephone, but that a public records request form is completed and then the information is provided.

MOTION: *To dismiss the Complaint by Commissioner Black.
Seconded by Commissioner O'Neal.*

VOTE: *6 – 0 Motion carried.*

D. John Michael Clay (APP) – Case No. 2006-048

Mr. Steven Sparks, attorney, appeared on behalf of Mr. Clay. Mr. Craig said they suggested an Advisory Notice due to the Commission's decision in a recent prior similar case. Commissioner Burns asked to see the template of the Advisory Notice. Ms. Gervase provided Commissioner Burns with the draft. Commissioner Baker also wanted to see the document. Commissioner Burns said that it was a personal thing and wanted staff to email he and Commissioner Baker the Advisory Notice. Ms. Gervase stated that this document would be emailed to all of the Commissioners after the meeting for their review and comment. Mr. Craig pointed out that an Advisory Notice does not count as a prior violation, as it's not a disciplinary action. Mr. Black said that it does; however, count as a complaint.

MOTION: *To issue an Advisory Notice, by Commissioner O'Neal.
Seconded by Commissioner DeVere.*

VOTE: *6 – 0 Motion carried.*

E. Joseph Michael McKinnon - (APP) – Case No. 2006-046

Ms. Runbeck said it appeared Commission staff attempted to convince Mr. McKinnon to not have his license revoked, but that he no longer wanted the license.

MOTION: *To revoke the Applicator License, by Commissioner Baker.
Seconded by Commissioner Black.*

VOTE: *5 – 0 – 1 Motion carried. (Commissioner O'Neal absent from vote)*

VIII. Requests for Review or Rehearing or Previous Commission Decisions.

None

IX. Review or Rehearing of Previous Commission Decisions.

None

X. Consideration of Suspension of Business, Qualifying Party and/or Applicator licenses for Non-payment of Civil Penalties and/or Nonpayment of Renewal Fees.

None

XI. Consideration of lifting Suspension of Business, Qualifying Party and/or Applicator Licenses.

None

XII. Recommended Decision and Orders.

None

XIII. Settlement Proposals

None

XIV. Consideration of Informal Settlement Conference proposed resolutions

None

XV. Reporting by Licensees on Probation

A. Joseph D. Wilkerson, Applicator License No. 060328 “B3” – Case No. 2006-003

Ms. Gervase said Mr. Wilkerson has been compliant with the terms of his SPCC probation. Ms. Gervase said she received a very nice letter from Mr. Wilkerson’s probation officer. Mr. Wilkerson was present and said he is doing well. He added that he will soon be applying to broaden his applicator license. He is due to complete his criminal probation early.

XVI. Applicants with Criminal Convictions

A. Cory J. Linninkamp

Mr. Linninkamp was not present before the Commission. Commissioner Runbeck said this is the second time Mr. Linninkamp was placed on the agenda and did not appear.

MOTION: *To deny the application due to the felony conviction and the nature of the offense by Commissioner Black. Seconded by Commissioner O’Neal.*

VOTE: *6 – 0 Motion carried.*

B. Johnathon A. Sterkeson

Mr. Sterkeson and Mr. Gavin Gallifant were present before the Commission. Mr. Gallifant said Mr. Sterkeson has been working for his company and doing well.

MOTION: *To approve by Commissioner Black. Seconded by Commissioner Baker.*

VOTE: *6 – 0 Motion carried.*

C. Raymond Chavez, Jr.

Mr. Chavez was present and stated that he has been working for Asplundh. A representative from his employer (Al Martinez) was present but had to leave.

MOTION: *To approve by Commissioner O’Neal. Seconded by Commissioner Baker.*

VOTE: *6 – 0 Motion carried.*

D. Michael W. Donn

Mr. Donn said he was approximately 20 years old at the time of his offense. He said he immediately joined the military after that and served four years. Mr. Donn has been working for Alliance Pest Control since then.

MOTION: *To approve by Commissioner Black. Seconded by Commissioner DeVere.*

VOTE: *6 – 0 Motion carried.*

E. Mark Lumia

Mr. Lumia was present. He stated he has not had any other legal problems since this incident, which occurred when he was a minor.

MOTION: *To approve by Commissioner O’Neal.
Seconded by Commissioner Black.*

VOTE: *6 – 0 Motion carried.*

F. K.C. Cody Vasquez

Mr. Vasquez was not present. Commissioner Runbeck said she has several questions for Mr. Vasquez.

Tabled

G. Charles Korzun

Mr. Korzun was present. Mr. Michael Bollier, owner of Critter Busters, was also present. Mr. Bollier said he has known Mr. Korzun for many years and understands that Mr. Korzun has had a checkered past; however, he knows that Mr. Korzun is now on the right path and wants to do the right thing. He added that Mr. Korzun lives with him, and his 10-year-old daughter and his mother, and added that he has every bit of confidence in Mr. Korzun.

Mr. Korzun said he has been working for Critter Busters digging trenches and working with weeds.

MOTION: *To accept by Commissioner Commissioner Black.
Seconded by Commissioner O’Neal.*

Commissioner Burns expressed concern about Mr. Korzun’s problematic history and if the Commission licenses him for weed control, he could later broaden his license to general pest and Mr. Korzun would be going into consumer’s homes. Commissioner Runbeck expressed being conflicted about how to rule on this application.

Mr. Korzun said he has paid all restitution and has been working since he was released from prison. Mr. Korzun said he has a stable living arrangement, living with Mr. Bollier.

Commissioner Black asked if the Commission can just deny any future applications to broaden. Mr. Gervase did not believe so. Commissioner Runbeck added that she would like to see an agreement where there are conditions. Mr. Korzun said he has been working for the company for four years and would like to obtain an applicator license to be able to advance in life.

Commissioner Burns also stated that this is a difficult decision and does not like to make decisions on a man’s livelihood; however, he also has to protect the public. In response to the Commission’s question about whether the Commission has

encountered a similar situation in the past, Ms. Magdalena Vazquez mentioned a situation where the Commission offered the applicant a consent agreement that required him to notify the Commission before applying to broaden his license.

Previous Motion and Second withdrawn.

MOTION: *To offer a consent agreement that Mr. Korzun will only be licensed in the “B3” and “B5” categories after passing the required exams, that after receiving his license, it will be on probation for three years during which he must notify the Commission of this consent agreement if he applies to broaden his license, and must appear before the Commission to again consider his background before approving him to broaden his license, by Commissioner Black. Seconded by Commissioner O’Neal.*

VOTE: *5 – 0 – 1 Motion carried. (Commissioner Baker abstained)*

XVII. Commission Updates

A. Commission Training

Tabled until all Commissioners are present.

B. Legal Advice

Tabled to provide the SPCC’s new Assistant Attorney General the opportunity to prepare.

C. Complaint Status Log

Provided to the Commissioners. There where no questions.

D. Computer Based Testing “CBT” Status and Statistics

Provided to the Commissioners. There where no questions.

E. Expenditure Report

Provided to the Commissioners. There where no questions.

F. Case Status Report

None

G. Repeal of Substantive Policy Statements that are no longer necessary in light of the new rules.

2005-001 – Issuing and renewing temporary QP licenses – Now addressed in rules A.A.C. R4-29-101, -208 and –209.

2004-003 – creating horizontal barriers under abutting slabs that are not under roof – now addressed in rule A.A.C. R4-29-305.

2004-001 – allowance to treating to depth to footer beyond 4” – now addressed in rule A.A.C. R4-29-305

2003-001 – 2” lettering – now addressed in rule A.A.C. R4-29-605

MOTION: *To repeal the substantive policy statements by Commissioner O’Neal.
Seconded by Commissioner Baker.*

VOTE: *6 - 0 Motion carried.*

H. Sexton Pest Control/Paul K. Sexton – Inquiry 2007-047: Commission’s consideration of Sexton’s objection to record’s request to review treatment/inspection related to documents.

(Handled at 9:05 a.m. per Commissioner Burns’ request).

Commissioner Runbeck gave a brief history and stated that the only issue before the Commission was the Commission’s records request and Sexton’s objection that they needed more specificity and clarification. Commissioner Runbeck asked Ms. Gervase to give an overview and address the scope of the request.

Ms. Gervase said the Commission opened an Inquiry and on April 10 sent a written request to review records to the licensee. The request was for the licensee to have the records ready for review on April 24 at 9:00 A.M. and the records were documents pertaining to termite treatments, Wood Destroying Insect Inspection Reports, copies of TARFs, chemical purchase records and a list of chemical suppliers from January 1, 2006 thru April 1, 2007. When the Investigators arrived at the licensee’s office, the records review was refused. Later that day or the next day, the Commission received a written objection to the records request. The Commission then modified it to eliminate the list of suppliers and require only an inventory of purchases, but not the actual chemical purchase records. The review was rescheduled to May 1st, but when Inspectors showed up on May 1st, they were denied access. Sexton handed them a letter offering the Inspectors to review a random sample of 160 records or allowing them to review records for 2 hours one day 2 hours the next day and so on. Inspectors then left. The next day the Commission received a request for the matter to go before the Commission; however, before responding, the Commission was served on May 3 with an Order to appear at a Temporary Restraining Order (TRO) to Show Cause hearing.

The hearing was held on May 4, 2007. Judge Dunevant issued a TRO until May 14 to allow the Commission to decide today how to handle the records request, and quashed the subpoenas because they were issued under an "Inquiry" rather than a "Complaint". Ms. Gervase said the Commission issued subpoenas to the chemical suppliers via Certified Return Receipt mail according to the Commission's rule. The subpoenas were issued under the "Inquiry" investigation. The Commission hadn't filed a complaint because the law change in September 2003, allowed the Commission to handle investigations as inquiries rather than complaints. It has been the Commission's practice to open investigations as Inquiries rather than Complaints while determining the merits of allegations so that meritless complaints aren't on a company's record. However, the way the statute is worded, as far as issuing subpoenas, the Commission would have to open it as a complaint in order to re-issue the subpoenas. Ms. Gervase said the subpoena issue was not before the commission. She said that as far as the records request was concerned, the judge said that if the Commission files a records request and the licensee objects to the scope of the records request, according to rule R4-29-609, if the Commission and licensee cannot work it out, then the issue needs to go before the Commission for the Commission to decide under that rule. Ms. Gervase said there were two bases for an objection under the rule and if the Commissioners need legal advice, they should ask the Assistant Attorney General. Ms. Gervase said the records request was for 15 months of termite treatment related records.

Commissioner Runbeck asked whether the current request was asking Sexton to allow them to inspect was termite treatment records and inventory of chemical purchases from January 2006 through April 1, 2007. Ms. Gervase said yes, and the Wood Destroying Insect Inspection reports and TARFs that were filed. 15-month's worth of documents that are required to be maintained for five years.

Attorney Scott Richardson was present representing Sexton Pest Control. Mr. Richardson thanked Commissioner Burns for allowing him to be heard prior to hearing other cases. Mr. Richardson indicated that he wanted to correct a couple of things regarding the procedural history. He said it was correct that Sexton received a records request on April 10th, but his client did not know about the records request until the 24th because it was buried in an inbox. Mr. Richardson said there was no excuse; however, those things happen. On that same day, when the Inspectors showed up to the office was the same day they filed the first objection. Mr. Richardson said his client asked for more specificity under rule R4-29-609 for a number of other things, and also advised the Commission that what was being requested by the Commission may involve some protected trade secrets. Mr. Richardson said that issue did not get resolved and there was documentation that went back and forth. Sexton then received a notice notifying them that Commission Inspector Pugh would be back to visit Sexton's office on May 1, 2007. When the Inspector arrived at the office on May 1, 2007, Mr. Richardson happened to be at Sextons office. At that time he said to Inspector Pugh that he had a right under the Rule R4-29-609 to object to whether the records request has specificity, so in order to know if it has specificity it has to specific to something, which is to be a violation. He then said he asked Inspector Pugh what was the violation that the Commission was alleging.

Commissioner Runbeck asked Mr. Richardson if what he was saying was that the Commission did not have the authority to go in and review records absent a violation. Mr. Richardson said that what he was saying was that he had a right to object to a request if it lacks specificity and without a violation it lacks specificity. Commissioner Runbeck said that was not answering her question. Mr. Richardson said he believed the Commission did not have that authority. Mr. Richardson said he told Inspector Pugh he needed to tell them what the violation was. Mr. Richardson said he was met with silence. Commissioner Runbeck said that it may have been because there hadn't been a violation found, as they are investigating.

Mr. Richardson said he assumed they were investigating just because and said he did not think they could do that. Mr. Richardson said that it was at that point that two things happened, even though the Commission was willing to back off on the purchase records they still wanted the inventory records, the Commission issued illegal subpoenas to chemical suppliers. He told the Commission they would not give them the 15 months of records until the Commission told them what the violation was so that he could file an objection as to specificity. The lawsuit seeks a declaratory judgment. They asked for a temporary restraining order and the hearing was held on May 4, 2007. Mr. Richardson said the first issue the court addressed was whether the Commission could issue the subpoenas.

Commissioner Runbeck said that all of that had already been resolved.

Mr. Richardson said yes, it had all been resolved and he would be happy to provide a copy of the transcript. Mr. Richardson said that with respect to the second issue there was a lot of discussion. Mr. Richardson said that he sent an electronic version of the transcript of the hearing to Ms. Gervase a couple of days before the Commission meeting and asked her to share it with the Commission. He said he had never been advised the issue was on the agenda and he happened to see it on the website. Mr. Richardson asked the Commissioners if they received a copy of the transcript. Commissioner Runbeck said she did receive the e-mail, however, she was not able to open it. Mr. Richardson said he had copies of the transcripts and provided them to the Commissioners.

Commissioner Burns asked if Ms. Gervase e-mailed it to everyone. Ms. Gervase said that Mr. Richardson sent the e-mail to the Assistant Attorney General and copied her, she then e-mailed it to the Commission Chairperson for direction. Ms. Gervase added that the scope of the Commission's review is the records request and the objection to the records request, per the judge's ruling. Commissioner Runbeck said the Judge has already ruled on the subpoena issue. The Commission's discussion is limited to Sexton's objections and request for specificity and clarification.

Commissioner Runbeck asked whether the request for specificity and clarification goes to what records are being requested and asked if Mr. Richardson was clear on what

records were requested, or if the objection was that the Commission has to provide him with the information as to why they want to review the records.

Mr. Richardson said he did not know if he had an obligation to provide records unless he knows what the violation is. He said the reason why he felt the transcript was important is because of the position the agency took in open court when the same issues were being raised. The first of the issues was that he said to the Court, if the Commission would simply tell him what the violation is they would be able to work it out.

Mr. Richardson read from part of the transcript, saying that the Assistant Attorney General stated that, "this is a records request, there doesn't have to be a violation, you can't determine if there is a violation unless you actually get a chance to conduct your investigations and look at the records and determine what you have. The staff can conduct their own investigations at any time and that is what they do. Now I don't know what these records are going to reveal, one can only suspect their refusal to turn them over may lead someone to believe that there may be public protection issues out there."

Mr. Richardson said that is guilty until proven innocent, and the Court said staff members can't decide whether an objection is proper and granted the TRO so the Commission can decide. Commissioner Runbeck said that was why the Commission was hearing this today.

Mr. Richardson referenced a case where a party may resist a subpoena if it is not within the agencies scope of authority, is vague, seeks irrelevant information, or used for an improper purpose such as to harass or put pressure on the investigated party. He wants some showing that there is reasonable cause to believe that there has been a violation.

Commissioner Runbeck asked Ms. Verstegen or Ms. Gervase if there was a statute or rule that allows the commission to review without a violation or allegation of a violation, if there is something that says the commission can just go in and review records now and then if someone is licensed.

Ms. Gervase said that under the powers and duties it says that the Commission has the authority, after providing at least 24 hours notice, to request specific records to the business licensee. Upon written request by the Commission the Licensee shall make the records required under this section available for review by the Commission within 24 hours or by a later date specified by the Commission - under R4-29-505(B) and R4-29-609(E). According to the Rule R4-29-609(H) lack of specificity is not tied to knowing the purposes of the inspection or investigation, it's tied to whether a reasonable person would understand what is being requested.

Commissioner Black asked if the statute allows the Commission to request specific records, any and all for the last 15 months, is pretty broad. Commissioner Black said that is the issue that the Commission is being asked to consider, is whether the request is specific enough to follow the rule.

Ms. Gervase said that if the Commission limits the request to provide the documents for specific addresses, the Commission will not know if the business is complying with all of the things they need to comply with. The Commission needs to see what termite actions they did to see for example if they filed the TARFs that were supposed to be filed, the Commission only knows specific address based on the TARFs the companies file and the Commission wouldn't know if TARFs were being filed on termite actions that the Commission does not know about.

Commissioner Black asked if the issue wasn't just with regard to Pre-treatments.

Ms. Gervase said it was for Pre-Treatments, Post treatments, Wood Destroying Insect Inspection Reports. All the actions that would require a TARF to be filed.

Mr. Richardson said if it was a TARF audit and what they want to do is tie TARFs to records that was fine. He said that when the Commission wants to tie TARFs to records, they do not need purchase records, list of suppliers all of the things that they are asking for. The Court still has jurisdiction over the matter. If the issue is going to be restricted on R4-29-609 and other things, it seems to him that he was being shut out arguing the issues then everything would end up before the court either way. He is bringing all of the issues before the Commission so that the Commission has the full picture.

Commissioner Runbeck asked Mr. Richardson what he felt he was being shut out of arguing. Mr. Richardson said the constitutional issues and the issues of the case he was citing. Commissioner Runbeck said she felt that was going pretty far before the Commission. Mr. Richardson said he would be happy to go before the court. Commissioner Runbeck offered Mr. Richardson to argue all of the issues, as they would want to hear them.

Mr. Richardson said that in this case, there are two fundamental questions. One is, can someone come in and ask for 15 or 20 thousand pages of records under any and all without any stated violation. Secondly, can the Commission do this without some reasonable probable cause. Mr. Richardson said the Commission staff has overstepped their authority in this case by taking on the decision of doing thinking and decision making that he felt the Commission staff do not have. He continued saying that the staff did this without stated violations and they do not know what the violation is 'til they obtain the records and because Sexton won't give them, then they must be guilty. This is not enforcement, this is guilty until proven innocent.

Commissioner Runbeck asked Mr. Richardson if it was his assertion that R4-29-505B carried with it an unwritten requirement that there be a complaint or violation prior to requesting records. Mr. Richardson said yes, because when they are that broad and you've got to ask about specificity because it is tied to R4-29-609 and because they never made a request to the Qualifying Party, the request went to the Business Licensee in this case.

Commissioner Runbeck said that if there was a procedural problem, that could be rectified and asked Mr. Richardson at what point the request to review is not broad enough to require a violation or complaint and asked if the Commission can go in and ask for 6 months worth of records without having any violation being alleged. Mr. Richardson said no. Specificity is a basis for an objection. Specific to what's the violation.

Commissioner Runbeck said reading R4-29-609, her understanding of specificity would be what specific records is the Commission asking for and not why the Commission is asking for the records. Mr. Richardson said that is the reason why he did not want to be limited to only arguing R4-29-609 as the Commission would like him to be, and added that it is a two fold argument.

Commissioner Burns said that regarding R4-29-505B, he spent a lot of hours involved in rule writing and said that he never believed it was for the Commission to ask for every record in the company. Ms. Gervase said that the rule was simply a restatement of the rule that has been in place since at least 1992. Commissioner Burns said that he appreciated Ms. Gervase's restatement however, he believes it was designed so that the Commission could say, we need 1234 Elm Street, could you give us all the records on that. He said in that situation the Commission has a right to obtain that but, not to ask for all records.

Commissioner O'Neal said in his background, they had to have a pattern of violations and needed cause to inspect. Commissioner O'Neal asked about the process.

Ms. Gervase said administrative law differs from civil and criminal law. The Attorney General's office advises agencies to be proactive rather than reactive to provide meaningful protection to the public. This prevents problems from occurring in the first place, identifies problems in the early stages before damages occur and actively seeks out violations of the law. These goals may be attained by: instituting education programs, monitoring business trends, soliciting input from regulated industries, and so forth. As a general rule the legislature has provided each administrative agency with the authority to conduct investigations to determine whether someone has violated laws administered by the agency. An agency may require that records or reports be maintained or filed with the agency if authorized to do so by statute in a properly promulgated rule. Such a requirement can be a valuable tool for ascertaining compliance with agencies or agency laws.

Ms. Gervase then said that according to our powers and duties statutes, the agency has the authority to investigate violations, has the authority to investigate alleged violations and may request records with at least 24 hours notice. The agency has done this since at least the 1996 sunset audit. The Auditor General told the Commission that they needed to conduct more audits specifically in the TARF area. Ms. Gervase said the audits have been done for a number of years and added that the laws and rules require companies to maintain records certain records and for certain periods of time, some for three years and some for five years. The whole point of requiring those licensees or

companies to maintain those records is so that they can be reviewed to determine compliance with the law. The commission does not know if there is a violation until they look. With most of the TARF audits the Commission may request three or five years records and a lot of those are small companies. Ms. Gervase said the Commission does not want to overwhelm themselves or the companies, the bigger the company the more the records, therefore, the Commission will scale back on the request time period. The cycle of termite work is pretreat, final grade to be done within 12 months, TARF to be filed thirty days after the final grade. Ms. Gervase said that in order to do that whole cycle you would be looking at more than a years' worth of records. Looking at the TARF part of it, the Commission only knows what TARFs have been filed if they have been filed. The Commission then relies on the company's records. Ms. Gervase said there have been many times where the Commission has seen numerous cases brought before them where the TARFs aren't reported. The Commission then has said that it is not fair and that those companies who are required to file TARFs should be doing it because everyone else is complying. Ms. Gervase said the Commission tries to conduct the audits as least intrusively as possible by calmly and professionally reviewing records and cross-referencing them with what the Commission shows has been filed to verify compliance with that aspect, rather than ask for copies up front. Ms. Gervase said that with respect to the chemical purchases, five months ago the Commission had a case before them where the Qualifying Party, Applicator and Business Licenses were revoked because the company did not purchase enough chemicals to do several hundred termite pretreatments. Ms. Gervase said she understands the sensitivity and level of concern when they ask about chemical purchases.

Commissioner O'Neal said that those are all things that would wave a red flag that says there might be a problem and that someone is doing something wrong. He continued by saying that the Commission chose the company arbitrarily.

Commissioner Runbeck said what Ms. Gervase just described is that there was no red flag being waved until after they did the TARF audit. They went in and did the TARF audit and found that in fact there were things done that were not reported.

Ms. Gervase said that the Commission was actually doing a routine office inspection that some questions arose then they requested records, looked at the Commission database, subpoenaed records from the suppliers, the supplier list that Mr. Richardson provided on behalf of his client. Ms. Gervase said that is how more was found and added that it was significant. Ms. Gervase said the Commission hope that is not the case when they conduct an audit or investigation.

Commissioner Black said when there's a TARF audit, the Commission does not know if they are violating the rule. If the Commission asks a company for all the records for the last month and the company says they do not have them or they did not do any. He asked how the Commission checks to see if that is true or not.

Ms. Gervase said that they rely on what the company has, and other records. If the company has made and maintained records and if the records show a termite action

that they are supposed to TARP and the Commission does not have that TARP then that may show that they did not file the TARP. However, if the situation is as Commissioner Black described where the company does not provide the records, then Commissioner Black is right, the Commission may not know of the violation unless there is an independent source, such as builders contacting the Commission or if there is a pretreatment tag at a site and there is no TARP filed for that treatment. Ms. Gervase said the Commission receives calls from manufacturers, suppliers, builders, homeowners, other pest licensed management companies, so the information comes from a variety of sources.

Commissioner Black asked what would have happened if the Commission would have told the company that they had the records request and that they have sent it, and if the company would have told the Commission that they were not allowed to enter, he asked what the Commission would do. Ms. Gervase said the Commission inspectors left. Commissioner Black asked what happened next. Ms. Gervase said the Commission would then file a complaint and take it before the Commissioners. Commissioner Black said that the Commission would file a complaint and said that the Commission was jumping the gun. Mr. Richardson said the new complaint would be for a failure to respond to the records request not for the violations the Commission was trying to find in records that they did not know existed. Commissioner Black said he was separating the two and added that he would say alleged violations.

Ms. Gervase said there's no basis to go into executive session to explain the allegations and didn't feel it appropriate to do in a public meeting without having been able to review records to confirm. Commissioner Runbeck said that they may want to hear the allegations to determine if there is specificity. Ms. Gervase said she would not want to disclose allegations until a review to see if the allegations are true. From a public protection viewpoint, to disclose the information, thwarts the investigative process.

Commissioner Black said that the disconnect is that there is an inquiry process and there is a complaint process. He said that it seems as if the Commission starts an inquiry process and if the company does not want to cooperate then the Commission starts the complaint process in which they have due process at which time they are allowed to go through discovery and hearing. Ms. Gervase said they can jump right to the complaint process but, they do not want to have to open everything as a complaint.

Commissioner Runbeck said that it seemed to her that what the Commission is boiling down to is whether or not the Commission has the authority to do a records review without defining a potential violation. Commissioner Runbeck asked Mr. Richardson if he needed more specificity regarding what it is the Commission is requesting as far as what records come out and get put in front of them. Mr. Richardson said no and added that he understood the word all.

Commissioner Runbeck said that Mr. Richardson's point was that he thinks the Commission has to tell him why it is that they have to see the records. Mr. Richardson

said so then he can go before the commission and say that it is not specific to the violation.

Commissioner Runbeck said the Commission cannot address the next objection until they address the first objection because if the Commission has not told him why it is that they are asking for the records then he does not have anything to go before the Commission and say it is wrong. Commissioner Runbeck said that the Commission's job is to decide whether to say nothing, this is just a routine records review, and you need to produce them. Or, if the Commission has to tell him what the investigation is about, he would be back before the Commission telling them which documents he feels he has to produce. Mr. Richardson agreed so that he can determine whether the scope of the request is too broad.

Commissioner Runbeck asked if TARP audits were allowed without alleging a violation. Mr. Richardson said a TARP is a public record filed with the SPCC. Commissioner Runbeck said that didn't answer her question and asked if there is nothing in the rules and statutes that allows the Commission to go in without an alleged violation and demand to review records, is a TARP audit, a due process violation. Mr. Richardson said he would be happy to research that for the Commission and said that is not what happened in this case because they want more than a TARP audit. They are comparing one record that is filed as a matter of public record with the Commission, which is a TARP, with a treatment record that matches up with it.

Commissioner Runbeck said that the Commission is still demanding they produce all the treatment records. Mr. Richardson said he did not think there was a problem with that. Commissioner Runbeck said she did not see the difference between that and asking to see the treatment records. Mr. Richardson said that what they are doing is beyond the TARP violation. Commissioner Runbeck asked if his position is that TARP audits are not a problem. Mr. Richardson said he had not researched it.

Commissioner Runbeck said that in light of the fact that Mr. Richardson was asking the Commission to make decisions on constitutional issues she would like to get some legal advice on that and suggested the Commissioners go into executive session very briefly and not for the purpose of discussing what the alleged violations are. She said that would not be appropriate and added the Commission is limited to legal advice and whether or not the Commission has the power to review records without there being an alleged violation and without revealing it.

MOTION: To enter into Executive Session by
Commissioner Black.
Seconded by Commissioner Baker.

VOTE: 5 – 1 Motion carried (Commissioner Burns
opposed).

(Executive Session from 9:57 A.M. to 10:23 A.M.)

MOTION:

Vacate the Records request and that Sexton Pest Control and Commission staff have a meeting to disclose the allegations and that staff draft a new records request specific to those allegations and the documents pertaining to those allegations. If the Company does not agree to with the new records request, then the Commission may file a complaint on the substantive allegations by Commissioner Burns.

Seconded by Commissioner O'Neal.

VOTE:

5 – 1 Motion carried (Commissioner Runbeck opposed).

Discussion: Commissioner Black asked if the Commission can add to the motion a clear statement that the Commission does not believe that there needs to be an allegation in order to make a records request. Commissioner Runbeck said that her feeling is that this is a motion specific to this case and it would certainly not apply across the board.

Commissioner Black said that he felt there was a legal question and a policy question. The legal question as to whether the Commission has that authority and the policy question whether the Commission wants to wield that authority. Commissioner Burns said that his motion strictly addressed this case and said he the Commission can have a policy discussion on what records request should consist of.

Commissioner Runbeck asked Ms. Versteegen if she agreed that the motion was specific to this case and not intended to be any type of policy statement. Ms. Versteegen said yes, and asked if the Commission had a specific time the Commission expected this to occur. Commissioner Runbeck said within the next month.

Commissioner Burns said that he would hope that they would get together in a reasonable timeframe to take care of it. He said he assumes that they have been willing to produce things and if they choose not to a complaint will have to be followed and they will be before the Commission the following month.

Commissioner Black said that he would like to see that if they do not come to an agreement then they can go through the formal complaint process. Commissioner Burns asked if he needed to amend his motion to address that. Commissioner Black said his understanding of the motion was the Commission go and meet with the Company and tell them what the allegations are, issue the new records request, then if they do not comply then the Commission files a substantive allegation on what they just told them. Basically, tell them we thought you violated rule this and this. Commissioner Black said he did not feel that the complaint should be that they violated the rule that

they have to comply with the records request. If they do not comply then the Commission goes through the normal complaint process. Commissioner Runbeck said that Commissioner Burns just told her that was his intended motion.

Commissioner Burns said he was pretty comfortable with the parties in that they would get it taken care of immediately.

Ms. Gervase said she still wanted to clarify that if the Company does not comply with the new records request after their meeting, the Commission then files a complaint on the substantive allegations, then the Commission investigates those allegations pursuant to the complaint and then they would have to file records request and subpoenas to get the records to determine whether the allegations have merit or don't have merit.

Commissioner Runbeck said the Commission cannot put in to the motion every potential thing that could happen. She said the Motion should be limited to the current records request will be dropped, the Commission is instructing the company to get together with the Commission so that the Commission can reveal any alleged violations then structure a new records request and if they cannot agree on the new records request, then the Commission shall file a complaint.

Commissioner Burns said that in that process he was not giving staff carte blanche to issue subpoenas, he said he was not an attorney and asked for help. He said from his understanding a TRO says the Commission cannot subpoena those records. Ms. Gervase said that is as an inquiry not as a complaint. Commissioner Black said that if that is the case, Ms. Gervase said they would be back before the Commission, but they would not because they would be back before a court because they issued the subpoena.

Mr. Richardson said the records request originally sent to Sexton would be set aside or quashed, secondly they are being ordered to get together so that the Commission can provide them with the specific allegations. He said that much everyone agrees on. He continued by saying that Sexton then has the option to assert their rights under 609 to the new records request and Commission staff have the right to file a complaint. He said he did not think they needed a motion once it gets to that point.

Commissioner Runbeck agreed and said the motion needed to be as originally stated by Commissioner Burns to set it aside, get together, tell them what the allegations are and make a new records request.

Commissioner Baker said Ms. Gervase did not have enough direction. Ms. Gervase said that staff operated within the bounds of the law except on the technically that they opened it as an inquiry instead of a complaint, and added that they may be back every step of the way before the Commissioners. Commissioner Runbeck said that there was no problem with that. She said that telling them what the alleged violations are takes care of a lot of Mr. Richardson's issues.

Commissioner Black asked Ms. Gervase if she saw a problem with having to disclose the allegations. Ms. Gervase said that there was no problem and said that she was prepared to disclose them during the public meeting and file a complaint depending on the Commissioners' decision. Commissioner Black asked Ms. Gervase if she had a problem telling them in a private meeting. Ms. Gervase said no, however, they will just be back with a complaint instead of an inquiry, not in terms of fully investigating the complaint but by being back on the procedural steps of investigating the complaint.

Commissioner Burns said he was OK with that. Commissioner Burns asked Commissioner Black if he was OK with that. Commissioner Black said he had a fundamental problem with investigating someone without filing a complaint that states what he or she is being investigated for.

Commissioner Runbeck said that she is voting against the motion because she felt the rules did give Commission the authority to do random records reviews. Everyone who has the privilege of having a license should be happy to know that the Commission is doing random records review to know that their competitors are doing what they are supposed to do to level the playing field. She feels Sexton should have complied with the request.

Commissioner Burns said he felt she was correct in the fact that the Commission has the right to do random records request, but believes this is beyond random and felt that staff is undirected by the Commission as to the scope of the request. Commissioner Black said that this is not a random records request; it was specific to an allegation that had not been disclosed. Commissioner Runbeck said that under the inquiry there was no requirement to sit and do that.

XVIII. Approval of Minutes and Continuing Education Programs

A. April 13, 2007 (regular session) Minutes

MOTION: *To approve the April 13, 2007 Minutes by Commissioner Baker.
Seconded by Commissioner O'Neal.*

VOTE: *5 – 0 - 1 Motion carried. (Commissioner Burns abstained).*

B. Continuing Education Program Applicants

The list of CEU Program Applicants was provided to the Commission. There were no questions.

MOTION: *To approve the CE Program Applicants by Commissioner Black.*

Seconded by Commissioner DeVere.

VOTE:

5 – 0 - 1 Motion carried. (Commissioner Baker recused due to conflict of interest).

XIX. Future meetings

Per tentative schedule.

XX. Adjournment

MOTION:

*To Adjourn by Commissioner DeVere.
Seconded by Commissioner Baker.*

VOTE:

6 – 0 Motion carried.

Meeting ended: 12:15 A.M.