ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 6, 2009

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

OR2009-14750A

Dear Mr. Fenner:

This office issued Open Records Letter No. 2009-14750 (2009) on October 19, 2009. Since that date, you have provided new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on October 19, 2009. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 366822.

The Texas Racing Commission (the "commission") received a request for communications relating to Longhorn Downs and Austin Jockey Club ("AJC") from November 1, 2000, to the present.[1] You state the commission has released some responsive information to the requestor. You assert that some of the submitted information is not subject to the Act. Additionally, you claim the remaining submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.136 of the Government Code. You also inform us that release of the requested information may implicate the proprietary interests of the following third parties: AJC; Dallas City Limits Properties, L.P. ("Dallas City Limits"); Hagn & Timmerman, Ltd.; and Tack Development, Ltd. Accordingly, you have notified these third parties of the request and of their right to submit arguments to this

[1]The commission states, and provides documentation showing, that the requestor narrowed his request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

office. *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 explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.[2] We have also received and considered comments submitted by the Texas Comptroller (the "comptroller"). *See* Gov't Code § 552.304 (providing that a person may submit comments stating why information should or should not be released).

Initially, we note the requestor has agreed to the redaction of e-mail addresses, social security numbers and Texas driver's license numbers. Therefore, any of this information within the submitted documents is not responsive to the present request for information. Our ruling does not address this non-responsive information, and the commission need not release this information in response to this request.

We now address your assertion that Exhibit I is not subject to the Act. Texas Revised Civil Statutes Article 179e (the "The Texas Racing Act") 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:
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> . . .
>
> (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

[2]We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

> subsection shall be required of proposed totalisator firms, concessionaires, and managers and management firms[.]
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> . . .
>
> (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).[3]

Id. § 6.03(a)(11), (b). You state that Exhibit I consists of the totalisator contract, concession contract, and management contract submitted by Dallas City Limits with its license application. Based on your representations and our review of the information at issue, we agree that Exhibit I consists of documents submitted to the commission under section 6.03(b) of the Texas Racing Act by an applicant; therefore, Exhibit I is not subject to the Act.[4] *See* V.T.C.S. art. 179e, § 6.03(b)

Next, we note the remaining submitted information includes a transcript of an open meeting before the commission. Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, expressly provides that the "minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." Gov't Code § 551.022. Information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under chapter 552 of the Government Code. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Therefore, the commission may not withhold the submitted transcript under the claimed exceptions and must release this information to the requestor.

We next note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any arguments from the interested third parties for withholding any of the information at issue.

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[3]Article 6252-17a is the predecessor to the Act.

[4]As our ruling is dispositive, we do not address your remaining arguments for exception of this information.

Therefore, we have no basis to conclude that the release of the information at issue would harm the proprietary interests of these third parties. *See id.* § 552.110(b); Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). Accordingly, the commission may not withhold any of the submitted information on the basis of any proprietary interest these third parties may have in the information.

Some of the remaining submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part the following:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]
> >
> > . . .
> >
> > (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;
> >
> > . . .
> >
> > (17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (17). Exhibit H includes completed reports made for the commission that are subject to section 552.022(a)(1), Exhibit L includes checks issued to the commission, and Exhibit K contains court-filed documents that are subject to section 552.022(a)(17). Although you seek to withhold some of this information under sections 552.103 and 552.111 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). As such, sections 552.103 and 552.111 are not other law that makes information confidential for the purposes of section 552.022. Therefore, none of the information subject to section 552.022

may be withheld under section 552.103 or section 552.111. You also raise sections 552.101 and 552.136 of the Government Code for some of this information. Accordingly, because sections 552.101 and 552.136 are other law that makes information confidential for the purposes of section 552.022, we will determine whether the commission must withhold any of the information subject to section 552.022 under section 552.101 or section 552.136. We also will consider all of your exceptions to disclosure of the remaining information. As you raise no other exceptions to disclosure of the court-filed documents in Exhibit K, this information must be released to the requestor.

We now address your argument under section 552.103 of the Government Code for the remaining information that is not subject to section 552.022, because section 552.103 is the most encompassing exception you claim. Section 552.103 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.
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> . . .
>
> (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 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *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).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include,

for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. Open Records Decision No. 331 (1982).

You state that an individual called the commission and stated that he was going to sue the commission's general counsel regarding the commission's actions in the transfer of ownership of the AJC license. We note, however, that a threat to sue without any further action is not sufficient to establish reasonably anticipated litigation. *See id.* In this instance, you have not informed us that this individual has taken any other concrete steps toward the initiation of litigation. Consequently, we find you have not established that the commission reasonably anticipated litigation when it received the request for information. Accordingly, the commission may not withhold any of the information at issue under section 552.103 of the Government Code.

Next, you raise section 552.101 of the Government Code for portions of the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 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 this 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 investigative files of the commission confidential. *See* Open Records Decision Nos. 567 (1990), 548 (1990). You state that Exhibit H contains an administrative report from the Texas Department of Public Safety ("DPS") which is part of the commission's investigatory files. We note the remaining information in Exhibit H also consists of administrative reports prepared by DPS. You also state that Exhibit K-1 consists of handwritten notes from meetings between commission staff and DPS staff, which are also part of the commission's investigatory files. This office determined in Open Records Decision No. 548 that the confidentiality afforded by section 2.15 for investigative records remains in force even after an investigative file has been used in a commission hearing. *See* ORD 548. (construing statutory predecessors to

sections 5.04 and 2.15 of article 179e, Vernon's Civil Statutes).[5] You inform us that the subject of the investigation has not consented to the release of the records at issue and that the commission has not been presented with a court order for the information. Based on your representations and our review, we find that the remaining information in Exhibit H and Exhibit K-1 is confidential pursuant to section 552.101 of the Government Code in conjunction with section 2.15 of article 179e of Vernon's Civil Statutes.

Next, you claim Exhibit J is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the

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[5] The statutory predecessor to section 2.15 read as follows: "All records of the commission that are not made confidential by other law are open to inspection by the public during regular office hours. The contents of the investigatory files of the commission, however, are not public records and are confidential except in a criminal proceeding or in a hearing conducted by the commission." *See* Texas Racing Act, 69th 2d C.S., ch. 19, § 1, 1986 Tex. Gen. Laws 48, 53, *amended by* Act of May 18, 1991, 72d. Leg. R.S., ch. 386, § 5, 1991 Tex. Gen. Laws 1444,1446. We will cite to the current version of section 2.15 as the 1991amendment does not affect our analysis.

privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information in Exhibit J consists of confidential communications between commission employees, members of the commission, and commission attorneys. You state these communications were made for the purpose of facilitating the rendition of professional legal services. You also state that the confidentiality of these communications has been maintained. We therefore conclude that section 552.107 is applicable to Exhibit J. Thus, the commission may withhold Exhibit J under section 552.107 of the Government Code.

The comptroller also argues that a portion of the submitted information is excepted from disclosure under section 552.107. The comptroller states that the e-mails and handwritten notes it has identified consist of confidential communications between the comptroller, in the comptroller's capacity as an *ex officio* voting member of the commission, and the attorneys for the comptroller. The comptroller states these communications were made between privileged parties for the purpose of facilitating the rendition of professional legal services to the comptroller regarding commission issues. The comptroller also states that the confidentiality of these communications has been maintained. Accordingly, we conclude that the commission also may the information we have marked under section 552.107 of the Government Code.[6]

Next, we address your argument under section 552.111 of the Government Code for Exhibit F and the remaining information in Exhibit K that is not subject to section 552.022. Section 552.111 of the Government Code, which excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental

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[6]As our ruling on this issue is dispositive, we do not address the comptroller's remaining argument against disclosure of this information.

body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. ORD 615 at 4-5.

You assert that Exhibit F and the remaining information in Exhibit K that is not subject to section 552.022 should be withheld under section 552.111 and the deliberative process privilege. Upon review, we conclude that most of the information in Exhibit F is factual in nature. You do not explain how such information constitutes the advice, opinion, or recommendation of the commission's employees on a policy matter. Additionally, we note the information at issue in Exhibit K pertains to a variety of issues. You make no representations explaining how any of this information relates to commission policymaking or reflects the policymaking process of the commission. Thus, we find that you have failed to demonstrate the applicability of the deliberative process privilege to the information, and no portion of the information in Exhibits F or K may be withheld under section 552.111 of the Government Code.

Next, you assert the information you have marked in Exhibit L is excepted from disclosure under section 552.136 of the Government Code, which states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). The commission must withhold the bank account numbers and routing numbers we have marked under section 552.136 of the Government Code. We note, however, the remaining information you marked under section 552.136 consists of check numbers. Check numbers do not constitute access device numbers for purposes of section 552.136. Accordingly, none of the remaining information may be withheld under section 552.136 of the Government Code.

Finally, we note some of the remaining information may be excepted from disclosure under section 552.117 of the Government Code.[7] Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code.

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[7]The Office of the Attorney General will raise a mandatory exception like section 552.117 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

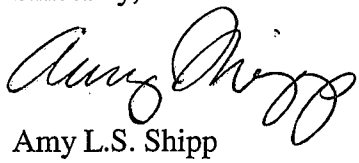
See id. §§ 552.117(a)(1), .024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The commission may only withhold information under section 552.117(a)(1) on behalf of a former or current official or employee who has made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. Thus, if the official at issue timely elected to keep his personal information confidential under section 552.024, the commission must withhold the information we have marked pursuant to section 552.117(a)(1). If the official at issue did not make a timely request for confidentiality, the information at issue must be released.

In summary, Exhibit I is not subject to the Act. The commission must release the submitted transcript of an open meeting before the commission in accordance with the Open Meetings Act. The commission must withhold the remaining information in Exhibit H and Exhibit K-1 pursuant to section 552.101 of the Government Code in conjunction with section 2.15 of article 179e of Vernon's Civil Statutes. The commission may withhold Exhibit J and the information we have marked under section 552.107 of the Government Code. The commission must withhold the information we have marked in Exhibit L pursuant to section 552.136 of the Government Code. If the official at issue timely elected to keep his personal information confidential under section 552.024, the commission must withhold the information we have marked pursuant to section 552.117(a)(1). The remaining information must be released to the requestor.

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.

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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/sdk

Ref: ID# 366822

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

c: Mr. Bryan Brown
Vice President
Austin Jockey Club, Ltd.
One Retama Parkway
Selma, Texas 78154
(w/o enclosures)

Mr. Timothy Timmerman
President
Hagn & Timmerman, Ltd. & Tack Development, Ltd.
4903 Whitehorn Court
Austin, Texas 78746
(w/o enclosures)

Mr. David Alameel
Manager
Dallas City Limits Properties, L.P.
3010 LBJ Freeway, Suite 200
Dallas, Texas 75234
(w/o enclosures)

Ms. Ruth H. Soucy
Deputy General Counsel for Open Records
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528
(w/o enclosures)