



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 10, 2012

Mr. Chuck Trout
Executive Director
Texas Racing Commission
P.O. Box 12080
Austin, Texas 78711-2080

OR2012-00482

Dear Mr. Trout:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 441918.

The Texas Racing Commission (the "commission") received a request for information pertaining to MAXXAM, Inc. ("MAXXAM"); a named individual; and expanding legalized gaming in Texas during a specified time period. You claim some of the submitted information is not subject to the Act. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code. Further, although you take no position as to whether the remaining submitted information is excepted under the Act, you state release of the remaining information may implicate the proprietary interests of LRP Group, LLP ("LRP") and MAXXAM. Accordingly, you state, and provide documentation showing, you notified LRP and MAXXAM of the request for information and of their rights to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from LRP and MAXXAM. We have considered the submitted arguments and reviewed the submitted information, portions of which consist of representative samples.¹ We have also received and considered comments from Penn National Gaming, Inc. ("Penn National"). *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

¹We assume the "representative samples" of records submitted to this office are 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 those records contain substantially different types of information than that submitted to this office.

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

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

...

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

...

(b) When the commission receives a plan for the security of a racetrack facility, or a copy of a management, concession, or totalisator contract for review under Subdivision (11) of Subsection (a) of this section, the commission shall review the contract or security plan in an executive session. Documents submitted to the commission under this section by an applicant are subject to discovery in a suit brought under [the Texas Racing] Act but are not public records and are not subject to Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973 (Article 6252-17a, Vernon’s Texas Civil Statutes).²

Id. § 6.03(a)(11), (b). The commission states Exhibits C and D consist of racetrack security plans, Exhibit G consists of a management contract, and Exhibit H consists of a totalisator contract, each submitted for commission review under section 6.03 of the Texas Racing Act. The commission further states “Exhibit F is an internal agency memorandum that discloses the contents of Exhibits C and D.” Further, LRP and MAXXAM assert portions of their

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

submitted information are subject to section 6.03 of the Texas Racing Act. Based on these representations and our review of the information at issue, we agree Exhibits C, D, G, and H consist of documents submitted to the commission under section 6.03(b) of the Texas Racing Act by an applicant. We further find the information we have marked within Exhibit F and the information we have marked within LRP and MAXXAM's submitted information was obtained directly from such information submitted to the commission by an applicant. Accordingly, we find Exhibits C, D, G, and H, the marked information within Exhibit F, and the information we have marked within LRP and MAXXAM's submitted information are not subject to the Act and need not be disclosed in response to the request for information.³ *See id.* § 6.03(b). However, we find the commission has not demonstrated how the remaining information in Exhibit F consists of information submitted by an applicant for commission review under section 6.03(a)(11) of the Texas Racing Act for purposes of section 6.03(b). Further, we find LRP and MAXXAM have not demonstrated how any portion of their remaining information consists of information submitted by an applicant for commission review under section 6.03(a)(11) of the Texas Racing Act for purposes of section 6.03(b). Accordingly, we find the remaining information at issue is subject to the Act, and must be released unless the information is subject to an exception to disclosure under the Act. *See Gov't Code* §§ 552.006, .021, .301, .302. As no further exceptions to disclosure have been raised for the remaining information in Exhibit F, the remaining information in Exhibit F must be released. However, we will consider the submitted arguments against disclosure of the remaining information at issue.

Next, we must address the commission's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The commission received the request for information on October 18, 2011. You do not inform us the commission was closed for any business days between October 18, 2011, and November 8, 2011. Accordingly, you were required to provide the information required by section 552.301(e) by November 8, 2011. Although the commission timely submitted some of the responsive information on November 8, 2011, we note the commission submitted additional responsive information on November 10, 2011, and November 14, 2011. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we conclude the commission failed to comply with the

³As our ruling is dispositive, we do not address your remaining arguments for exception of this information.

procedural requirements mandated by section 552.301 of the Government Code with respect to the information submitted on November 10, 2011, and November 14, 2011.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 319 (1982). Generally, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 177 (1977). You state the information that was not submitted timely may contain third-party confidential information or trade secrets that should be protected. Because third party interests are at stake in this instance, we will consider whether any of the information that was not submitted timely must be withheld to protect the third parties' interests.

Next, we note LRP argues against the release of information that was not submitted by the commission. Our ruling is limited to the information the commission has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

LRP, MAXXAM, and Penn National argue LRP and Penn National's submitted information is not responsive to the instant request for information because it does not directly relate to MAXXAM. The request broadly seeks "[a]ny and all records related to or referring to [MAXXAM], . . . between December 21, 2000 and the present, including but not limited to any and all correspondence to or from [MAXXAM] . . .;" and "[a]ny and all records related to or referring to [a named individual], including but not limited [sic] any and all correspondence to or from [the named individual]; [and a]ny and all records referring to or related to proposals to or actions taken to establish, increase, or expand legalized gaming in Texas between December 21, 2000 and the present." We note this office must rely on a governmental body to make a good-faith effort to determine what information is responsive to a request. *See* Open Records Decision No. 590 (1991). In this instance, the commission has determined the submitted information is responsive to the request for information, and has submitted the information for our review. Accordingly, we find LRP's and Penn National's submitted information is responsive to the request, and we will consider the submitted arguments against its disclosure.

LRP and MAXXAM argue portions of their information must be withheld because they are marked "confidential" on each page and were supplied to the commission with the expectation of confidentiality. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the

predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

LRP and Maxaam each claim portions of the submitted information are subject to a protective order that prohibits release of the information at issue. Section 552.107(2) excepts information from public disclosure if “a court by order has prohibited disclosure of the information.” LRP and Maxaam contend release of the information at issue is prohibited by a protective order entered by the State Office of Administrative Hearings (the “SOAH”) in *In the Matter of an Application for a Class 2 Horse Racetrack License in Webb County Texas*, SOAH Docket No. 476-04-5361. This office has found an administrative forum operating pursuant to the Administrative Procedures Act functions as a court. *See* Open Records Decision No. 588 at 3 (1990) (citing *State v. Thomas*, 766 S.W.2d 217(Tex.1989)). We note the submitted protective order states, “This [p]rotective [o]rder is subject to the requirements of the [Act], . . . provided that parties subject to [the Act] will give the party asserting confidentiality notice, if possible under [the Act], prior to disclosure, for the purpose of allowing such party to contest release of the confidential information. In the event of any conflict between this [p]rotective [o]rder and the requirements of the [Act], . . . the requirements of [the Act] shall control.” Thus, upon review, we find the submitted protective order does not make any information confidential or otherwise prohibit the release of information for purposes of section 552.107(2) of the Government Code, and the commission may not withhold any portion of the submitted information on that basis.

Section 552.101 of the Government Code 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. Section 2.15 provides:

All records of the commission that are not made confidential by other law are open to inspection by the public during regular office hours. All applications for a license under [the Texas Racing Act] shall be maintained by the commission and shall be available for public inspection during regular office hours. The contents of the investigatory files of the commission, however, are not public records and are confidential except in a criminal proceeding, in a hearing conducted by the commission, on court order, or with the consent of the party being investigated.

V.T.C.S. art. 179e § 2.15. Section 2.15 makes investigatory files of the commission confidential. *See* Open Records Decision Nos. 567 (1990), 548 (1990). The commission states Exhibits A and B contain background investigation reports from the Texas Department of Public Safety (the “department”) that are part of the commission’s investigatory files. Further, we find portions of the remaining information consist of background investigation reports contained within the commission’s investigatory files. The commission does not

inform us the subjects of the investigations have consented to the release of the information at issue. Further, the commission does not state it has been presented with a court order for the information. Based on these representations and our review, we find Exhibits A and B, and the information we have marked within the remaining information, are confidential pursuant to section 2.15 of the Texas Racing Act, and the commission must withhold the information at issue under section 552.101 of the Government Code. However, we find no portion of the remaining information at issue is confidential pursuant to section 2.15, and the commission may not withhold any of the remaining information under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 2.16 of the Texas Racing Act. LRP and Penn National argue portions of the remaining information are made confidential by section 2.16, which provides, in relevant part:

(a) Except as otherwise provided by [the Texas Racing Act], the files, records, information, compilations, documents, photographs, reports, summaries, and reviews of information and related matters that are collected, retained, or compiled by the [department] in the discharge of its duties under [the Texas Racing Act] are confidential and are not subject to public disclosure, but are subject to discovery by a person that is the subject of the files, records, information, compilations, documents, photographs, reports, summaries, and reviews of information and related matters that are collected, retained, or compiled by the [department] in the discharge of its duties under [the Texas Racing Act].

(b) An investigation report or other document submitted by the [department] to the commission becomes part of the investigative files of the commission and is subject to discovery by a person that is the subject of the investigation report or other document submitted by the [department] to the commission that is part of the investigative files of the commission.

V.T.C.S. art. 179e § 2.16(a), (b). Upon review, we find LRP and Penn National have not demonstrated the applicability of section 2.16 of the Texas Racing Act to any portion of the remaining information. Consequently, the commission may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 2.16 of the Texas Racing Act.

LRP, MAXXAM, and Penn National argue portions of their submitted information are made confidential by common-law privacy, which is also encompassed by section 552.101 of the Government Code. *See* Gov't Code § 552.101. Common-law privacy protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both

prongs of this test must be demonstrated. *See id.* at 681-82. This office has found personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). We further note an individual's name, address, and telephone number are generally not private information under common-law privacy. *See* Open Records Decision No. 554 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the commission must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, the commission may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

Penn National also argues dates of birth within its submitted information must be withheld. Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we find no portion of the remaining information consists of information that must be withheld under section 552.102(a) of the Government Code, and the commission may not withhold any of the remaining information on that basis.

Next, LRP, MAXXAM, and Penn National argue portions of their remaining information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage

over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁴ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

⁴The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

LRP, MAXXAM, and Penn National argue portions of their information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find LRP, MAXXAM, and Penn National have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the commission must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find LRP, MAXXAM, and Penn National have made only conclusory allegations that the release of any of their remaining information would result in substantial harm to their competitive positions. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Accordingly, none of LRP, MAXXAM, or Penn National’s remaining information may be withheld under section 552.110(b).

MAXXAM and Penn National assert portions of their remaining information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude MAXXAM and Penn National have failed to establish a *prima facie* case that any portion of their remaining information meets the definition of a trade secret. We further find neither MAXXAM nor Penn National has demonstrated the necessary factors to establish a trade secret claim for their remaining information. *See* ORD 402. Therefore, none of MAXXAM’s and Penn National’s remaining information may be withheld under section 552.110(a).

MAXXAM and Penn National argue portions of their information are excepted under section 552.107(1) of the Government Code, which excepts from disclosure “information

that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct[.]”⁵ Gov’t Code § 552.107(1). Section 552.107(1) protects information that comes within the attorney-client privilege. Section 552.107(1), however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 522 (1989) (discretionary exceptions intended to protect only interests of governmental body as distinct from exceptions intended to protect information deemed confidential by law or interests of third parties). As the commission does not seek to withhold any of the remaining information under section 552.107(1), we find section 552.107(1) of the Government Code is not applicable to any portion of the remaining information, and it may not be withheld on that basis. *See* ORD 676.

MAXXAM and Penn National also assert portions of their information are excepted under section 552.111 of the Government Code. This section excepts from disclosure “[a]n 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 section incorporates the deliberative process and attorney work product privileges. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision Nos. 677 at 4-8 (2002), 615 at 2 (1993). However, section 552.111 is a discretionary exception that is designed to protect only the interests of governmental bodies rather than third parties. As such, section 552.111 and may be raised or waived by a governmental body at its discretion. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475 (Tex. App.—Dallas 1999, no pet.) (noting that section 552.007 provides that governmental body may choose not to raise exception and may voluntarily disclose information that is not confidential by law); *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied) (noting that government agency may waive permissive exception and release information unless release is expressly prohibited by law or information is confidential under law); Open Records Decision Nos. 663 (1999) (section 552.111 may be waived by governmental body), 522 at 4 (discretionary exceptions in general). Because the commission has not raised section 552.111, we find section 552.111 is inapplicable to the submitted information, and no portion of MAXXAM or Penn National’s information may be withheld on that basis.

⁵Penn National also raises section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence for the information at issue. However, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, we note section 552.107 of the Government Code is the correct exception when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code. *See* ORD 676 at 1-2.

We note the remaining information includes information that is subject to section 552.130 of the Government Code.⁶ Section 552.130 provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of this state or another state or country is excepted from public release. *See* Gov't Code § 552.130. Accordingly, the commission must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

A portion of the remaining information is subject to section 552.136 of the Government Code. Section 552.136 provides, "[n]otwithstanding any other provision of [the Act], 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." *Id.* §552.136(b). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining "access device"). Accordingly, the commission must withhold the routing, bank account, and insurance policy numbers we have marked under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). The e-mail addresses we have marked are not excluded by subsection (c). Therefore, the commission must withhold the marked personal e-mail addresses under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure.⁷

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, pursuant to section 6.03 of the Texas Racing Code, Exhibits C, D, G, and H, the marked information within Exhibit F, and the information we have marked within the remaining information are not subject to the Act and need not be disclosed in response to this

⁶The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁷We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

request. The commission must withhold (1) Exhibits A and B and the information we marked within the remaining information under section 552.101 of the Government Code in conjunction with section 2.15 of the Texas Racing Code; (2) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the information we marked under section 552.110(b) of the Government Code; (4) the motor vehicle record information we have marked under section 552.130 of the Government Code; (5) the routing, bank account, and insurance policy numbers we marked under section 552.136 of the Government Code; and (6) the marked personal e-mail address under section 552.137 of the Government Code, unless the owners have affirmatively consented to their public disclosure. The commission must release the remaining information; however, any information that is protected by copyright may be released only in accordance with copyright law.⁸

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/agn

Ref: ID# 441918

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁸We note the information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

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