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ATTORNEY GENERAL OPINION NO. 88-3

The Honorable Alfred G. Schroeder
Kansas Racing Commission
128 N. Kansas Avenue
Topeka, Kansas 66603

Re: Laws, Journals and Public Information -- Records
Open to Public -- Kansas Racing Commission;
Applications for Licensure

Synopsis: The application form submitted to the Kansas Racing Commission (Commission) by entities and persons seeking licensure to conduct and manage parimutuel horse and greyhound races and own racetrack facilities is a public record subject to disclosure under the Kansas Open Records Act. The Commission has discretion under K.S.A. 1987 Supp. 45-221(a)(4) to keep confidential the names of prospective employees listed on the application. In addition, security information supplied with the application is exempt from mandatory disclosure under K.S.A. 1987 Supp. 45-221(a)(12). Further, the Commission is prohibited from disclosing applicants' tax returns required to be submitted with the applications. Cited herein: K.S.A. 2-1202; 16-715; 39-709b; 45-215; 45-216; 45-217; K.S.A. 1987 Supp. 45-221; K.S.A. 47-502; K.S.A. 1987 Supp. 65-436; K.S.A. 65-1831; 66-1220a; 74-8801; 74-8802; 74-8813; K.S.A. 1987 Supp. 75-4318; 79-3234; K.A.R. 112-3-7; 112-3-8; 112-3-11; 112-3-12, as proposed.

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Dear Mr. Chief Justice Schroeder:

On behalf of the Kansas Racing Commission, Janet A. Chubb, Assistant Attorney General for the Commission, has requested our opinion on two questions concerning the Kansas Open Records Act, K.S.A. 45-215 et seq: (1) Whether the application for licensure to conduct and manage parimutuel horse and greyhound racing and own racetrack facilities may be closed to the public before the license is granted; (2) if the application cannot be closed, whether the names of key, prospective employees listed on the application may be kept confidential before licensure is granted.

The 1987 session of the Kansas legislature enacted the Kansas Parimutuel Racing Act, which provides for the regulation and taxation of parimutuel wagering on horse and greyhound racing. K.S.A. 1987 Supp. 74-8801 et seq. The Kansas Racing Commission (Commission) was established to carry out the provisions of the parimutuel racing statutes and regulations adopted by the Commission. It is the Commission's duty to license nonprofit organizations, granting them the authority to conduct races and parimutuel wagering. Such licensed, nonprofit organizations, "organization licensees," may also be licensed to construct or own racetrack facilities. K.S.A. 1987 Supp. 74-8802(o). If the racetrack facility will not be owned by the organization licensee, the proposed racetrack owner must obtain licensure as a "facility owner licensee." K.S.A. 1987 Supp. 74-8802(g). In addition, if the organization licensee contracts for the management of the racetrack facility, the proposed manager must obtain licensure as a "facility manager licensee." K.S.A. 1987 Supp. 74-8802(f). Thus, a potential of three entities and/or persons may need to be licensed by the Commission to operate, manage, and own a parimutuel racetrack facility.

Applicants for an organization license must meet the requirements specified by the legislature in K.S.A. 1987 Supp. 74-8813, and the requirements of administrative rules and regulations promulgated by the Commission pursuant to statute. These requirements are being incorporated into an application form which all applicants must complete and submit to the Commission. If the nonprofit organization will not manage or own the racetrack, the prospective facility manager and facility owner must apply for licensure by completing pertinent sections of the application form. Your first question is whether applications for licensure submitted to

the Commission are public records which must be open to the public.

The Kansas Open Records Act (KORA) declares it to be the policy of this state that public records of public agencies "shall be open for inspection by any person. . . ." K.S.A. 45-216(a). The KORA further provides that the act is to be liberally construed and applied to promote the public policy of openness. K.S.A. 45-216(a); Harris Enterprises, Inc. v. Moore, 241 Kan. 59, 63 (1987). The Kansas Racing Commission is a public agency as it meets the definition stated in K.S.A. 45-217(e) (1):

"'Public agency' means the state or any political or taxing subdivision of the state, or any office, officer, agency or instrumentality thereof, or any other entity receiving or expending and supported in whole or in part by public funds appropriated by the state or by public funds of any political or taxing subdivision of the state."

A "public record" is "any recorded information, regardless of form or characteristics, which is made, maintained or kept by or is in the possession of any public agency." K.S.A. 45-217(f) (1). Public records do not include

"records which are owned by a private person or entity and are not related to functions, activities, programs or operations funded by public funds or records which are made, maintained or kept by an individual who is a member of the legislature or of the governing body of any political or taxing subdivision of the state." K.S.A. 45-217(f) (2).

Pursuant to these definitions, the application form submitted to the Commission by prospective licensees is a public record.

Not all public records are required to be open for public inspection. K.S.A. 1987 Supp. 45-221(a) (1) provides that records, the disclosure of which is prohibited or restricted by law, are not subject to disclosure under the KORA. In addition, K.S.A. 1987 Supp. 45-221(a) (2)-(36) lists records which a public agency has discretion to keep confidential. We are not aware of any state or federal law which prohibits

disclosure of the application form. In addition, it does not appear that any of the exceptions to mandatory disclosure are applicable.

We shall examine several exceptions listed under K.S.A. 1987 Supp. 45-221(a). Exception (10) provides that criminal investigation records are not required to be disclosed. "Criminal investigation records" are records of "an investigatory agency or criminal justice agency. . . compiled in the process of preventing, detecting or investigating violations of criminal law. . . ." K.S.A. 45-217(b). The information supplied on the application forms is used to investigate an applicant's background. However, the Commission is not an investigatory agency and the information is compiled for purposes of obtaining licensure.

Under K.S.A. 1987 Supp. 45-221(a)(11), a public agency is not required to disclose the following records:

"Records of agencies involved in administrative adjudication or civil litigation, compiled in the process of detecting or investigating violations of civil law or administrative rules and regulations, if disclosure would interfere with a prospective administrative adjudication or civil litigation or reveal the identity of a confidential source or undercover agent."

This exception does not exempt the application form from disclosure as the Commission is not involved in an administrative adjudication, the information was not compiled to detect violations of law, and disclosure would not reveal a confidential source or undercover agent.

A public agency also has discretion whether to disclose "records pertaining to prospective location of a business or industry. . . ." K.S.A. 1987 Supp. 45-221(a)(31). At first glance, this exception may seem applicable to the present situation. However, the exception only applies when "no previous public disclosure has been made of the business' or industry's interest in locating in, relocating in or expanding within the state." The Commission's grant or denial of a license must be done in an open meeting. See K.S.A. 1987 Supp. 75-4318(a). Exception (31) further provides:

"This exception shall not include those records pertaining to application of agencies for permits or licenses necessary to do business or to expand business operations within this state."
(Emphasis added).

Since licensure is required to conduct parimutuel racing and wagering, this provision is not applicable to exempt the application from disclosure. In the absence of a statutory provision prohibiting disclosure or permitting the Commission to keep the document confidential, the application form as a public record is open for public inspection upon request by any person.

You ask whether the names of key, prospective employees listed on the applications may be kept confidential before licensure is granted. Proposed K.A.R. 112-3-11(c) requires an applicant for an organization license to "list those persons within the applicant organization who will be supervising the conduct and operation of the horse races or greyhound races, or both, and the operation of the pari-mutuel system of wagering. . . ." Applicants for an organizational license or facility manager license in which the applicant proposes to manage a racetrack facility are required by proposed K.A.R. 112-3-12(b) to list their management personnel on the application form.

The KORA provides that, if a public record contains material not subject to disclosure, the public agency shall separate or delete the material and make available to the requestor the information in the public record which is subject to disclosure. K.S.A. 1987 Supp. 45-221(d). In our opinion, the Commission may keep confidential the names of prospective employees listed on the application as an exception to mandatory disclosure is applicable:

"[A] public agency shall not be required to disclose:

. . .

(4) Personnel records, performance ratings or individually identifiable records pertaining to employees or applicants for employment, except that this exemption shall not apply to the names, positions, salaries and lengths of service of officers and employees of

public agencies once they are employed
as such." K.S.A. 1987 Supp. 45-221(a).
(Emphasis added).

The above exception provides that the names of applicants for employment are not required to be disclosed. This exception is generally invoked in instances concerning public agency employees and applicants for such employment. See Tew v. Topeka Police and Fire Civ. Service Comm'n., 237 Kan. 96, 103-04 (1985). However, it also extends to applicants and employees of private entities when an individually identifiable record becomes a public record, such as the application form in the present case. The individuals named in the application are not yet employed by the organization but are potential employees. Therefore, it is our opinion that the Commission has discretion to keep confidential the names of such individuals. The exception further provides that, once they are employed by a public agency, the names of public agency employees must be disclosed to the public. No such requirement is placed on persons employed by a private entity.

We note that proposed K.A.R. 112-3-7(e) and proposed K.A.R. 112-3-8(c) require applicants for an organization license, facility owner license, and facility manager license to include with the application a copy of the applicant's tax returns from the previous three years or all tax returns if the applicant has been organized for less than three years. State law prohibits tax returns and tax return information from being disclosed by any state officer or employee:

"(b) Except [as otherwise provided] it shall be unlawful for the director, any deputy, agent, clerk or other officer, employee or former employee of the department of revenue or any other state officer or employee or former state officer or employee to divulge, or to make known in any way, the amount of income or any particulars set forth or disclosed in any report, return, federal return or federal return information required under this act. . . ." K.S.A. 79-3234. (Emphasis added).

Thus, the Commission is prohibited from disclosing tax returns submitted with the application forms.

We understand the Commission is concerned that applicants are required to submit on the application detailed information regarding their security plans and financing mechanisms. K.S.A. 1987 Supp. 45-221(a)(12) gives a public agency discretion to close the following records:

"Records of emergency or security information or procedures of a public agency, or plans, drawings, specifications or related information for any building or facility which is used for purposes requiring security measures in or around the building or facility or which is used for the generation or transmission of power, water, fuels or communications, if disclosure would jeopardize security of the public agency, building or facility."
(Emphasis added).

Proposed K.A.R. 112-3-14 requires applicants who wish to manage a racetrack facility to submit public safety and security information. In pertinent part, the regulation provides:

"(b) The application shall describe a complete security plan for the race period and the non-race period, including:

- (1) The number and deployment of security personnel;
- (2) the perimeter;
- (3) the stable and the kennel compound;
- (4) the cash room;
- (5) the vault;
- (6) the method of money transfer between wagering windows, cash room and any other location to which money will be transferred;
- (7) the number of sworn law enforcement personnel assigned to any local law enforcement

offices and the types of incidents to which the law enforcement personnel may be expected to respond;

- (8) the coordination between the racetrack facility security and the local law enforcement personnel, including the location of the local law enforcement office and the approximate response time;
- (9) any video monitoring equipment, including the type and location;
- (10) any alarms, including the type and location;
- (11) the testing or detention barn or paddock for horses;
- (12) the greyhound paddock;
- (13) the parking lot
- (14) the backside and the frontside;
- (15) any emergency procedures, including ambulance, first aid or evacuation, and the location of any local emergency medical services and approximate response time;
- (16) the exclusion and expulsion rules;
- (17) the security force equipment;
- (18) the policy and procedure for admittance of persons to any locations at the racetrack facility; and
- (19) the control of traffic at the racetrack facility."

Clearly, regulations drafted by the Commission pursuant to the Parimutuel Racing Act require security measures for racetrack facilities. Therefore, it is our opinion that the Commission may, in accordance with K.S.A. 1987 Supp. 45-221 (a) (12), refuse to disclose security information submitted with the application.

In regard to applicants' financing mechanisms, the parimutuel wagering statutes do not contain a provision protecting the confidentiality of this information and we do not find any statute exempting it from mandatory disclosure. K.S.A. 1987 Supp. 45-221(a) (34) only exempts financial information of a contractor "who has submitted a bid or is negotiating for a contract on a public improvement project." Frederickson, Letting the Sunshine in: An Analysis of the 1984 Kansas Open Records Act, 33 U. Kan. L. Rev. 205, 261 (1985). Financial information contained in the applications, therefore, must be disclosed to the public.

As we have shown, in order for information contained in or supplied with the application form to be withheld from disclosure, a specific statute must exist. In other areas of the law, the legislature has enacted statutes exempting from disclosure certain information required to be filed with public agencies. See, e.g., K.S.A. 2-1202 (fertilizer blender's reports required to be submitted for licensure); K.S.A. 16-715(e) (pawnbrokers and precious metal dealers' reports); K.S.A. 39-7096 (information concerning applicants for and recipients of SRS assistance); K.S.A. 47-502 (ingredients in livestock remedies required to be submitted on application for registration); K.S.A. 65-436 (records of licensing agency concerning medical care facilities which identify individuals or facilities); K.S.A. 65-1831 (applications submitted for registration by the Board of Barber Examiners); K.S.A. 66-1220(a) (trade secrets of entities regulated by the Kansas Corporation Commission). In addition, the KORA grants public agencies discretion to keep confidential certain documents required to be filed with the agency. See, e.g., K.S.A. 1987 Supp. 45-221(a) (17) (student financial assistance applications); 45-221(a) (19) (well samples, logs, or surveys required to be filed with the state corporation commission); 45-221(a) (28) (sealed bids).

In summary, the application form submitted to the Kansas Racing Commission (Commission) by entities and persons seeking licensure to conduct and manage parimutuel horse and greyhound races and own racetrack facilities is a public record subject to disclosure under the Kansas Open Records

Act. The Commission has discretion under K.S.A. 1987 Supp. 45-221(a)(4) to keep confidential the names of prospective employees listed on the application. In addition, security information supplied with the application is exempt from mandatory disclosure under K.S.A. 1987 Supp. 45-221(a)(12). Further, the Commission is prohibited from disclosing applicants' tax returns required to be submitted with the applications.

Very truly yours,



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