



August 3, 2010

Via email: [glaserm@gtlaw.com](mailto:glaserm@gtlaw.com)

Mark Glaser, Esq.  
Greenberg Traurig, LLP  
54 State Street, 6<sup>th</sup> Floor  
Albany, New York 12207

Re: Determination under the Freedom of Information Law of Claim of Confidentiality of Matter Contained in the Proposal Submitted by Aqueduct Operator LLC and Aqueduct Real Estate LLC (SL Green Proposal) Pursuant to the Request for Proposals for Development and Operation of a Video Lottery Facility at Aqueduct Racetrack, dated May 11, 2010 ("RFP")

Dear Mr. Glaser:

This is in response to your letter dated July 27, 2010 on behalf of SL Green, which identified portions of the SL Green Aqueduct Proposal (the "Proposal") as confidential information and offered explanations of SL Green's claims that those portions should be withheld from public disclosure under the Freedom of Information Law ("FOIL") and the Personal Privacy Protection Law.

The New York State Division of the Lottery (the "Lottery") has reviewed the portions of the Proposal and the explanations offered in your letter and determined that some of the portions SL Green identified as confidential do not fall within exceptions permitted under FOIL and therefore, may be publicly disclosed.

SL Green asserted that the business structure of the bidding entity (specifically, the names Aqueduct Real Estate LLC and Aqueduct Operator LLC) should be redacted from the Transmittal Letter and all other portions of the Proposal. The Lottery disagrees with that assertion because the proposed structure is not a novel business structure that would be competitively disadvantageous to SL Green if revealed and such a business structure is not a trade secret. The intended purposes of the two companies are apparent in their names. Aqueduct Real Estate LLC is a real estate holding company, and Aqueduct Operator LLC is an operating company. Corporate entities routinely structure their business affairs by organizing separate holding and operating companies. A July 15, 2010 letter from SL Green's attorney Harold Iselin referred to Aqueduct Real Estate LLC and Aqueduct Operator LLC as "SL Green" without asserting any confidentiality claim.

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SL Green asserted that phone numbers for certain persons on the bidding team and the names of individuals who had no “public role” in the Proposal should be redacted because disclosure of that information might subject those persons to “unwanted solicitations and harassing calls.” The Lottery disagrees with that assertion because business entities and business phone numbers are not protected from disclosure under FOIL since disclosure of that information would not constitute an unwarranted invasion of personal privacy. *See* New York State Committee on Open Government FOIL-AO-13878. Furthermore, there is no exception under FOIL that allows withholding information based on the possibility of “unwanted solicitations and harassing phone calls.” SL Green also asserted that the names of investors Daniel Tishman, Jeffrey Gural Caribbean Cage LLC, and Robert Johnson should be redacted. The Lottery disagrees with that assertion because those names were already publicly disclosed when SL Green published them on its website at <http://hardrockaqueduct.slgreen.com/the-team>. The same names were also published on Governor Paterson’s website at [www.ny.gov/governor/press/aqueduct\\_vlt\\_bid\\_documents.html](http://www.ny.gov/governor/press/aqueduct_vlt_bid_documents.html).

SL Green asserted that its revisions to the Acknowledgement of Addenda should be redacted because the revisions are proprietary and relate to its revisions to the Memorandum of Understanding (“MOU”) required by the RFP. SL Green also asserted that Andrew Levine’s signature on the Acknowledgement should be redacted. No explanation was provided to justify redacting Andrew Levine’s signature. The Lottery disagrees with the assertion that the revisions of the Acknowledgement are confidential because they are not novel or secret business ideas that if disclosed would be competitively disadvantageous to SL Green. The revisions only reflect SL Green’s proposal to require the licensing fee to be held in escrow. An unredacted disclosure of the Acknowledgement would not cause substantial competitive injury to SL Green because an escrow arrangement is a commonly used and known business arrangement. The Lottery also disagrees with the assertion that Andrew Levine’s signature should be redacted from the Acknowledgement. While you did not provide a justification for redacting Mr. Levine’s signature, a signature alone is not protected from disclosure under FOIL or the Personal Privacy Protection Law.

SL Green asserted that Part A of the Business Organization chart should be withheld from public disclosure. Part A of the chart graphically depicts the relationship of Aqueduct Operator LLC and Aqueduct Real Estate LLC and the roles of each entity in SL Green’s Proposal. As stated above, the Lottery disagrees with the assertion because the organizational form is not a novel or secret business structure that would be competitively disadvantageous to SL Green if revealed and such a business structure is not a trade secret.

SL Green asserted that its references should be withheld because they are not known to the general public and disclosure would subject the references to “press inquiries, blogger entries, and telephone and e-mail harassment” and an invasion of the personal privacy of the named individuals. The Lottery disagrees with that assertion because there is no exception under FOIL for protection from the risks you described.

SL Green asserted that its quality assurance program is a proprietary program developed for SL Green that is not available to the public and that describes SL Green’s collaboration with Kingsley Associates. Your letter claimed that the release of the program description would cause

substantial injury to the competitive position of SL Green. The Lottery disagrees with that assertion because the description shows services and methodologies provided by Kingsley Associates that are already publicly available on Kingsley Associates' website at [www.kingsleyassociates.com](http://www.kingsleyassociates.com). Kingsley Associates also lists SL Green as one of its clients on its website. The quality assurance program description contains information about SL Green's auditing system and states that the annual opinions of an independent auditor are included in SL Green's Form 10-K reports filed with the Securities and Exchange Commission ("SEC") that are available to the public. Additionally, the quality assurance program description lists recent awards won by SL Green, which is information SL Green publicized on its website at <http://hardrockaqueduct.slgreen.com/renderings/>. The information contained in the quality assurance program description about the availability of the audit opinions in public documents and the list of publicly presented awards may not be withheld from disclosure under FOIL.

SL Green asserted that the page designated Hard Rock "revenues" consists of information not available to the public that will cause substantial harm to Hard Rock's competitive position if disclosed. The Lottery disagrees with that assertion because it is not a trade secret that Hard Rock's revenues consist of sales from company café operations and from franchise arrangements. It is also not a secret that, as described in the Hard Rock revenue page, Hard Rock café operating revenues are comprised of food and beverage sales and driven by the impact of tourism; franchise operation revenues consist of acquisition fees, royalties, merchandise sales and memorabilia fees; hotel revenues include royalties on hotel room, food and beverage and merchandise sales; casino revenues are comprised of acquisition fees, royalties on gaming activities, hotel room, food and beverage, merchandise sales and memorabilia fees; and revenue from other operations is comprised of merchandise sales through retail stores, royalties from licensed hotel stores, and an online merchandise shop. Furthermore, the several segments of Hard Rock's operations are disclosed on its website at [www.hardrock.com](http://www.hardrock.com). Hard Rock also publicly advertises its franchise opportunities on its website and specifically describes the costs associated with acquiring a Hard Rock branded franchise.

SL Green asserted that the Tishman Construction quality assurance plan is a confidential program. The Lottery disagrees with that assertion because that brief document is not confidential and release of portions of the document would not cause substantial competitive injury to Tishman. The document is a general description of principles of a quality assurance program but does not provide specific details of the program, only general statements about the company's commitment to an effective work plan. For example, maintaining survey and project records, work performance reports, certifications for personnel and drawings are not concepts unique to Tishman Construction, but general industry-wide practices.

SL Green asserted that Tishman Construction's references and Gardiner & Theobald's references are not known to the public and would subject the listed references to "press inquiries, blogger entries and telephone and e-mail harassment" and an invasion of the personal privacy of the named individuals. As discussed above, the Lottery disagrees with that assertion because business entities and business phone numbers are not protected from disclosure under FOIL as disclosure of that information would not constitute an unwarranted invasion of personal privacy. *See* New York State Committee on Open Government FOIL-AO-13878. Furthermore, there is

no exception under FOIL to allow withholding information based on the possibility of the risks you described.

SL Green appears to assert that its organizational chart showing the structure and relationships of the various SL Green team members are trade secrets. The Lottery disagrees with that assertion because the investors shown on the chart are already known to the public and associated with each other and SL Green's Proposal, as explained above. Additionally, as explained above, the Lottery disagrees with SL Green's assertion that SL Green's real estate holding company and operating company should be withheld from disclosure.

SL Green asserted that its entire capital plan is proprietary and the drawings are copyrighted documents that are not available to the public. The Lottery disagrees with SL Green's assertion that the entire capital plan should be withheld from disclosure because portions of the plan are already published with the artist renderings contained in the Capital Plan portion of the Proposal on the SL Green website at <http://hardrockaqueduct.slgreen.com/renderings/>. Despite the "confidential" designations on the images available on SL Green's website, the renderings are easily and publicly accessible.

SL Green asserted that its entire marketing plan is proprietary. The Lottery disagrees with that assertion because the entire marketing plan cannot be considered confidential because portions of the plan describe generally available statistics, public advertising campaigns and public brand recognition and well-known strategies. The following portions of the marketing plan cannot be considered confidential or trade secrets: Executive Summary; Market Assessment; Geography; SWOT Analysis; Summary Takeaways of Business Analysis; Target Audience; Positioning Discussion; Advertising Creative; Award Winning Amenities; Public Relations; Philanthropy; Partnerships; and Technology.

SL Green asserted that if the MBE – WBE plan is publicly released, SL Green and its team members would suffer substantial competitive injury. The Lottery disagrees that the plan should be withheld from disclosure because it is already publicly available on Governor Paterson's website at [www.ny.gov/governor/press/aqueduct\\_vlt\\_bid\\_documents.html](http://www.ny.gov/governor/press/aqueduct_vlt_bid_documents.html).

SL Green asserted that disclosure of the MOU and accompanying exhibits submitted by SL Green would subject SL Green to substantial competitive injury and provide competitors with an advantage in future bids. The Lottery disagrees with that assertion because the non-conforming MOU submitted by SL Green, which was not accepted by the Lottery, is not necessarily of any value as a guide to future bidders since rejection of the proposal makes clear that it did not meet the State's requirements. Furthermore, there is little possibility that this unique procurement conducted by the Lottery will adversely impact SL Green or its team members in future procurements since the knowledge and understanding of the SL Green team's concerns are specific to the process to recommend and select an agent to operate the Aqueduct VLG facility. The Lottery also finds that SL Green's allegations of competitive harm relating to disclosure of the MOU are conclusory in nature and are without factual support of specific competitive injury.

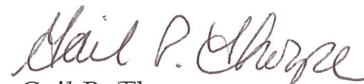
SL Green asserted that its workforce employment staffing plan is confidential. The Lottery disagrees with that assertion because the plan only contains estimated numbers of staff members who may fill listed federal occupational categories and provides total percentages of minority and female employees. The plan does not specifically identify the staff members. Since the staffing plan is unique to this procurement, there is little possibility that this unique procurement conducted by the Lottery will adversely affect SL Green or its team members in future procurements since the information contained in this plan is specific to the process to recommend and select an agent to operate the Aqueduct video lottery facility.

Lastly, you asserted that the information contained in your letter dated July 27, 2010 which identified the portions of the Proposal that SL Green asserts are confidential and the reasons therefor are also confidential and sensitive to the SL Green bidding team because release of your letter would result in substantial injury to the competitive position of SL Green and its bidding partners. The Lottery disagrees with that assertion because your letter did not replicate or reproduce the portions of the Proposal that SL Green identified as confidential and does not provide any specific information that the Lottery agrees is confidential. Your letter only offered justifications for withholding certain identified portions of the Proposal from disclosure to the public. FOIL is based on a presumption of access to records, and the justifications for withholding portions of public records from the public must be publicly available even if the underlying records are not.

For the foregoing reasons, the portions of SL Green's Proposal cited in this letter do not fall within exceptions permitted under FOIL or prohibited from disclosure under the Personal Privacy Protection Law and therefore, may be publicly disclosed by the Lottery.

Pursuant to Public Officers Law Section 89 (5)(b), you may submit a written appeal of this denial of exemptions from public disclosure within seven (7) business days of receipt of this denial by writing to Lottery Director Gordon Medenica.

Sincerely,



Gail P. Thorpe  
Contracting Officer