

October 4, 2005

Sent Via Facsimile and U.S. Mail

Mr. William Bock
Kroger, Gardis & Regas
111 Monument Circle
Indianapolis, IN 46204

Re: Formal Complaint 05-FC-196; Alleged Violation of the Access to Public Records Act by the Indiana Gaming Commission

Dear Mr. Bock:

This is in response to your formal complaint alleging that the Indiana Gaming Commission (“Commission”) violated the Access to Public Records Act (“APRA”). I find that the Gaming Commission violated the Access to Public Records Act in some respects, but in most other respects complied with the Access to Public Records Act.

BACKGROUND

You filed your complaint on September 27, 2005, seeking priority status for the complaint. Because you allege that one or more of the records are sought for the purpose of presenting the public record in a proceeding to be conducted by another public agency, your request for priority status has been granted. *See* 62 IAC 1-1-3. Accordingly, this advisory opinion has been issued seven days after you filed your complaint.

You allege that you have been denied access to public records on two bases: 1) that the Commission’s delay in producing records yet to be produced as of the filing of the complaint is unreasonable delay under the APRA; and 2) that the Commission has withheld records, citing confidentiality, where the records are either subject to mandatory disclosure requirements in the gaming statutes, or do not otherwise qualify as confidential records under the APRA. You are seeking records on behalf of the City of East Chicago (“City”).

I summarize the salient facts as provided by the City and the Commission as follows. The City is a party to a petition for judicial review against the Commission that is pending in the Lake County Superior Court. The petition for judicial review relates to an action by the Commission to approve a transfer of ownership of the East Chicago riverboat license from Harrah's Entertainment, Inc. to RIH Acquisitions IN, LLC, styled as the approval of Resolution 2005-25. In connection with the judicial review, the City filed on May 20 a request for the Commission to prepare and transmit the agency record to the Lake Superior Court.

On July 5, 2005, you hand-delivered and faxed to the Commission a request for records under the APRA. You requested five items. The requests were couched as general requests, such as for "all documents that deal with or reference..." certain transfers of ownership of East Chicago riverboats. You also asked for "all minutes and filings from 1994 to the present that deal with or reference the East Chicago riverboat." The Commission responded to your APRA request by letter on July 12, 2005. In its letter, the Commission, through its outside counsel David Jensen, indicated that all meeting minutes from 1995 to the present were available at the Commission's website. Pre-1995 minutes would be compiled for you. Other documents would take, at a minimum, 6-8 weeks to produce. The Commission invited you to "reformulate" your request to expedite the production of documents, but did not specify how your request could be reformulated to speed production.

On July 14, 2005, you sent the Commission a letter inquiring about the status of preparation of the record. In this letter, you indicated that you were requesting the agency record pursuant to the APRA, demanding compliance with the APRA within seven days. The Commission sent you a letter dated July 19. In this letter, the Commission stated that it had been diligently pursuing the compilation of the agency record. It enclosed a list of all documents "compiled by the Commission staff." The list contained two parts. The first part was an inventory of all non-confidential records. The second part contained a list of records deemed by the Commission to contain confidential information or likely to contain confidential information. The Commission stated that it would be difficult to estimate the time required to review the confidential records to determine whether information could be redacted. The Commission suggested that you stipulate to fewer than all documents so as to reduce the time needed to compile the record for purposes of appeal.

On July 21, you sent a letter to the Commission acknowledging the July 19 letter. You asserted that the Commission should not delay in making the non-confidential documents in Part I of the list available for inspection and copying, requesting access on July 22. You also proposed a process by which you, on the City's behalf, could review the confidential documents under a confidentiality agreement to determine the necessity for including those documents in the agency record. In what appeared to be a contradiction of your demand that Part I records should be disclosed immediately, you sent a letter dated July 22 to the Commission agreeing to the six to eight week timeframe in which to receive records; however, I believe this letter pertained only to the APRA request rather than the Part I documents relating to the agency record. You renewed your request to receive part of the agency record in a July 26 letter to the Commission.

On July 27, the Commission wrote you stating that records responsive to your July 5 APRA request, item #5, would be available for inspection at the Commission offices the week of August 8. The Commission noted in this letter that the documents to be disclosed would include items which were identified in Part I of the inventory of records supplied to you on July 19.

In your July 28 letter to the Commission, you stated your belief that the Commission, in its July 19 letter, had admitted that the agency record had been compiled with respect to the Part I documents, and hence, the Commission's undue delay until August 8 in disclosing the records was a violation of its duties under the Administrative Orders and Procedures Act and the APRA. In this letter, you also admit that the July 14 APRA request was confined solely to the agency record. Hence, you believed that the Commission could not hold the agency record up while compiling APRA-related records. You sent several letters relating to this matter between August 1 and August 4, culminating in the August 4 letter confirming the August 8 date to review documents.

On August 8, the Commission provided you with a CD Rom containing copies of disclosable Commission files responsive to item #5 of the July 5 APRA request. The Commission reiterated its original timeframe of 6 to 8 weeks as the minimum required to compile and produce the July 5 APRA requests. The Commission promised to contact you no later than August 31 for an update on the progress of the July 5 APRA request. The Commission also stated that the production of records of August 8 should not be construed to be comprising the agency record. The Commission staff continues to identify, compile, and analyze documents for inclusion in the agency record, the Commission asserted.

You sent a letter dated August 12, 2005 to the Commission. In it, you recounted the difficulties that you encountered in copying a voluminous, comb-bound set of records, preferring that the Commission arrange for an outside vendor to copy the records. You also indicated that a certain letter from Robert Grand to Phil Sicuso dated February 15, 2005 ("the Grand letter") was omitted from the CD-ROM and from the hard copy records made available on August 8. You requested immediate transmission of this document. You also stated that production was insufficient because it lacked certification of the partial record. On August 23, you followed-up on your August 12 plea for the Grand letter.

On August 31, 2005, the Commission provided a letter giving its progress on the July 5 APRA request. The Commission reiterated the availability of the post-1995 minutes online; it also stated that the 1994 minutes had been located. The Commission also stated that the records requested in item #2 of the July 5 request had been identified. The Commission indicated that both those sets of records would be available on September 7 for review between the hours of 9:00 a.m. and 2:00 p.m. On September 2, you acknowledged receipt of the August 31 letter. You state that the Commission did not address the status of the "filings" that you had requested in item #1 of the July 5 request. Also, you complained that the Commission had not addressed the status of the outstanding items #3, 4, and 5 of the July 5 request. You demanded production of the remaining items by September 9.

On September 7, the Commission wrote you, transmitting part of the agency record contained in "Volume VII." Part of the records contained in this part of the agency record

included the Grand letter and related documentation. You were also provided an index with references to tabs 63 through 116, indicating the documents that the Commission considers confidential. You provided me with a copy of this index. The index includes a description of the document and a citation to the exemption applying to all or part of that record. The exemptions cited are confined to section 4(a)(3)(those records required to be kept confidential by federal law); section 4(a)(4)(records containing trade secrets); and section 4(a)(5)(confidential financial information obtained, upon request, from a person). Another letter from the Commission dated September 7 notifies you that records responsive to items #1 and 2 of your July 5 request were then available for inspection and copying in the Commission's offices.

Finally, the Commission provided me with a copy of the letter to you dated September 30, 2005, giving another update on the progress of the July 5 document production. The letter states that on October 14, records responsive to item #3 will be available; on October 21, records responsive to item #4 would be available. In this letter, the Commission states that it has never received a more narrow definition of the records sought by the City; it also states for the first time (from the record before me) that the term "filings" in item #1 lacks sufficient particularity. With the planned October 21 production, the Commission believes that all records responsive to your July 5 request would be provided.

You graciously provided me with an extra copy of the complaint and documentation, which I delivered to the Commission. The Commission has provided me with a thorough, twelve page responsive letter. I enclose a copy of the Commission's complaint response with this advisory opinion, for your reference.

ANALYSIS

All persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code 5-14-3-1. Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information. *Id.* Any person may inspect and copy the public records of any public agency during the agency's regular business hours, except as provided in section 4 of the APRA. IC 5-14-3-3(a). A request for inspection or copying must identify with reasonable particularity the record being requested. IC 5-14-3-3(a)(1). The public agency shall either provide the requested copies to the person making the request, or allow the person to make copies on the agency's equipment or on the person's own equipment. IC 5-14-3-3(b). Hence, the Commission did not violate the APRA by requiring you to make the copies of the comb-bound volumes on the Commission's copier, although I question whether the Commission could have had the voluminous parts of the bound records copied by a vendor without undue delay.

An agency that receives a request for a record via hand-delivery is required to respond within 24 hours, or the request is deemed denied. IC 5-14-3-9(a). A request received via facsimile or U.S. Mail must be responded to within seven (7) calendar days. A written denial of access to a record must include a statement of the specific exemption or exemptions authorizing

the withholding of all or part of the public record and the name and the title or position of the person responsible for the denial. IC 5-14-3-9(c).

An agency's response to a record need not necessarily include production of the record or records. A response contemplates acknowledgment of receipt of the request and a statement regarding the agency's intention to fulfill the request or provide a more detailed response at a later time when the agency has located any responsive records. There are no strict requirements in the APRA for when an agency must produce a record. The Office of the Public Access Counselor has stated that an agency should produce records within a reasonable time, under all the facts and circumstances. Factors to consider in the timeliness of the agency's production include the nature of the requests, the number of records responsive to the request, whether the records are aged or stored off-site, and the constraints on the agency with respect to staff.

A public agency may not disclose a record that is confidential under IC 5-14-3-4(a). Records that are required to be kept confidential under federal law may not be disclosed. IC 5-14-3-4(a)(3). Records containing trade secrets may not be disclosed. IC 5-14-3-4(a)(4). Also, a public agency may not disclose records that are confidential financial information obtained, upon request, from a person. However, this does not include information that is filed with or received by a public agency pursuant to state statute. IC 5-14-3-4(a)(5).

You do not raise any issue with respect to the response time of the Commission. Rather, your complaint states that the Commission has unreasonably delayed transmission of the records relating to the APRA request of July 5. You also allege that the Commission cannot sustain its burden of showing that the confidential records are, in fact, confidential. Throughout the correspondence of the parties to this complaint, I note that the City had complained that the Commission had delayed the agency record in the judicial review. I do not have authority to issue an opinion regarding whether an agency is responsive under IC 4-21.5-5-13, which governs the responsibility of an agency with respect to producing the record for judicial review. *See* IC 5-14-4-10. Therefore, I decline to opine regarding any issue with respect to the timeliness of transmission of the agency record in the judicial review.

Reasonable Production Time

You have argued that the Commission continues to delay the production of records that are non-confidential. As of September 27 when you filed your complaint, you had not received records responsive to items #3 and 4 of the July 5 APRA request. You also had not received the Commission's September 30 letter outlining its plans to provide records responsive to items #3 and 4. In your complaint, you cite the twelve weeks between your July 5 request and the time of your complaint as unreasonable delay, pointing to the lack of justification offered by the Commission for the delay, outside of the voluminous nature of the request.

The Commission in its complaint response does cite the voluminous records that are being compiled, and have been compiled, in response to the July 5 request. The Commission states that its attorneys' attention to the pending litigation, along with other duties of the Commission which include undertaking a new enforcement unit within the Commission, added to the time in which the Commission was able to produce the records. Moreover, the

Commission has produced over 2,000 pages of records to date. The Commission also cites the general, broad nature of the requests, a circumstance not ameliorated by the condition that the records sought related to a discrete set of transactions. Also, the Commission stated from the outset that it anticipated that the request would result in voluminous records, and would likely entail, at a minimum, six to eight weeks to produce the records. The Commission avers that it immediately began work on compiling responsive documents. The Commission has produced responsive records in installments rather than waiting until all records were compiled before producing the first record. The Commission invited you to download minutes from Commission meetings from the Commission's website. The Commission also printed out the records of minutes from its website and made those available to you. Also, the Commission has provided monthly updates on its progress in compiling the records. Finally, the Commission stated that it had devoted several hours per week of attorney staff time to the request for records.

For all the reasons cited by the Commission, I do not find the production of records, on the whole, unreasonably delayed. The Commission did all the things this office counsels agencies to do: produce records in installments, give requesters regular updates, and maintain regular effort to compile and review large requests for records, in spite of the need to attend to the other work required by the agency. A public agency shall regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. IC 5-14-3-7(a). In particular, I do not find the APRA request of July 14, wedding the request for agency record to an APRA request to be unduly delayed, since by its very terms, the July 14 APRA request was for the "agency record," a compilation of documents that had not yet been created.

Two related issues you raise in your complaint deserve attention. First, I do not find any provision in the APRA that requires that a public agency give a requester full justification for a prolonged effort to provide records as records are produced. Hence, the Commission did not violate the APRA to the extent that it did not communicate to you the extent of its justification for the twelve week production time. However, it behooves a public agency to consider telling the requester why a request for records is taking additional time, particularly if the estimated time for disclosure will be exceeded. Also, I disagree that the Commission's July 19 letter to you stated that the non-confidential records were ready for disclosure; I read the letter to state only that the records had been identified.

Nevertheless, I do have concerns that certain records responsive to the APRA request were unreasonably delayed, apparently in an effort to "gather" responsive records and disclose them at once. The Grand letter is cited as missing in your August 12 letter to the Commission; yet, the Commission did not produce this letter until September 7, some four weeks later. Also, your request for "filings" related to the East Chicago riverboat in item #1 of the July 5 request was characterized by the Commission in its September 30 letter as "not sufficiently particular" evidently for the first time. An agency that believes a request for records is not reasonably particular may not ignore that part of a request, but is required to inquire of the requester what is meant by the request. It is also incumbent on the public agency to help the requester understand what is ambiguous about a request for a record. Hence, if the Commission believed that "filings" was ambiguous or unclear, it should have sought clarification from you, as soon as possible. The Commission did not meet the spirit of the APRA when it failed to clearly state

well before September 30 that the word “filings” was not sufficiently particular to enable it to locate responsive records. I hope that the Commission will contact you to seek clarification of this request, perhaps facilitating disclosure of these records by October 21, or sooner.

Finally, it is not clear to me why the Commission is making the item #3 records available on October 14 and the item #4 records available the following week. This is because with one exception, the Commission has not copied the records for you in advance. If the Commission is projecting that it will be able to identify responsive records and review them by those dates, well and good. However, if the Commission has already identified and reviewed responsive records and is only making those records available for inspection, it is not clear to me the need for delay.

With respect to the matter of the post-1995 minutes, I learned from you that although the Commission had told you that the Commission minutes were available on the website, you do not believe that the Commission has discharged its duty to provide you with a “public record.” If a public agency posts its records on the web, it may certainly direct a requester to the website containing those public records. No violation of the APRA occurs in the event that a public agency makes its records available in electronic form. You have expressed to my office a desire to see the original document, which may contain signatures or a certification as the Commission’s official minutes. Again, this dispute falls into the realm of a “reasonably particular” request. You have admitted that you have not told the Commission that you were requesting a hard copy of the official record of minutes from the Commission. You should recast your request for this record in a manner that clarifies for the Commission precisely what record you are seeking.

Records Claimed to be Confidential

You also claim that the Commission’s denial of records as confidential may not be sustained. The Commission has raised a threshold issue regarding whether I may issue an opinion with respect to the confidentiality of the withheld records.

Under IC 5-14-4-10(6), the counselor may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under Indiana Code 5-14-1.5 or Indiana Code 5-14-3. I interpret this admonition to mean that I may not issue an advisory opinion where a lawsuit has been filed that raises a claim under one of the access laws. The judicial review petition, I am told by the Commission, does not raise a claim under the APRA. Hence, I am not prevented from issuing an advisory opinion in this matter where the confidentiality of withheld records is at issue.

You assert that the claimed bases for withholding certain records (those records described under tabs 63 to 116, inclusive, and those partially withheld under tabs 56 to 61 inclusive) are not appropriate. You argue that IC 4-33-5-2 takes the APRA out of play by virtue of the following language: “Notwithstanding any other law, upon written request from a person, the commission shall provide the following information to the person: (1) The information provided under section 1 of this chapter concerning a licensee or an applicant.” IC 4-33-5-1 specifies 14 categories of information that must be provided to the Commission with respect to an applicant for a license.

In the alternative, you argue that the APRA exceptions cited are not applicable, because the documents withheld do not contain trade secrets or are not confidential financial information. You assert that with respect to confidential financial information, the records are required to be submitted under IC 4-33-5-1, thereby removing the records from the ambit of the exception.

The APRA places the burden of proof for the nondisclosure of a public record on the public agency that denies a record, not on the person requesting the record. IC 5-14-3-1. Further, in a court action challenging the denial of a record filed under IC 5-14-3-9(e), the burden of proof is on the public agency to sustain its denial. The public agency meets its burden to show that a record is confidential by establishing the content of the record with adequate specificity and not by relying on a conclusory statement or affidavit. IC 5-14-3-9(f). A person who supplied any part of the record at issue is entitled to intervene in any litigation that results from the denial. IC 5-14-3-9(e). If any one of the exemptions claimed for a record is appropriate, the record may be excepted from disclosure, unless another law mandates disclosure of the record. If a public record contains disclosable and nondisclosable information, the public agency shall separate the material that may be disclosed and make it available for inspection and copying. IC 5-14-3-6(a).

Trade Secrets

A “trade secret” for purposes of the APRA has “the meaning set forth in IC 24-2-3-2”, the Indiana Uniform Trade Secrets Act. IC 5-14-3-2(o). There are four characteristics of a trade secret, one of which you claim is particularly absent from the Commission’s stated claim of trade secret for some of the excepted records. You allege that the Commission has not established or attempted to establish that the information withheld is of “independent economic value.”

The issue you raise is best characterized as relating to the discharge of the Commission’s burden at this stage than it is a specific challenge to a record being excepted as a trade secret. In fact, many of the various records in the listing of excepted records are claimed to be trade secret or partially excepted as containing trade secrets. However, without any ability to view the records or gather information about the nature of the Commission’s trade secret claim, I cannot assess the validity of the exemption. Clearly if the records excepted do not meet the definition of a trade secret under IC 24-2-3-2, the exemption of the record on that basis fails. You raise in your complaint the question whether IC 4-33-5-2 trumps IC 5-14-3-4(a) generally, and IC 5-14-3-4(a)(4) specifically. This presents a pure legal issue, one that I do not believe any Indiana court has considered. Caselaw authorities on the predominance of a specific statute over the more general provisions of the APRA could inform my judgment about this question, but unfortunately, in the context of this expedited advisory opinion, I cannot review the authorities in sufficient time to render a timely opinion on this issue.

Confidential Financial Information

As previously stated, a public agency may not disclose records that contain confidential financial information obtained, upon request, from a person. However, this does not include

information that is filed with or received by a public agency pursuant to state statute. IC 5-14-3-4(a)(5).

You do not raise any issue with respect to whether the excepted records meet the definition of “confidential financial information obtained from a person” as set out in *Opinion of the Public Access Counselor 03-FC-59*. There, the public access counselor drew on authorities under the federal freedom of information act to opine that information of the type that would not customarily be released to the public by the person from whom it was obtained would fall under the exemption in the APRA, unless it was submitted pursuant to a state statute. Without inspecting the records, I cannot opine whether each of the withheld records meets the exception. However, I have no doubt that the records respecting an individual’s federal and state income taxes and other individual financial records may well fall under the “confidential financial information” definition. You challenge chiefly the validity of the exemption where you assert that the records were filed with the agency pursuant to state statute.

The Commission has cited section 4(a)(5) as the basis for denying most if not all of the withheld records. However, the withheld records are not all the same type; they are a heterogeneous mix of financial records. The Commission claims in its response that much of the information required by the gaming statute applies only to corporate applicants, not individuals. More specifically, the Commission states that the records withheld under tabs 70 through 84 were not filed pursuant to IC 4-33-5-1. I cannot definitively state whether or not any or all of the records have been filed pursuant to IC 4-33-5-1. However, if any record *was* filed under IC 4-33-5-1, that record may not be withheld on the basis of IC 5-14-3-4(a)(5).

Records Required to be Kept Confidential by Federal Law

You do not take issue with the “federal law” exemption in your complaint, but I write to comment that the Commission has not fulfilled the requirement under IC 5-14-3-9(c) to cite the specific exemption or exemptions authorizing withholding the record, with respect to its citing of IC 5-14-3-4(a)(3), records required to be kept confidential by federal law. Any exemption under section 4(a)(3) would require a citation to the federal law mandating nondisclosure of the record. I note that with respect to social security numbers contained in the records, the Commission could cite to the federal Privacy Act, 42 U.S.C. 405(c)(viii)(I). *See Opinion of the Public Access Counselor 02-FC-34*. In any case, effective July 1, 2005, a public agency may not disclose a social security number contained in the records of a public agency. IC 5-14-3-4(a)(12).

CONCLUSION

It is my opinion that the Gaming Commission has generally provided records to you within a reasonable time under the circumstances, although certain specific records should have been provided more timely. The Gaming Commission has the burden of showing that the records it has denied under the APRA may be withheld under any of the exceptions in IC 5-14-3-4(a).

Sincerely,

Karen Davis
Public Access Counselor

cc: Philip Sicuso