

February 25, 2008

Grace Schneider  
The Courier-Journal and Times Co. of Louisville  
2500 Lincoln Drive  
Clarksville, Indiana 47129

*Re: Formal Complaint 08-FC-44; Alleged Violation of the Access to Public Records Act by the Indiana Gaming Commission*

Dear Ms. Schneider:

This is in response to your formal complaint alleging the Indiana Gaming Commission (“Commission”) violated the Access to Public Records Act (“APRA”) (Ind. Code 5-14-3) by denying you access to records. I have enclosed a copy of the Commission’s response to your complaint for your reference. It is my opinion the Commission has not violated the APRA.

#### BACKGROUND

You allege that you submitted a request to the Commission dated October 29, 2007 for copies of reports, email messages, videotapes and related documents involving an incident at a craps table at Caesars Indiana in September 2007. The Commission sent you a letter dated November 1, acknowledging the request and advising you the staff was researching which records may be available. On November 28, the Commission emailed you to indicate the only responsive record was a videotape recording of the incident. The Commission indicated you could appear at the office to view the videotape but a copy would not be provided to you.

You viewed the tape in the Commission office on December 17. The tape included a three-minute gap from one camera position. At that time, Larry Hawkins of the Commission indicated that the Commission maintains an “incident report” related to the issue. Mr. Hawkins also indicated that at least four cameras that record the table. The tape you viewed contained recordings from only two cameras. You telephoned the Commission and requested permission to view the tape again. By letter dated January 22, 2008, the Commission denied the request on the basis that additional viewing or providing footage from other angles could jeopardize gaming security or record-keeping systems. The Commission explained the gap in coverage as having resulted when casino employees were performing a routine and permissible procedure. You

submitted this complaint January 25, alleging the Commission violated the APRA for the following reasons:

- You were only allowed to view a portion of the Commission's footage of the incident; you contend the record is either a public record or it is not and the Commission should either provide full access to the record or deny access to the record.
- You allege the Commission is withholding footage from two cameras.
- You allege the Commission has denied the existence of records related to the incident which to exist, as evidenced by your conversation with a Commission staff member.

The Commission responded to your complaint by letter dated February 13 from Staff Attorney Lea Ellingwood. The Commission contends it told you on November 20 that no relevant written investigatory documents exist because the Commission never opened a case. The Commission further contends the videotape about which you complain was disclosable at the discretion of the Commission, pursuant to I.C. § 5-14-3-4(b)(10). The Commission advised you that although the record could be withheld, the Commission would make arrangements to allow you to view the videotape.

The Commission indicates that in response to your request to view the videotape a second time, it indicated that the footage responsive to your request is "information [that] may jeopardize a record keeping or security system (specifically, the surveillance system used to protect the assets of, and the integrity of gaming conducted at, Caesars Indiana)." The Commission also advised you that "it is the Commission's policy that repeated review and/or unrestricted dissemination of surveillance footage, surveillance camera angles, and/or other sensitive information about casino surveillance systems, is not conducive to protecting the integrity of gaming in Indiana." As such, the Commission would not confirm the number of cameras used to cover the table. The Commission further assured you that the footage you viewed represented all the responsive footage in the Commission's possession. Regarding the three-minute gap in coverage, it resulted from Caesars Indiana employees performing a routine and permissible procedure in the ordinary course of their duties. The activity at the relevant table was covered in its entirety by another camera from a different angle. You were permitted to view that coverage.

Regarding the footage you claim the Commission is withholding, the Commission explains that you erroneously assume all surveillance and security tapes created by a riverboat licensee or operating agency are public records of the Commission. The Commission explains that under 68 IAC 12, riverboat licensees or operating agents conduct surveillance of various activities and locations. Although the Commission outlines the procedure, the tapes created under the rules are maintained by the licensee or agent. They are not routinely provided to, maintained by, or created on behalf of the Commission. If a tape is forwarded to or received by the Commission, it becomes a record subject to the APRA. The Commission contends that until you contacted the Commission, it had no knowledge of surveillance tapes covering the incident. The Commission then obtained a copy of the surveillance tape to determine whether an investigation should be initiated. The Commission determined no investigation was necessary and as such obtained no further records from Caesars. The Commission contends that if any further footage from other cameras covering the incident exists, it is property of Caesars. The

Commission contends it is not required to obtain any additional records solely for the purpose of responding to your request.

Regarding your allegation that the Commission has withheld an incident report, the Commission contends that no further records regarding the incident exist. The Commission contends that you were mistakenly advised of the existence of further records. After an exhaustive review of its records, the Commission contends no further records exist.

Regarding the Commission's actions to allow you to view the videotape one time and its denial to your request for a copy of the footage, the Commission relies on I.C. § 5-14-3-4(b)(10), which excepts from disclosure at the discretion of the agency "administrative or technical information that would jeopardize a record keeping or security system." The Commission cites *Opinion of the Public Access Counselor 03-FC-126*, which addressed a surveillance videotape created at a correctional facility. The Commission contends its charge is to maintain the public's confidence and trust through strict regulation of facilities, persons, associations, and gambling operations in Indiana. I.C. § 4-33-1-2. As such, the Commission regulates the surveillance collected by licensees or agents in 68 IAC 12. The surveillance cameras are required to be "secreted from the public and non-security personnel view to effectively and clandestinely monitor, in detail, from various points, the coverage described in [68 IAC 12]." 68 IAC 12-1-3(c). The Commission contends that these records fall under the exception found in I.C. § 5-14-3-4(b)(10).

The Commission contends it appropriately exercised its discretion by allowing you to view the videotape footage one time but denying further access. The Commission contends that repeated access to the record is contrary to the Commission's mandate to protect the integrity of gaming in Indiana because such access would jeopardize the security system. Although the Commission could have withheld the footage completely, the Commission decided to allow a limited viewing in an effort to "uphold the spirit of the APRA as well as possible under these circumstances."

The Commission finally contends that the footage you viewed is exactly as the footage was provided to the Commission. The gap in coverage is a result of routine and permissible actions by Caesars employees. The Commission declines to provide further information related to the gap for the same security reasons implicated in I.C. § 5-14-3-4(b)(10).

#### ANALYSIS

The public policy of the APRA states that "(p)roviding persons with 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." Ind. Code § 5-14-3-1. The Commission is clearly a public agency for the purposes of the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy the public records of the Commission during regular business hours unless the public records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. I.C. § 5-14-3-3(a).

The Commission claims the videotape recordings of the craps tables at Caesars are exempt from disclosure under I.C. § 5-14-3-4(b)(10), which exempts documents which contain administrative or technical information that would jeopardize a record keeping or security system. Because the public policy of the APRA requires liberal construction in favor of disclosure (See I.C. § 5-14-3-1), exemptions to disclosure must be construed narrowly. *Robinson v. Indiana University*, 659 N.E.2d 153, 156 (Ind. Ct. App. 1995). But a liberal construction of the APRA does not mean the exemptions set forth by the General Assembly should be contravened. *Hetzel v. Thomas*, 516 N.E.2d 103, 106 (Ind. Ct. App. 1987).

This office has addressed the security system exemption to disclosure (See I.C. § 5-14-3-4(b)(10)) in *Opinion of the Public Access Counselor 03-FC-126*. There, the issue related to surveillance videotapes made at the Miami Valley Correctional Facility. Counselor Hurst referred to *City of Elkhart v. Agenda: Open Government*, 683 N.E.2d 622 (Ind. Ct. App. 1997), which involved telephone numbers of City employees. The City declined to release the telephone numbers based on the exemption found in I.C. § 5-14-3-4(b)(10) and based on the prior misuse of the Emergency 911 system to determine the owners of telephone numbers. The court said,

[A]ny prior alleged misuse or speculated future misuse of information *which is innocuous on its face* is irrelevant. Section 4(b)(10) provides a discretionary exception for public records containing a “type” of information due to its nature and not because of a speculated “use” of the information would jeopardize a record keeping or security system. *City of Elkhart*, 683 N.E.2d at 627 (emphasis added).

As Counselor Hurst noted, the telephone numbers being sought were not part of the security system their disclosure was said to endanger. About the surveillance videotapes at issue in *Opinion of the Public Access Counselor 03-FC-126*, though, Counselor Hurst opined the following:

Here, unlike the telephone numbers at issue in *City of Elkhart*, the videotape cannot be characterized as ‘innocuous’ or not of the “type” of technical or administrative information that due to its nature if disclosed would jeopardize the record keeping and security system the Department utilizes at the Miami Valley Correctional Facility. The videotape is part and parcel of the security system utilized by that facility. . . it also represents information of the sort fully contemplated by the legislature when it codified the security system exemption. . . The quality of the videotape and clarity of images projected may certainly be characterized as “technical information” regarding the security system that, if disclosed, could jeopardize that system. *Id.*

I agree with Counselor Hurst’s opinion in this matter. Here, the Commission has duties prescribed by I.C. § 4-33-1-2 to maintain the public’s confidence and trust through strict regulation of facilities, persons, associations, and gambling operations in Indiana. As such, the Commission regulates the surveillance collected by licensees or agents in 68 IAC 12. The surveillance cameras are required to be “secreted from the public and non-security personnel view to effectively and clandestinely monitor, in detail, from various points, the coverage described in [68 IAC 12].” 68 IAC 12-1-3(c). Since the Commission neither maintains, nor is

required to maintain, the surveillance video collected by all licensees or agents, it does not become a public record unless the Commission receives a copy of it. I.C. § 5-14-3-2(m). The Commission does not dispute that the video it received from Caesars is public records; it does, however, argue the surveillance video received by the Commission is exempted from disclosure pursuant to I.C. § 5-14-3-4(b)(10).

In accepting the argument that the surveillance video was excepted from disclosure under I.C. § 5-14-3-4(b)(10), Counselor Hurst in *Opinion of the Public Access Counselor 03-FC-126* said the following:

From such information as the camera angles an offender may determine from the videotape where they can hide from camera detection, and from that information avoid monitoring and commit infractions or offenses against corrections personnel and other inmates. The videotape may also reveal the operational times and operation status of specific cameras. In my opinion, such information relating to the administration of the security system would, if disclosed, jeopardize the security system and render the security provided by the cameras non-existent. *Id.*

Here, the issue is quite similar. The Commission argues that “repeated review and/or unrestricted dissemination of surveillance footage, surveillance camera angles, and/or other sensitive information about casino surveillance systems, is not conducive to protecting the integrity of gaming in Indiana.” For the reasons provided by Counselor Hurst in the previously cited opinion, I agree that disclosure of the surveillance video maintained by the Commission and recorded by the casino could jeopardize the security system the Commission is statutorily obligated to protect.

The question then is whether the Commission appropriately exercised its discretion afforded by I.C. § 5-14-3-4(b)(10) by permitting you to view the video footage one time and denying your request for further viewing and/or copying. The APRA provides that the legal standard for an agency’s disclosure based on I.C. § 5-14-3-4(b) is whether the denial was arbitrary or capricious. I.C. § 5-14-3-9(g)(2). While Indiana courts have not addressed the arbitrary and capricious standard as applied to the APRA, the Indiana Court of Appeals has said that “arbitrary or capricious action . . . means willful and unreasonable action, without consideration and in disregard of the facts and circumstances of the case; action taken without some basis which would lead a reasonable and honest man to such action.” *State Board of Tax Commissioners v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 96 N.E.2d 279, 282 (Ind. App. 1951).

Here, the Commission contends it was endeavoring to uphold the spirit of the APRA when it permitted you to view the videotape recording one time in its office. The Commission contends, though, that repeated viewing or unfettered release of the information (i.e. providing you a copy of the video) would jeopardize the security system of the casino. While it is my opinion a public agency may not allow a person to inspect records and then contend they are nondisclosable under section 4(a) of the APRA (prohibiting an agency from disclosing certain records), it is my opinion that in some circumstances an agency may exercise its discretion under section 4(b) by providing access to one person but denying access to another. For instance, in

the case of investigatory records of law enforcement agencies, which are addressed in section 4(b)(1), it is understandable that a law enforcement agency may disclose records to individuals it believes can assist in the investigation but withhold those records from other requesters.

Here, I do not believe the Commission exercised its discretion in an arbitrary and capricious manner. I commend the Commission for endeavoring to uphold the spirit of the APRA when it permitted you to view the videotape recording, as it is my opinion the Commission could have withheld the video from disclosure at all. In hindsight, the Commission could have avoided confusion by making you aware you would only be allowed to inspect the video one time. But I do not believe the Commission's denial of repeated access to the video was arbitrary and capricious. It is my opinion the Commission gave fair consideration to the facts and circumstances, namely the jeopardy in which the security system might be placed by repeated and/or unfettered access to the video footage. In my opinion it was reasonable for the Commission to provide you access to the video on one occasion and only one occasion.

Regarding your allegation that you were only allowed to view the footage from two cameras rather than the four cameras covering the table in question, that the footage contained and three-minute gap, and that the Commission withheld an incident report regarding the incident, the Commission has repeatedly assured you that you have been provided access to all records maintained by the Commission responsive to your request. The Commission has further explained that casino surveillance video recordings are not created by or on behalf of the Commission. As such, the video recordings do not become public records until they are received by the Commission. I.C. § 5-14-3-2(m). Nothing in the APRA requires a public agency to *develop* records or information pursuant to a request (or in this case to obtain from a non-public agency records that were not created on behalf of the public agency). The APRA requires the public agency to *provide access* to records already created.

It is my opinion that if the Commission maintained any further records responsive to your request, it would be required pursuant to the APRA to provide you access to those records or provide the appropriate authority for nondisclosure. I see no evidence the Commission has not provided you access to all the records it maintains which are responsive to your request.

#### CONCLUSION

For the foregoing reasons, it is my opinion the Commission has not violated the APRA.

Best regards,



Heather Willis Neal  
Public Access Counselor

cc: Lea Ellingwood, Staff Attorney, Indiana Gaming Commission