

August 15, 2003

Mr. Richard Allender
C/o Rudolph Wm. Savich
Attorney at Law
230 West Seventh Street
Bloomington, IN 47404

Re: Advisory Opinion 03-FC-58; Alleged Denial of Access to Public Records by the State Lottery Commission of Indiana.

Dear Mr. Allender:

This is in response to your formal complaint, which was received on July 14, 2003. You have alleged that the State Lottery Commission of Indiana ("Commission") has violated the Indiana Access to Public Records Act ("APRA"), Indiana Code chapter 5-14-3. Specifically, you allege that the Commission wrongfully denied you access to public records with respect to written requests that you made to the Commission. Ms. Janna J. Shisler, General Counsel for the Commission, responded in writing to your complaint. A copy of her response is enclosed for your reference. For the reasons set forth below it is my opinion that the Commission improperly withheld public records in violation of the APRA and this denial is actionable under Indiana Code section 5-14-3-9.

BACKGROUND

According to your complaint, you have made several public records requests to the Commission for documents containing the time a winning Powerball lottery ticket was purchased at Joe's Junction on March 12, 2003. In response to each of your requests you received a letter from the Commission denying you access to the records. In those letters the Commissioners asserted that the record was exempt from disclosure pursuant to Indiana Code sections 5-14-3-4(b)(1), (10), and (11) as adopted by the Hoosier Lottery and set forth in its regulations at 65 IAC 1-2-3(b)(1), (5), and (6). Additionally, the Commission refers to Indiana Code section 4-30-11-4(4). After receiving the Commission's denial letter of June 30, 2003 you filed a formal complaint with this Office.

In her response to this Office Ms. Shisler asserted that the information you requested was exempt from disclosure. Ms. Shisler advised that Indiana Code section 5-14-3-4(a)(1), records declared confidential by state statute, requires that the Commission withhold the information you requested unless required to release the information by federal or state statute or required to release the information by an order of the court under the rules of discovery. Additionally, Ms. Shisler asserted that the records in question are exempt from disclosure at the discretion of the Commission pursuant to

Indiana Code section 5-14-3-4(b)(10), Indiana Administrative Code 65 IAC 1-2-3(5). I will address each of these in turn.

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. Furthermore, "[t]his chapter shall be liberally construed to implement this policy and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record." Ind. Code § 5-14-3-1.

The Commission is clearly a public agency for the purposes of the APRA. Ind. Code § 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 Indiana Code section 5-14-3-4. Ind. Code § 5-14-3-3(a).

Indiana Code section 5-14-3-4(a)(1)

Under the APRA, a public agency must withhold from disclosure records that are "declared confidential by state statute." In this case there does not appear to be a statute that declares the information you have requested, the time the winning lottery ticket was purchased, confidential. Although Indiana Code section 4-30-11-4(4) does refer to "confidential validation and security tests" it does not identify those tests. Since no specific statute declares the information you requested confidential it is my opinion that 5-14-3-4(a)(1) is inapplicable.

However, Ms. Shisler further asserts that although the "confidential validation and security tests" are not defined by statute, the Commission was directed to adopt rules establishing a "system of verifying the validity of tickets claimed to win prizes and to make payment of the prize." Ind. Code § 4-30-11-1. The question then becomes whether Indiana Code section 5-14-3-4(a)(2) is applicable. Indiana code section 5-14-3-4(a)(2) provides that a public agency may not disclose records that are "declared confidential by rule adopted by a public agency under specific authority to classify public records as confidential granted to the public agency by statute." Although the Commission has authority to adopt rules concerning the establishment of a verification system the Commission has not been given specific authority to declare records confidential. Therefore, it is my opinion that because the Commission has not been given specific authority to declare records confidential Indiana Code section 5-14-3-4(a)(2) is also inapplicable.

Indiana Code section 5-14-3-4(b)(10), Indiana Administrative Code 65 IAC 1-2-3(5)

Additionally, Ms. Shisler asserts that the information you requested is nondisclosable at the discretion of the Commission pursuant to Indiana Code section 5-14-3-4(b)(10) and Indiana Administrative Code 65 IAC 1-2-3(5) (hereafter reference will only be made to Indiana Code section 5-14-3-4(b)(10)". Indiana Code section 5-14-3-4(b)(10) provides that a public agency may withhold in its

discretion "[a]dministrative or technical information that would jeopardize a record keeping or security system." Since it is the public policy of the APRA that it is to be construed liberally in favor of disclosure, exceptions to that general rule of disclosure are to be narrowly construed. Ind. Code §5-14-3-1.

Liberal construction of a statute requires narrow construction of its exceptions. In the context of public disclosure laws . . . "[E]xceptions to a statute and its operation should be strictly construed by placing the burden of proving the exception upon the party claiming it. Other states, in examining their respective 'Open Door' or 'Sunshine' laws, follow these same mandates, particularly the principle of strict construction of statutory exceptions."

Robinson v. Indiana University, 659 N.E.2d 153, 156 (Ind. App. 1995) [Citations omitted] quoting *Common Council of City of Peru v. Peru Daily Tribune, Inc.* 440 N.E. 2d 726, 729 (Ind. App. 1982) [Citations omitted]..

In order to determine the intent of the General Assembly in enacting this language, we must rely upon the rules of statutory construction set forth by our Indiana courts. Fortunately, the Indiana Court of Appeals has already considered this exception to disclosure and provided helpful guidance for the purposes of this Opinion.

In *City of Elkhart v. Agenda: Open Government*, 683 N.E.2d 622 (1997) *transfer den.* 698 N.E.2d 1184 (Ind. 1998), the Indiana Court of Appeals reviewed a case in which the City had claimed Indiana Code section 5-14-3-4(b)(10) as authority for the nondisclosure of 1993 cellular telephone bills for the mayor and other City department heads. City officials denied Agenda: Open Government access because they believed that, with respect to an earlier public records request for similar information, the requestor had misused the E-911 system to discover the origin of the telephone numbers listed in the cellular telephone records.

The Court determined that the E-911 system did constitute a "record keeping or security system" under the APRA. The Court found that "[s]ection 4(b)(10) provides a discretionary exception for public records containing a 'type' of information due to its nature and not because a speculated 'use' of the information would jeopardize a record keeping or security system." The real question, therefore, according to the Court was whether the telephone numbers constituted "administrative" or "technical" information the disclosure of which would jeopardize that E-911 system.

The term "technical" may be defined as "of or relating to technique" and "marked by or characteristic of specialization." . . . the term "administrative" may be defined as "of or relating to administration."

City of Elkhart, at 626-7. Applying these meanings to the terms used in Indiana Code section 5-14-3-4(b)(10), the Court held that telephone numbers were neither technical nor administrative information. The

Court also reviewed the City's assertion that they were authorized to deny under this exception to disclosure because of the alleged prior misuse of the information by the requestor. The Court had no authority to deny access under this APRA exception to nontechnical and nonadministrative information based upon the prior misuse nor on the condition that the requestor provide assurance that the information would not be misused.

Applying the analysis supplied in the *City of Elkhart* case, the speculated use of the information is irrelevant in determining its disclosability under Indiana Section 5-14-3-4(b)(10). Therefore, it is irrelevant that the information may be used in a manner that could damage or eliminate the Commission's verification process. The question here is whether the time the winning lottery ticket was purchased is administrative or technical information, which if released would jeopardize a record keeping or security system. I agree that the system, process, or manner in which the Commission determines the time at which the winning lottery ticket is sold may be a record keeping or security system. However, the actual time that a ticket was sold does not constitute technical or administrative information that would jeopardize that system. Revealing the actual time that the winning lottery ticket was sold reveals nothing about the process, manner, or system by which the Commission determines the time the winning lottery ticket was sold. Although, the time the winning lottery ticket was sold may be used by the requester in a manner that might jeopardize a record keeping or security system, the Court determined that Indiana Code section 5-14-3-4(b)(10) provides an exemption for a type of information and not for the use of the information. Therefore, it is my opinion that the time the winning lottery ticket was sold is not exempt pursuant to Indiana Code section 5-14-3-4(b)(10).

CONCLUSION

In conclusion, it is my opinion that State Lottery Commission of Indiana improperly withheld records in violation of the Indiana Access to Public Records Act and that this denial is actionable under Indiana Code section 5-14-3-9.

Sincerely,

Sandra K. Barger
Acting Public Access Counselor

Cc: Ms. John Ross, State Lottery Commission of Indiana