

October 5, 2004

Glenn R. Lawrence
Executive Director
Indiana Gaming Commission
South Tower, Suite 950
115 W. Washington Street
Indianapolis, IN 46204-3408

Re: Informal Inquiry Response

Dear Mr. Lawrence:

You have asked for an informal inquiry response pursuant to IC 5-14-4-10(5) regarding a request for a record received from State Representative William Crawford. Specifically, Rep. Crawford has requested information maintained by the Indiana Gaming Commission ("Commission") relating to a riverboat licensee's minority business enterprise or women's business enterprise ("MBE/WBE") contracts for the years 2001, 2002 and 2003. For the reasons set forth below, it is my opinion that the information requested by Rep. Crawford is a public record that must be disclosed pursuant to the Access to Public Records Act.

BACKGROUND

During the summer of 2003, Rep. Crawford requested the names, addresses, and contract amounts of MBE/WBE's doing business with all riverboats for 2001, 2002, and 2003. The Commission denied him access to the individual contract amounts paid by each riverboat to a particular vendor, because the Commission deemed that information confidential financial information received, upon request, from a person under IC 5-14-3-4(a)(5). Rep. Crawford sought and received from the Public Access Counselor on January 14, 2004 an informal opinion that upheld this denial.

On April 14, 2004, Rep. Crawford renewed his request for information regarding the contract amounts for MBE/WBE's doing business with the riverboats. In his letter requesting this information, Rep. Crawford cited a law passed during the 2004 legislative session, House Bill 1436 (P.L. 84), effective July 1, 2004 making the contract information disclosable. The Commission responded to this request by letter dated April

21, 2004, denying the contract amount information until at least July 1, 2004, the effective date of P.L. 84, and also stating that the Commission would seek an opinion from the Public Access Counselor with respect to what information would be disclosable after July 1, 2004. The Commission's request for an informal inquiry response was sent to former Public Access Counselor Michael Hurst on April 26, 2004. Following Mr. Hurst's leaving this office, I assumed the position of Public Access Counselor on July 6, 2004. This letter is the response to your April request.

In July 2004, Rep. Crawford sent the Commission a new request for this information, stating that with P.L. 84 now in effect, he would like the previously-requested information on a periodic basis, either monthly or when the Commission receives the information from the riverboats. Your response to Rep. Crawford of July 30, 2004 states that you are willing to provide the information quarterly for information submitted to the Commission after July 1, 2004, but you are awaiting this Office's response with respect to information filed with the Commission prior to the new law's effective date.

ANALYSIS

Prior to the passage of P.L. 84, state law required that the riverboats submit annually to the Commission a report of the total dollar value of contracts awarded for goods or services and the percentage awarded to minority and women's business enterprises. IC 4-33-14-5(b). In addition, the Commission has since 2001 requested and received information from the riverboats with respect to specific contract amounts of minority and women-owned vendor contracts, by vendor. It is this latter information that Rep. Crawford seeks.

P.L. 84, Section 6 added the following provision, with the new language indicated in boldface:

- (c) An operating agent or a person holding an owner's license shall submit annually to the commission a report that includes the following information:
 - (1) **The** total dollar value of contracts awarded for goods or services and the percentage awarded to minority and women's business enterprises.
 - (2) **The following information relating to each minority business enterprise or women's business enterprise awarded a contract for goods or services:**
 - (A) **The name.**
 - (B) **The address.**
 - (C) **The total dollar amount of the contract.**
- A record containing information described in this subsection is not exempt from the disclosure requirements of IC 5-14-3-3 under IC 5-14-3-4.**

This provision was effective July 1, 2004.

The issue stated by the Commission is whether the contract information sought by Rep. Crawford is subject to the amended law when the information was submitted to the

Commission after July 1 when P.L. 84 was in effect, but regards contract information in effect for the quarter April through June 2004. In addition, because Rep. Crawford is seeking information from 2001, 2002, and 2003, the same question regarding the amended law's effect applies to this information as well.

ANALYSIS

Under the Access to Public Records Act, any person may inspect and copy the public records of any public agency during the regular business hours of the agency, except as provided in section 4. IC 5-1-4-3-3(a). The Commission is a public agency, and any record that is "created, received, retained, maintained, or filed" with the Commission is a "public record." IC 5-14-3-2.

This opinion will focus on the question of whether P.L. 84 mandates disclosure with respect to Rep. Crawford's July 2004 request for information submitted to the Commission before P.L. 84 went into effect regarding individual vendor contract amounts for 2001, 2002, and 2003. You have agreed to disclose information submitted to the Commission after July 1, 2004 and pertaining to contracts after July 1, 2004. Your question is whether information that was submitted prior to P.L. 84's effect, when it was subject to an exception to disclosure for confidential financial information obtained, upon request, from a person, must now be disclosed upon request.

This precise issue, it appears, has not been decided in any prior advisory opinion of this office. I also was unable to find a reported Indiana case. Although at first blush it would appear that the issue involves whether P.L. 84 may be given retroactive effect, the operation of the Access to Public Records Act makes such analysis unnecessary. This is because any record maintained by the Commission, and subject to a request such as the request here from Rep. Crawford, would be subject to the law that is in effect when the request was made, regardless when the information was submitted to the Commission or the period to which the record pertains. After July 1, Rep. Crawford's request for a record containing the total dollar amount of each MBE/WBE contract entered into by a riverboat licensee is subject to P.L. 84; that is, it is not exempt from disclosure under the Access to Public Records Act, including any exception under IC 5-14-3-4. IC 4-33-14-5(c).

Cases in other jurisdictions under identical or similar facts lend support to this opinion. See *State ex rel. Beacon Journal Publishing Co. v. University of Akron*, 415 N.E.2d 310 (Ohio 1980); *State of Hawaii Organization of Police Officers v. Society of Professional Journalists*, 927 P.2d 386, (Haw. 1996); *News-Press Publishing Co. v. Kaune*, 511 So.2d 1023 (Fla. Dist. Ct. App.1987); *N. C. Elec. Membership Corp. v. N. C. Dept. of Economic and Community Dev.*, 425 S.E.2d 440, (N.C. Ct. App. 1993).

In *Beacon Journal*, the university resisted disclosure of certain law enforcement records made prior to the amendment to the public access law that made those records public, contending that they were governed by the former law that deemed those records confidential. The Ohio Supreme Court ruled that the Beacon Journal newspaper was not

seeking to apply the amendment to the law in a retrospective manner, but was instead seeking present access to the records. This was true even though the records sought were created prior to the legislative amendment at issue:

“Concededly, the creation of the records took place prior to the legislative amendment at issue, but this is not the conduct regulated by the statute. [The statute] deals with the availability of public records, not the recordation function of government units. The date the records were made is not relevant under the statute. Since the statute merely deals with record disclosure, not record keeping, only a prospective duty is imposed upon those maintaining public records.”

Beacon Journal at 313.

Hawaii Organization of Police Officers adopted the same reasoning as in *Beacon Journal*, finding that the Society of Professional Journalists present request for records predating certain 1993 amendments to the Uniform Information Practices Act affected “only an agency’s prospective duty of disclosure and impairs no existing rights.” *Id.* at 397.

Conversely, where a class of records was made confidential by legislative amendment before the request for the record was made, courts that have held or observed in dicta that applying the amendment to the newly-exempt class of records filed with the agency prior to the amendment does not constitute a retroactive application of the amendment. *N. C. Elec. Membership*, 425 S.E.2d at 445; *News-Press Publishing Company, Inc.*, 511 So.2d at 1026:

“It seems indisputable that if the legislature determines that ‘all documents pertaining to subject ‘A’ in personnel files shall be exempt,’ it intends, unless it specifies otherwise, that on the effective date of the law creating the exemption *all* such documents are exempt from any request for disclosure made thereafter regardless of when they came into existence or first found their way into the public records.”

Id. at 1026.

The effect of P.L. 84 was to make any records maintained by the Commission “containing information described in this subsection” (the name, address and total dollar amount of each contract) available for inspection and copying because the amendment states that this information is not exempt from disclosure under IC 5-14-3-3 under IC 5-14-3-4. IC 5-14-3-4(a)(5) was properly claimed by the Commission as the exemption to disclosure prior to the change in law, but a present request for any documents maintained by the Commission containing that information is no longer subject to that exemption, in my opinion.¹

¹ Less careful drafting of P.L. 84 might have led me to conclude otherwise; for instance, if P.L. 84 section 6 had read: “a record submitted pursuant to this subsection is not exempt...” then the previously submitted

As you are aware, my opinions are advisory. I appreciate your diligence and patience in securing this informal advisory opinion regarding Rep. Crawford's request. Please feel free to contact me if you have any questions.

Sincerely,

Karen Davis
Public Access Counselor

Cc: Representative William Crawford

information would have remained exempt since the amendment by those terms would have applied only to those records submitted under the amendment making such submissions mandatory. However, the amendment is not so limited.