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November 23, 2009

VIA EMAIL AND U.S. MAIL

Audrey Buglione, Appeals Officer
Pennsylvania Office of Open Records
Commonwealth Keystone Building
400 North Street, 4th Floor
Harrisburg, PA 17120-0225

Re: Opposition To Consolidated Appeal AP 2009-0955

Dear Ms. Buglione:

On behalf of our client, Philadelphia Entertainment and Development Partners, L.P. d/b/a Foxwoods Casino Philadelphia (hereinafter "Foxwoods"), we submit this response to the Appeals filed by Adam Cutler, Esquire (AP 2009-0955) and Paul Boni, Esquire (AP 2009-0938) (collectively the "Requesters"), which have been consolidated in the above captioned Appeal. Referencing the Pennsylvania Right to Know Law, the Requesters each sought to obtain a copy of an October 1, 2009 Report submitted by Foxwoods to the Chief Enforcement Counsel for the Bureau of Investigation and Enforcement (the "Bureau") for the Gaming Board in connection with a noncriminal investigation being conducted by the Bureau (collectively, the "Requests"). By letters dated October 8, 2009 and October 15, 2009, the Open Records Officer for the Gaming Board correctly denied these Requests.¹

¹ We understand that the October 1, 2009 Report and cover E-Mail transmitting the October 1, 2009 Report were the only documents responsive to the Requests at the time that the Open Records Officer for the Gaming Board received and responded to the Requests. As such, we submit that those are the only documents at issue on Appeal. An agency can only produce documents that exist and are in its possession at the time of the request. *See Fugit v. Lancaster County Sheriff's Office*, OOR Docket AP 2009-0050; 65 P.S. §§ 67.305 (agency can only produce documents in its "possession"), 67.705 (agency is not required to create a record that does not exist). To the extent that the Requesters sought to create a continuing obligation on the part of the Gaming Board to provide additional documents as they become available, whether

As set forth below, the Office of Enforcement Counsel of the Bureau has the authority and duty to investigate potential violations of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. § 1101, et. seq., (the "Gaming Act"). Foxwoods provided the October 1, 2009 Report to the Office of Enforcement Counsel in connection with such investigation. Accordingly, as records relating to a noncriminal investigation, these records are exempt from disclosure. 65 P.S. § 67.708(b)(17). They are also exempt from disclosure because they are confidential under State law. Pursuant to the Gaming Act, the Gaming Board has the authority to declare certain information confidential and the duty to maintain that information as confidential and to protect it from disclosure. 4 Pa.C.S. § 1207. It has carried out that duty here in denying the Requests to examine the October 1, 2009 Report. Thus, Foxwoods requests that the Office of Open Records deny the Appeal and order that no further action is necessary by the Gaming Board with respect to the Requests.

I. THE STATUTORY AND REGULATORY MANDATE OF THE BUREAU AND THE OFFICE OF ENFORCEMENT COUNSEL

The Gaming Act and the Regulations promulgated thereunder, set forth the powers and duties of the Bureau. 4 Pa. C.S. § 1517(a.1)(1)-(9). Among other things, the Bureau is tasked to: "Investigate *licensees* . . . for potential violations of the act, including potential violations referred to the Bureau by the Board or other persons." 4 Pa. C.S. § 1517(a.1)(3) (emphasis added). *See also* 58 Pa. Code § 405a.1(2). Within the Bureau, the Gaming Act established the "Office of Enforcement Counsel." 4 Pa. C.S. § 1517(a.2). The Gaming Act provides further that the Office of Enforcement Counsel "shall act as the prosecutor in all noncriminal enforcement actions initiated by the bureau." 4 Pa. C.S. § 1517(a.2)(1). In addition, the duties assigned to the Office of Enforcement Counsel by the Gaming Act include the duty to: "Advise the bureau on all matters, including the granting of licenses, permits or registrations, the conduct of background investigations, audits and inspections and the *investigation of potential violations of this part.*" 4 Pa.C.S. § 1517(a.2)(1)(i) (emphasis added). The Office of Enforcement Counsel also has the responsibility for initiating proceedings for violations of the Gaming Act. 4 Pa.C.S. § 1517(a.2)(1)(iii); 58 Pa. Code § 405a.3.

pursuant to the Gaming Board's Order of September 1, 2009 ("Order") or otherwise, those Requests are improper and should be denied. *See* 65 P.S. § 67.901 (stating that the agency, upon receipt of the written request should make a good faith effort to determine if the record exists and if it is a public record and should respond to the request within 5 business days). In general, it is important that a request be construed only to cover documents in existence at the time of the request. Were it otherwise, an agency would not be able to evaluate specific documents subject to the request to determine whether there are additional reasons (such as confidentiality or privilege) for denying a request with respect to those documents. Furthermore, requiring an agency to track and respond to open-ended requests as any relevant documents become available would be unduly burdensome. Applied here, the issue is potentially relevant because the Board's Order contemplates future reports of increasing detail.

II. THE AUGUST 28, 2009 GAMING BOARD HEARING AND THE GAMING BOARD'S SEPTEMBER 1, 2009 ORDER GRANTING FOXWOODS MOTION

On August 28, 2009, the Gaming Board held a hearing on Foxwoods' Motion for an Extension of Time to Make Slot Machines Available for Play. During that hearing, Enforcement Counsel for the Bureau urged the Board to impose conditions on Foxwoods should the Board grant Foxwoods' Motion to Extend Time. Transcript of August 28, 2009 Hearing, at 44:23-47:18, a copy of the transcript was previously submitted in connection with this matter by Requester Boni. The proposed conditions included a series of reports to be submitted to the Bureau over time setting forth Foxwoods' efforts to make the requisite 1,500 slot machines available for play by the new deadline imposed by the Order -- May 29, 2011. Cyrus Pitre, Chief Enforcement Counsel, made clear at the hearing that these reports were part of his office's investigation into Foxwoods' compliance with the Gaming Act and its obligations thereunder. When asked by a Gaming Board member what consequences might result from a failure on the part of Foxwoods to submit the required reports and to work to meet the benchmarks set forth, Mr. Pitre stated that in such circumstances the Office of Enforcement Counsel, if it deemed appropriate, could file "a rule to show cause as to why [Foxwoods'] license should not be revoked." Tr. at 70:23-24. Chief Counsel added: "if they've not met the burden of showing that they were moving forward or trying to do their best to attain or reach certain benchmarks, then we would be filing an enforcement action to revoke the license." Tr. at 70:25-71:4. That statement clearly demonstrates that, pursuant to its obligations under the Gaming Act, the Office of Enforcement Counsel is conducting an investigation of Foxwoods, a licensee, with respect to potential non-criminal violations of the Gaming Act regarding its obligation to comply with the mandates of the Order and that if the Bureau concludes that Foxwoods has failed to satisfy these conditions, then it will commence proceedings to seek the appropriate sanctions against Foxwoods' in connection with its license.

At the conclusion of the hearing, the Gaming Board issued the Order largely adopting the recommendations of the Bureau and directed Foxwoods to submit monthly reports and other information to the Bureau as provided therein. See September 1, 2009 Order at ¶¶ 2-7, a copy of this Order was previously submitted in connection with this matter by Requester Boni.²

III. STANDARD OF REVIEW

We agree that the documents requested are "Records" as that term is defined in the Right To Know Law. 65 P.S. § 67.102. We further agree that records in possession of an agency are

² Requester Boni suggests that the Gaming Board's Order required Foxwoods to provide the same information to the Gaming Board. That is incorrect. The Order obligates Foxwoods to provide the Gaming Board with a written plan as to how it intends to make the slot machines available to play on time, to notify the Gaming Board of any impending change in ownership, control, or financial status (which is already required by the regulations), and to appear at public hearings as required by the Gaming Board. However, the remaining mandates of the Order are addressed to the submission by Foxwoods to the Bureau of the various documents described therein.

presumed to be “public” unless: (1) the record is exempt under Section 708; (2) the record is protected by a privilege; or (3) the record is exempt from disclosure under any other Federal or State law, regulation or judicial order or decree. 65 P.S. § 67.305. And, we agree that the parties resisting production bear the burden to show by a preponderance of the evidence that the record is exempt from public access. 65 P.S. § 67.708.

That standard for exemption is easily and clearly satisfied here.

IV. BECAUSE THE REQUESTED DOCUMENTS ARE RECORDS OF AN AGENCY RELATING TO A NONCRIMINAL INVESTIGATION, THE GAMING BOARD HAD THE AUTHORITY TO DENY THE REQUESTS UNDER 67.708(B)(17) OF THE RIGHT TO KNOW LAW

Section 67.708(b)(17) of the Right to Know Law exempts the following from disclosure:

A record of an agency relating to a noncriminal investigation, including:

...

(ii) Investigative materials, notes, correspondence and reports.

...

(iv) A record that includes information made confidential by law.

...

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of an agency investigation . . .

That Section exempts the October 1, 2009 Report from disclosure. Foxwoods addressed the October 1 Report to Mr. Pitre, Chief Enforcement Counsel for the Bureau, in connection with its continuing investigation into whether Foxwoods is in compliance with the Gaming Act and the conditions of its license as set forth above. As the Office Of Open Records has previously held: “The plain language of § 708 exempts investigative materials, notes, and reports *submitted* to an agency.” *Repetski v. North Lebanon Township*, OOR Docket, AP 2009-0792 (denying requester’s appeal because documents sought pertained to a noncriminal investigation) (emphasis added). It does not matter that the October 1, 2009 Report was provided to, rather than prepared by, the Bureau. It remains a report relating to a noncriminal investigation and is thus exempt from disclosure. *See, e.g., Hosie v. Bradford County*, OOR Docket, AP 2009-0885.

Furthermore, the Office of Open Record’s decisions in other matters confirm that these records are not subject to disclosure. For example, in *Hosie*, the Office of Open Records denied a requester’s appeal for access to computer files of certain judicial officers that a county had obtained during a noncriminal investigation concerning computer usage. The Office of Open Records concluded that while the records were records of the County because they had been obtained during the investigation, they were exempt from production because they were materials related to the investigation. Likewise, in *Nelle v. Penn-Delco School District*, OOR Docket AP 2009-0477, a case cited by Requester Cutler, the Office of Open Records denied the

requester's appeal for a transcript of an interview with an unidentified person as part of the district solicitor's investigation into alleged wrongdoing by district employees. Like the computer files in *Hosie*, and the October 1, 2009 Report at issue here, the transcript is information provided to the state entity by someone else relating to the investigation. Thus, the Office of Open Records agreed that it was exempt from disclosure.

Moreover, the Office of Open Records decision in *HCR-Manorcare v. Pennsylvania Department of Health*, OOR Docket AP 2009-0121, is distinguishable from this case.³ In *Manorcare*, the Department of Health sought to shield from disclosure documents related to routine surveys and inspections conducted by the Department of Health. The Office of Open Records noted that not "every inquiry and activity conducted by an agency rises to the level of the kinds of noncriminal investigation contemplated in Section 708(b)(17)." *Id.* at 7. The Office of Open Records concluded that there was no "trigger" to elevate the agency's routine inquiries and surveys in *Manorcare* to a noncriminal investigation. *Id.*

This case is very different. One of the primary functions of the Office of Enforcement Counsel is to investigate potential violations of the Gaming Act and enforce the Gaming Act as necessary. In that sense, that Office acts much like a prosecutor. In fact, the Gaming Act expressly states that the Office of Enforcement Counsel "shall act as the prosecutor in all enforcement actions initiated by the bureau." 4 Pa. C.S. § 1517(a.2)(1). And, here, the Office of Enforcement Counsel is carrying out its obligations by conducting these investigations. Moreover, as with investigations triggered by a complaint, the investigation relating to Foxwoods' compliance with the Gaming Act was triggered by its request for an extension of time to comply with the Gaming Act's requirements for making slot machines available to play. The conditions included in the Gaming Board's September 1, 2009 Order -- and which the Bureau seeks to investigate compliance by Foxwoods -- were recommended by the Office of Enforcement Counsel and ordered by the Gaming Board.

Furthermore, the October 1, 2009 Report is also exempt from production because "disclosure" would reveal the "progress" of the Bureau's investigation. Indeed, Requester Cutler concedes as much when he argues "[a]bsent public access to the monthly" reports, "the public would lose the ability to monitor the PGCB's enforcement of its September 1, 2009 Order." Requester Cutler's Appeal at 3-4. The Right to Know Law shields investigations from precisely that type of public scrutiny. The General Assembly determined as a matter of public policy that non-criminal agency investigations are best left to the agency to conduct, free from the potentially disruptive effects of public disclosure.⁴

³ We note that the *Manorcare* case is currently on appeal before the Commonwealth Court.

⁴ See *Adams v. Department of Health*, 967 A.2d 1082, 1087, 1089 (Pa. Commonwealth Ct. 2009). In that case, the Commonwealth Court interpreted the Health Care Facilities Act in the context of an appeal by residents of a nursing home who sought to intervene in the Department of Health's consideration of a change in ownership of a chain of nursing homes. The Court stated that the General Rules do not authorize appointing citizens "ad hoc Department staff" and that it would "produce chaos" to allow private citizens to involve themselves in agency decisions in that manner. *Id.* at 1087, 1089.

Cognizant that Section 708(b)(17) forecloses their request, the Requesters then argue that “[t]he records sought are simply not a result of or incident to any investigation initiated by the [Bureau] or the [Gaming Board].” Requester Cutler’s Appeal at 3. *See also* Requester Boni’s Appeal at 3. That is simply wrong. As discussed above, this type of investigation is the duty of the Bureau in general, and the Office of Enforcement Counsel in particular.⁵

V. THE RECORDS ARE ALSO EXEMPT FROM DISCLOSURE PURSUANT TO STATE LAW

Because the records being sought by the Requesters are related to the Bureau’s non-criminal investigation, the Office of Open Records can deny the appeal on that basis alone and need not reach the other reasons cited by the Gaming Board’s Open Records Officer in denying the Requests. If, however, the Office of Open Records does reach and consider those other reasons, they provide independent grounds for the Gaming Board not to disclose the records. The Right to Know Law exempts from disclosure records deemed exempt from disclosure under any other State law. 65 P.S. § 67.305(a)(3) (exempting from disclosure any record that “is exempt from disclosure under any other Federal or State law, regulation or judicial order or decree”). Section 1207 of the Gaming Act satisfies that requirement. It is a State law that authorizes the Gaming Board to “restrict access to confidential information in possession of the board which has been obtained under this part and ensure that the confidentiality of the information is maintained and protected.” 4 Pa.C.S. § 1207. Accordingly, information deemed confidential by the Gaming Board pursuant to § 1207 is exempt from disclosure under the Right to Know Law.

Requester Cutler argues that even if the October 1, 2009 Report consists of information deemed confidential under § 1207, the confidentiality of the information in that document should be deemed waived because Foxwoods submitted a non-confidential document to the Gaming Board two weeks later. With no basis whatsoever, Requester Cutler then declares that “the actual contents of the October 1 Report are no longer confidential as a matter of fact.” Requester Cutler’s Appeal at 4. Remarkably, Requester Cutler states that the undersigned’s October 16, 2009 letter to the Gaming Board⁶ “expressly asserted its ‘consistency with the monthly updates Foxwoods is submitting to the BIE,’ clearly stating that the information contained therein repeated the information in the October 1, 2009 monthly update report to the BIE.” Requester Cutler’s Appeal at 4.⁷ That is false and a gross misrepresentation of the October 16, 2009 letter.

⁵ In addition, Foxwoods currently has an application pending before the Gaming Board for renewal of its slot machine license. In all probability, the Office of Enforcement Counsel is also investigating Foxwoods in connection with that application. The October 1, 2009 Report is likely related to that investigation as well and is exempt from disclosure for that additional reason.

⁶ It is noteworthy that the October 16, 2009 letter was addressed to the Chairman of the Gaming Board, and not the Office of Enforcement Counsel.

⁷ Requester Boni also references this language from the October 16, 2009 letter.

The sentence selectively quoted by Requester Cutler does not say that the letter repeats the information submitted to Bureau. Instead, it says that Foxwoods will try to follow a similar organization for the letter and the Reports. Indeed, if the Requesters truly believed that the substance of the October 1, 2009 Report was merely repeated in the October 16, 2009 letter, there would be no reason for them to continue with the appeal since the October 16, 2009 letter is a matter of public record.

VI. CONCLUSION

For all the foregoing reasons, we respectfully submit that the Requesters are not entitled to disclosure of the October 1, 2009 letter or any other letter submitted to the Bureau pursuant to the Order, and request that the Office of Open Records deny the Requester's appeals for the October 1, 2009 Report and such other documents.

Should you have any questions, or require any additional information or documents, please let me know.

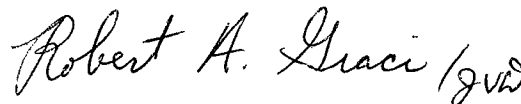
Sincerely,

COZEN O'CONNOR

Handwritten signature of F. Warren Jacoby in cursive, with initials 'FWD' at the end.

By: F. Warren Jacoby

ECKERT SEAMANS CHERIN & MELLOTT, LLC

Handwritten signature of Robert A. Graci in cursive, with initials 'RAG' at the end.

By: Robert A. Graci

FWJ

cc: Denise Miller-Tshudy, Esquire
Paul Boni, Esquire
Andrew Cutler, Esquire
Stephen A. Cozen, Esquire
Leroy Zimmerman, Esquire