



A PROFESSIONAL CORPORATION

1900 MARKET STREET PHILADELPHIA, PA 19103-3508 215.665.2000 800.523.2900 215.665.2013 FAX www.cozen.com

F. Warren Jacoby
Direct Phone 215.665.2154
Direct Fax 215.701.2154
fjacoby@cozen.com

December 7, 2009

VIA EMAIL

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

Re: Foxwoods' Response In 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 further response to the Joint Response of Appellant Requesters (the Requesters"), filed on December 2, 2009.

I. THE EVIDENCE IN THE RECORD CLEARLY DEMONSTRATES THAT THE DOCUMENTS BEING SOUGHT RELATE TO A NONCRIMINAL INVESTIGATION AND ARE THEREFORE EXEMPT UNDER SECTION 708

Requesters argue that the Pennsylvania Gaming Control Board (the "Board") has not met its burden of establishing by a preponderance of the evidence that the documents the Requesters are seeking (the "Documents") are exempt from disclosure.¹ Notwithstanding their contentions,

¹ It is not disputed that the Board bears the burden of proof in this proceeding. 65 P.S. § 67.708(a)(1). Foxwoods is participating in this proceeding in support of the Board's position because Foxwoods has a "direct interest in the record subject to" the appeal brought by the Requesters. 65 P.S. § 67.1101(c)(1). However, contrary to the assertions of the Requesters, as demonstrated in the earlier submissions of Foxwoods and the Board, and again in this response,

all of the evidence in the record illustrates that the Documents are not subject to disclosure. The Requesters simply have chosen to disregard that evidence or mischaracterize it.

Turning to the pertinent evidence of record in this appeal, the affidavits submitted by Paul Mauro, Deputy Director for the Bureau of Investigation and Enforcement of the Board (the "Bureau"), and Cyrus Pitre, Chief Enforcement Counsel, establish beyond any doubt that ongoing investigations are being conducted and that the requested Documents relate to those investigations. Both Mr. Mauro and Mr. Pitre state in their respective affidavits:

The records requested by Attorneys Paul Boni and Adam Cutler are records that are being provided to BIE for the purpose of investigating [Foxwoods'] compliance with the Board's Order and its ongoing suitability for licensure . . .

Exhibit A (Affidavit of Mr. Mauro) and Exhibit B (Affidavit of Mr. Pitre), attached to the Board's November 23, 2009 letter brief. In addition, both Mr. Mauro and Mr. Pitre confirm in those same affidavits that the records are also being "utilized as evidence and points of inquiry" in an ongoing noncriminal investigation into the renewal of Foxwoods' license. *Id.* It is respectfully submitted that no more evidence should be necessary to satisfy the Board's burden of proof in this matter.

Perhaps recognizing that this evidence dooms their claim, the Requesters then chose to ignore these statements and/or mischaracterize them. The Requesters argue that Mr. Mauro and Mr. Pitre stated that the "documents might be relevant to some *future* investigation of Foxwoods' suitability for a license." (Requesters' Joint Opposition at 3) (emphasis in original) That is false. As is clearly stated in the affidavits quoted above, the Deputy Director of the Bureau of Investigation and Enforcement and the Chief Enforcement Counsel have now testified that the documents are related to two *ongoing*, noncriminal investigations. Moreover, Mr. Mauro and Mr. Pitre also state that the documents may be "*utilized* as evidence by BIE in *future proceedings* before the Board regarding the ongoing suitability of [Foxwoods]." Exhibit A (Affidavit of Mr. Mauro) and Exhibit B (Affidavit of Mr. Pitre) (emphasis added), attached to the Board's November 23, 2009 letter brief. Thus, contrary to the Requesters' contentions, Mr. Mauro and Mr. Pitre clearly state that the Documents relate to ongoing noncriminal investigations and that they may utilize the Documents as evidence in future proceedings.

Not only is this evidence alone sufficient to satisfy the Board's burden of proof in this matter, it is also consistent with and buttressed by the August 28, 2009 hearing before the Board and the Board's September 1, 2009 Order. In arguing that the Board is only now suggesting that the Documents relate to a noncriminal investigation, the Requesters take language from the August 28 hearing out of context and essentially ignore the unequivocal statements of Chief Enforcement Counsel that contradict the Requesters' position. For example, the Requesters argue that the imposition of "benchmarks" by the Board somehow renders the investigation a non-investigation. Simply stated, it does not. Moreover, in its November 23 letter in this matter,

the Board has more than met its burden of establishing that the Documents are exempt from disclosure.

Foxwoods demonstrated that Chief Enforcement Counsel urged the Board to impose benchmarks, to require Foxwoods to submit the reports, and that if the investigation revealed that Foxwoods was not or could not comply with its obligations, Chief Enforcement Counsel might commence an enforcement action against Foxwoods. *See* Foxwoods November 23 Letter Brief, at 3 (discussing statements made by Mr. Pitre at the August 28, 2009, and stating: “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.”). Thus, it is clear that these Documents relate to the Bureau’s investigation into Foxwoods and its decision whether or not to commence an enforcement action.

Finally, the Board’s Order also reveals that these Documents relate to a noncriminal investigation. In its Order, the Board instructs Foxwoods to send these Documents to the Bureau, not the Board. *See* September 1, 2009 Order at ¶¶ 2-7. That is an important distinction that the Requesters disregard.² *See, e.g.,* Joint Opposition at 5 (stating that “This is the first of regular monthly reports, which will generally inform BIE and the Board of progress with Foxwoods development plans . . .”). The Board acted deliberately in directing Foxwoods to send these reports to the Bureau of *Investigation* and Enforcement, rather than the Board itself or the Bureau of Licensing, given the purpose for which they were to be utilized by the Bureau.³

II. REQUESTERS DISREGARD THE DISTINCTION BETWEEN THE BOARD AND THE BUREAU OF INVESTIGATION AND ENFORCEMENT

As mentioned above, Requesters seek to blur the lines between the Bureau, specifically the Office of Enforcement Counsel, and the Board. However, the duties and responsibilities assigned to the Bureau in general and the Office of Enforcement Counsel in particular confirm that these Documents relate to an ongoing investigation — because that is the duty of the Office of Enforcement Counsel. As Foxwoods explained, among other things, the Bureau is tasked to: “Investigate *licensees* . . . for potential violations of the act, including potential violations

² Requesters also complain that the neither the Board nor the Bureau used the word “investigation” in the August 28, 2009 hearing or September 1, 2009 Order. But the Right to Know Law does not require an agency to use magic words. Moreover, there are a plethora of reasons why an agency would not publicize an investigation. The relevant inquiry is whether the Documents at issue relate to an investigation, not whether the agency has publicly declared an investigation.

³ In addition, the Board’s Order distinguishes between information that Foxwoods is required to submit to the Board and information that Foxwoods is required to submit to the Bureau. The October 1 Report was provided to the Bureau. It was addressed to Mr. Pitre. In contrast, as required by the Order, Foxwoods addressed its October 16 letter to the Chairman of the Board, Mr. Fajt. That document is public.

referred to the Bureau by the Board or other persons.” See 4 Pa. C.S. § 1517(a.1)(3) (emphasis added) (quoted in Foxwoods November 23, 2009 Letter Brief at 2); see also 58 Pa. Code § 405a.1(2). In addition, Foxwoods explained that the Office of Enforcement Counsel, within the Bureau, is tasked with acting “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. Requesters do not — and cannot — dispute Foxwoods’ description of the powers and duties of the Bureau as provided in the Pennsylvania Race Horse Development and Gaming Act (the “Gaming Act”) and the Regulations promulgated thereunder.

Unquestionably, the Office of Enforcement Counsel is responsible for investigating potential violations of the Gaming Act and Regulations, and prosecuting any such violations through appropriate actions. Thus, requiring Foxwoods to provide reports to the Office of Enforcement Counsel in connection with the latter’s investigation is entirely consistent with the duties of that division.

III. BECAUSE THESE DOCUMENTS RELATE TO A NONCRIMINAL INVESTIGATION, AND NOT A ROUTINE INSPECTION, *MANORCARE* DOES NOT APPLY

Requesters discuss at length the Office of Open Records’ decision in *HRC-ManorCare v. Pennsylvania Department of Health*, AP 2009-0121. However, as explained in Foxwoods’ earlier submission, that case is easily distinguishable from the circumstances here. *ManorCare* involved a routine inspection and survey of various healthcare facilities. It was a general practice applicable to all members of the industry. The Office of Open Records noted that the inspections and surveys are required by the United States Department of Health and Human Services and are conducted on a regular basis by the Pennsylvania Department of Health. *Id.* at 2. As such, the Office of Open Records concluded that the inspections and surveys did not constitute a noncriminal investigation for purposes of the Right to Know Law. *Id.* at 7.

The circumstances here are very different. The Bureau’s investigation is not routine and is not applicable to all members of the industry. The September 1 Order applies only to Foxwoods, not every casino in the Commonwealth. Likewise, the Board directed Foxwoods to send the October 1 Report to the Bureau of Investigation and Enforcement — the investigative and prosecutorial arm of the Board. That was no accident. If the documents were not related to the Bureau’s investigation, the Board could have ordered the information sent to the Board itself or the Bureau of Licensing.

Furthermore, Requesters are also incorrect when they argue that there was no “trigger” for the investigation and that any trigger must allege that wrongdoing has been committed.

While it is true that Foxwoods is in compliance with the statute and regulations, at the August 28, 2009 hearing, the Bureau expressed concern about Foxwoods' ability to complete the project in the remaining time available after granting the requested extension. As a result, it asked the Board to require Foxwoods to provide certain information. As was made clear, both at the hearing and in the affidavits of Mr. Mauro and Mr. Pitre, the Bureau wanted this information so that it could evaluate whether it might be necessary to bring enforcement proceedings against Foxwoods. That is the paradigm of an investigation — the acquisition of information for purposes of determining whether to bring an enforcement action. As such, it is very different from the routine, industry-wide monitoring that was at issue in *ManorCare*.⁴

IV. THE RECORDS ARE CONFIDENTIAL UNDER STATE LAW

As demonstrated in Foxwoods' November 23 letter brief, the Gaming Act authorizes the Board to declare certain documents confidential and then requires it to maintain the confidentiality of such documents. Here, the Documents at issue have been designated confidential by the Board. As a result, they are confidential pursuant to State law and exempt from disclosure. 65 P.S. § 67.708(b)(17).

Moreover, the Office of Open Records should reject the Requesters' suggestion that the Office apply a broad subject matter waiver with respect to the contents of the records. Essentially, the Requesters argue that these records cannot be confidential because of the Requesters' belief that similar subject matter to that the Requesters' believe to be in these records has been previously discussed in public forums. Without arguing as to whether this has or has not occurred, there is simply no basis for such a rule, and the Requesters do not point to any. Indeed, the statute endows the Board with authority to declare records confidential. It has done so, and it is submitted that such decision should not be disturbed, regardless of whether similar topics are publicly discussed.

V. CONCLUSION

For all the foregoing reasons, we respectfully submit that the Requesters are not entitled to disclosure of the October 1, 2009 Report or any other report submitted to the Bureau pursuant to the Order, and request that, since the Board has carried its burden of demonstrating by a preponderance of the evidence that the subject Report is exempt from public access, the Office of

⁴ Moreover, contrary to Requesters' suggestion, nothing in the Right to Know Law requires that an agency await some external complaint or allegation to open an investigation, rather than conducting an investigation on its own initiative. Indeed, it would be absurd to adopt a rule that protects documents from disclosure where they relate to an agency investigation commenced upon receipt of some external complaint, but denying the same protection to investigations initiated by the agency itself. And the Office of Open Records did no such thing in *ManorCare*. It merely required some showing the documents related to an investigation, and not the routine agency conduct at issue in *ManorCare*.

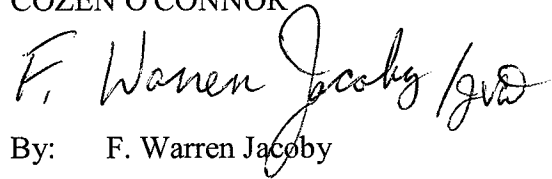
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Open Records deny the Requesters' appeals for the October 1, 2009 Report and such other documents.

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

Respectfully submitted,

COZEN O'CONNOR

Handwritten signature of F. Warren Jacoby in black ink, written in a cursive style. The signature includes the initials "FWD" at the end.

By: F. Warren Jacoby

ECKERT SEAMANS CHERIN & MELLOTT, LLC

Handwritten signature of Robert A. Graci in black ink, written in a cursive style. The signature includes the initials "gvd" 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