



PENNSYLVANIA GAMING CONTROL BOARD  
P.O. Box 69060  
HARRISBURG, PENNSYLVANIA  
17106-9060

December 7, 2009

Audrey L. Buglione  
Office of Open Records  
Keystone Building  
400 North Street, 4th floor  
Harrisburg, Pa 17120-0225

RE: Docket #AP-2009-0955

Dear Ms. Buglione:

On behalf of the Pennsylvania Gaming Control Board ("PGCB" or "Board"), I file this response to Mr. Boni and Mr. Cutler's December 2, 2009 joint response to the PBCB's November 23, 2009 filing, which provided additional information regarding the PGCB's reasons and its position in the denial of their Right to Know Law (RTKL) requests. In order to supplement and clarify the PGCB's position, the PGCB hereby incorporates its November 23, 2009 filing by reference herein.

**Ongoing Investigation**

**At issue is a report submitted by Philadelphia Entertainment and Development Partners, L.P. ("Foxwoods") pursuant to a Board Order, dated September 1, 2009, which required Foxwoods to submit a report, on October 1, 2009, on its "efforts to develop a facility with a minimum of 1500 slot machines available for play, on or before May 29, 2011 . . . (and) updates . . . regarding its efforts and progress to obtain financing . . . (and) . . . status of all outstanding licenses, certifications and permits required. See Adjudication and Order, Exhibit 3 attached to Paul Boni's November 6, 2009 letter to Terry Mutchler, Executive Director.**

As more fully explained in the Board's November 23, 2009 filing in response to the Requesters' appeals, the records Mr. Boni and Mr. Cutler ("Requesters") have requested are not "public records" as defined under the RTKL, 65 P.S. §67.102 and cannot be released in any format. Specifically, for the reasons outlined below, the records are documents that are part of a noncriminal investigation, 65 P.S. §67.708(b)(17), and are confidential under state law.<sup>1</sup> Therefore, these records are not public records and the PGCB may not provide them to the Requestors per the RTKL and Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §1101 *et seq* ("Gaming Act")

Clearly, these are "records" as defined in the RTKL, 65 P.S. §67.102, because they were received as part of a transaction or business activity; namely they have been received by the Bureau

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<sup>1</sup> 4 Pa.C.S. §1206(f), §1207, and 58 Pa. Code 407a.3

of Investigation and Enforcement's (BIE) as part of its investigative responsibilities and as a result of the Board's September 1, 2009 Order. As the Requesters have noted, under the RTKL all "records" are presumed to be public unless they do not meet the definition of "public record" under the RTKL, *See* 65 P.S. §67.305. A record is not a "public record" as defined in the RTKL if (1) the record is exempt under 65 P.S. §67.708; (2) it is protected by privilege; or (3) it is exempt from disclosure by law or regulation or judicial order/decreed, *See* 65 P.S. §67.102.

However, as noted (and contrary to the Requesters' insistence), the records they have requested<sup>2</sup> do not meet the definition of "public record" because the records are part of a noncriminal investigation under 65 P.S. §67.708(b)(17) of the RTKL and are excluded by the Gaming Act at 4 Pa.C.S. §1206(f), §1207 and the Board's Regulations at 58 Pa.Code §407a.3. Therefore, the records requested are not public records and the records are exempt from disclosure as defined in the RTKL.<sup>3</sup>

To fully understand this issue, it is imperative, that one review the background of the Foxwoods' license.

As described in Requesters' most recent filing, Foxwoods was granted a slot machine license on December 20, 2006. Subsequently, on February 1, 2007, an Adjudication outlining the Board's rationale for its decision was issued. That Adjudication found Foxwoods financially suitable for licensure, in part, as follows:

"Based upon the commitment letter from Merrill Lynch, Philadelphia Entertainment has demonstrated that it had access to sufficient funds to develop the proposed project. Merrill Lynch has committed to arrange and/or underwrite \$460 million in third-party financing for Philadelphia Entertainment's project, Foxwoods' Casino Philadelphia. In addition, land valued at approximately \$70 million, which is part of the total project cost, has been contributed to the project by WPI and did not need to be financed by the partnership. Philadelphia Entertainment will also receive \$55 million from Foxwoods Development Co., \$30 million of which will come in the form of equity to the project with the remaining \$25 million to be repaid by Philadelphia Entertainment to the Tribal Nation." In Re: Philadelphia Entertainment & Development Partners, L.P., Docket No. 1367, Finding of Fact #145

The conclusions reached by the Board relative to project financing were the outcome of a BIE investigation on the applicant's financial suitability. Unfortunately, due to a number of delays experienced by the applicant – as well as changes in the global credit markets – the financing approved by the Board during December 2006, became unavailable. As a result, BIE reopened its financial suitability investigation, as it related to project financing.<sup>4</sup>

Independent thereof, Foxwoods, recognizing that without project financing, it would require a 24 month extension to open its facility, petitioned the Board for just such an extension.<sup>5</sup> On September 1, 2009, the Board granted the extension, but recognized that Foxwoods was operating under an extremely tight timetable and, as a result, issued an Order mandating that certain investigative information – due to BIE as part of its ongoing financial suitability investigation in any

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<sup>2</sup> The only records at issue in this appeal are reports submitted by Foxwoods to the BIE on October 1, 2009.

<sup>3</sup> 65 P.S. §67.102 and §67.306

<sup>4</sup> Additionally, Foxwoods license renewal investigation commenced and remains ongoing.

<sup>5</sup> 24 months is the longest extension Foxwoods could ask for under the Gaming Act. 4 Pa.C.S. §1210(a).

event – be provided in certain intervals. Ultimately, the portions of the Board’s September 1, 2009 Order at issue here, do nothing more than establish a mechanism to assure that Foxwoods continues to supply investigative information to BIE in a timely manner and provide BIE with a tool to monitor whether or not Foxwoods will, in fact, be able to meet its May 2011 opening.

With the above as background, and as further explained below, the PGCB has met its burden providing evidence that the records have been received as part of a noncriminal investigation and are therefore exempt from disclosure under the Gaming Act and the Board’s Regulations.

In addition to the above, and the arguments made in the PGCB’s November 23, 2009 filing, it is further emphasized that the BIE is the *investigative arm* of the PGCB represented by the Office of Enforcement Counsel who prosecute and bring matters before the Board based upon investigative information obtained by the BIE. The BIE is separate from the PGCB and performs a separate function from the Board, *See* 4 Pa.C.S. §1517.

The PGCB, as have almost all administrative agencies, has been given administrative, regulatory, licensing, investigatory, prosecutorial, and adjudicatory authority. As required by law, adjudicatory functions and prosecutorial functions cannot be mingled. *See Lyness v. State Board of Medical Examiners*, 605 A2d 1204(1992) and *Lastella v. Bureau of Professional and Occupational affairs, State Board of Psychology*, 954 A.2d 769(Pa.Cmwlth. 2008). The fact that the Board, in its adjudicative function, ordered the BIE, the investigative office and not another office within the PGCB, such as the Bureau of Licensing or the Board’s counsel, to receive proof of compliance with its Order, demonstrates that - based upon the information testified to at the August 28, 2009 hearing - it was the Board’s expectation that, upon receipt of the documents ordered to be produced, the BIE would act within its statutorily given authority in order to investigate Foxwoods.

The BIE may *only* act within the authority given to it by the legislature. That power and authority is outlined in 4 Pa.C.S. §1517 and 58 Pa.Code §405a.1, giving it the authority and duty to, among other things, collect, examine, review, consider, and determine whether Foxwoods has provided sufficient documentation that is accurate and which amply complies with the Act. These are exactly the types of duties and actions that are required of an investigation. Foxwoods, has been ordered by the Board to provide documents and information to the BIE for its examination, consideration, and determination as to whether the information and documentation is accurate and meets Foxwoods’ responsibilities imposed by the Act.

Requesters continue their argument that BIE’s investigation of Foxwoods is not an investigation, stating that OOR has found that not every inquiry and activity conducted rises to the level of a noncriminal investigation and citing to ManorCare v. Dept. of Health, AP 2009-0121. ManorCare can be completely distinguished from the investigation that the BIE is doing. The OOR’s decision in ManorCare focused on the fact that the Department of Health was conducting routine inspections that had no “trigger” such as a compliant or allegation of wrongdoing. In the matter at hand, Foxwoods was ordered by the Board to submit data it was otherwise required to submit in any event. Clearly, the “trigger” was the collapse of Foxwoods project financing and the need, because of that, to have BIE reinvestigate project funding and development.

Unlike other Bureaus in the PGCB that specifically monitor certain functions, such as Gaming Operations, Compulsive and Problem Gambling, and Diversity which monitor a licensee’s compliance with those particular provisions of the Gaming Act and the Board’s Regulations, the

BIE's *sole function* is to act as an investigative body. The Requesters, not appreciating the function of the BIE or understanding the background of this case, argue and then cite to Oyugi v. Police Advisory Commission, AP 2009-0576 indicating that this case stands for the proposition that records must be part of a specific investigation for the noncriminal investigation to apply. In fact, as noted above, the records at hand deal quite particularly with one case; specifically, the now reopened financial suitability investigation of Foxwoods due to the collapse of its financing and its related negative impact on the project, generally.

The RTKL was designed to make records that are public, accessible and to be made accessible within a reasonable amount of time. However, it is also designed to protect those records that are sensitive, provide privileged and confidential information, and those that, if disclosed, would interfere with an agency's function. When an investigative branch of an agency, created solely for the purpose of investigating both applicants and licensees, receives documents by Board Order, it has a duty to and it must act within its authority with those documents provided by Foxwoods. All records received on October 1<sup>st</sup> were received, reviewed, and have been/are being investigated for accuracy and truthfulness. These are the duties of the BIE. These are the duties and actions that the OOR has indicated are true investigative functions. See Howard v. Pennsylvania Department of Corrections, AP 2009-0352.

The BIE has stated - as attested to by both Paul Mauro, Deputy Director of BIE, and Cyrus Pitre, Chief Enforcement Counsel - that the records provided by Foxwoods, "are being provided to BIE for the purpose of investigating Philadelphia Entertainment and Development Partners, L.P. d/b/a Foxwoods Casino's compliance with the Board's Order and its ongoing suitability<sup>6</sup> for licensure." (Exhibits A & B to November 23, 2009 PGCB filing). BIE and its Counsel have attested that the records provided by Foxwoods "will be utilized as evidence by BIE in future proceedings before the Board regarding the ongoing suitability of Philadelphia Entertainment and Development, L.P. d/b/a Foxwoods Casino" (Exhibits A & B). The Requesters, in their response, ignore statements made at the Board hearing on August 28, 2009 when BIE's Counsel, Cyrus Pitre made it clear that he was requesting the "benchmarks" so that during its investigation, if Foxwoods fails to meet the requirements of the Board Order, that it, after review, could file formal disciplinary action to revoke its license (Transcript 70).

Additionally, because of the confidential nature of and because of being part of an investigation, which includes information and records that have not and will not be shared with the Board except, possibly, in future proceedings it is obvious that those records serve an investigative purpose and therefore, cannot be provided to the Requesters. The affidavits from BIE and its Counsel in and of themselves provide sufficient evidence for the PGCB to meet its burden.<sup>7</sup>

Just as exempt from the definition of "Public Record," under 65 P.S. §67.306, "nothing in [the RTKL] shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree."

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<sup>6</sup> 4 Pa.C.S. §1313- Slot Machine Licensees have the responsibility to maintain financial fitness and suitability, and as such, are continuously being investigated to determine if this is so.

<sup>7</sup> Hosie v Bradford County, AP 2009-0885, OOR found that Bradford County met its burden of proof where it provided an affidavit of proof where the Open Records Officer stated "all documents...in the possession of Bradford County responsive to the request specifically relate to a non criminal investigation..."

The PGCB has met its burden, proving that those records provided to the BIE are confidential by law. Section 1206(f) of the Gaming Act requires all information submitted by an applicant, pursuant to section 1310(a) of the Gaming Act; relating to slot machine application character requirements; or obtained by the Board or Bureau as part of a background investigation be treated as confidential. Pocono Manor Investors v. PGCB, 927 A.2d 209(2007).

The Requesters read Section 1206(f) strictly to include applicants *only when initially applying for a license* but not information that is collected by the Bureau's investigations as licensees. Regulation of the Gaming Industry, however, requires there to be a free exchange of information necessary to fully determine compliance with the law, investigate concerns of suitability, and verification of the information provided. As such, Requesters' interpretation is nonsensical.

Additionally, the definition of "background check" is set forth in section 1103 of the Gaming Act and is defined as "a security, criminal, credit and suitability investigation of a person as provided for in this part." This is exactly the investigation that is currently being conducted by the BIE. This is supported by the August 28, 2009 hearing transcript where the BIE has been directed to receive certain documents from Foxwoods. There is no question, the transcript supports the fact that because of Foxwoods' troubles since the initial approval of its license have led to its loss of full financial backing, after the credit market crashed, and the need to obtain various milestones to prevent Foxwoods from facing legal action before the Board. These facts and the necessity for the BIE to receive, review, analyze and determine if Foxwoods is meeting its obligations is clear support of the PGCB's position that those records are without a doubt part of an ongoing investigation into Foxwoods' suitability by the investigative arm of the PGCB.

Moreover, the records being collected, reviewed, analyzed, and verified by the BIE are records required to prove suitability, both general suitability and financial suitability, which are also required in a background investigation and, at all times, as an ongoing requirement of their licensure. See sections 1311 and 1313 of the Gaming Act. To read section 1206(f) so narrowly as to conclude that the records provided and collected under other sections of the Act are not confidential is nonsensical. Pocono Manor If there is a requirement when an individual is an applicant, the requirement does not change after the person or entity is licensed. It does not logically follow that the same information collected in an investigation when an applicant, is no longer confidential because the individual/entity is now a licensee. In fact, such a narrow reading would prevent the free flow of information so necessary in a regulated industry. Additionally, it is clearly noteworthy that the OOR does not have the authority to dismiss the PGCB's interpretation of its enabling law—the Gaming Act.<sup>8</sup>

Therefore, the PGCB has met its burden of proof by providing the OOR, not only affidavits regarding the character of the documents, but also by its factual and legal analysis of the Gaming Act and the Board's own Regulations.

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<sup>8</sup> Pennsylvania Bankers Ass'n v. Pennsylvania Dept of Banking, 981 A2d 975(Pa.Cmwlth 2009)(citing Rinaldi v. Bd of Vehicle, Manufactures, Dealers, and Salespersons, 843 A2d 418(Pa.Cmwlth 2004))(An Appellate Court must give due deference and great weight is to be given to an administrative agency's interpretation of a statute it is charged with enforcing and its interpretation may not be disregarded or overturn without cogent reasons and a decision determining the agency was clearly erroneous.) This can only be decided by an appellate court, not the OOR.

## Redaction, 65 P.S. §706

Under section 706 of the RTKL, an agency may redact confidential information found in “*a public record.*” The RTKL’s purpose is to provide open government by making government *public records* available to those who request to have access to them. However, not all government records are public. Records that do not meet the definition of a “public record” are not subject to release to the public; and records that are exempt by statute, privilege, or by any of the 30 individual exemptions set forth in 65 P.S. §67.708(b) are not public records and not subject to release under the RTKL.

The records requested by Mr. Boni and Mr. Cutler, as discussed at length in our initial response on October 23, 2009 and as set forth above, are not public records by definition, and are, therefore, exempt in total from disclosure by statute, including the RTKL. The analysis stops there. Only public records are subject to any further analysis as to whether or not certain information in that document may be confidential and need to be redacted prior to the release of that otherwise public record. Consequently, under the RTKL, the PGCB has no duty to release the requested records or any information contained within those records.

The RTKL requires the redaction of confidential information within a public record it does not require or otherwise impose upon an agency the responsibility to excise and disclose otherwise public information from a nonpublic record. Doing so would create a new record, which the PGCB is specifically not required to do, 65 P.S. §67.705. Regardless of the content of a record, any record that is specifically exempt from public disclosure is simply not a public record and no redaction is required to make it public.

Moreover, the RTKL states that “[n]othing in the act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree” 65 P.S. §67.306. The records requested are exempt by the RTKL in that they are not public records as defined in the RTKL and are specifically exempt under 65 P.S. §67.708(b)(17). Therefore, the OOR may not modify the nature of these records by requiring redaction of a nonpublic record in order to essentially create a document that may contain public information to remain on the document. To issue an order requiring the redaction of a “nonpublic record” is not only contrary to the plain language of the RTKL; it is an order requiring an unreasonable and burdensome task. Such an order would require staff to search every sentence within a document that has already been identified as “nonpublic” to see if there is one iota of public information such as the name of the casino that may be left without redaction tape. These records are not electronic, and even if they were, technology is not advanced enough to guarantee that the redaction can be “stripped” away<sup>9</sup> and the underlining modifications remain, including metadata, thus redaction will require staff to use redaction tape or black out of all nonpublic information, which, because the record is nonpublic will essentially provide a blacked out page with the name of the casino or other simple information such as ownership which is already available on the PGCB website. This is an unnecessary and burdensome task, and is not authorized by section 706, when a record is not public, under the RTKL. Therefore, all of the records requested must be excluded and may not be provided in any form.

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<sup>9</sup> Patriot News v. PGCB, AP 2009-016

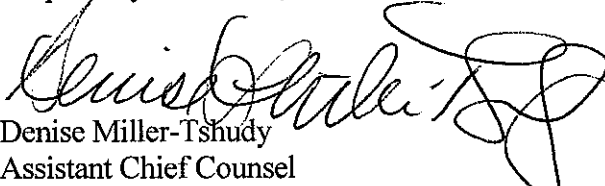
### Additional Responses

The Requesters also argue that the PGCB has “waived” its position that personal identifying information within documents and infrastructure security documents are confidential. The PGCB has not waived its position on either of these two objections to the initial denial. In fact, the ultimate issue of whether a record is public or not is never waived; therefore, if the documents requested were confidential because of personal information or infrastructure safety, those records would still be confidential and could not be ordered to be provided due to their confidentiality. The issue of whether a record is a public record is *always* at issue and cannot be waived. See LaGrande v. Department of Corrections, 920 A.2d 943(Pa. Cmwlth 2007) citing LaValle v. Office of General Counsel of the Commonwealth of Pennsylvania, 769 A2d 449(2001)(finding that where the type of record does not fall under the definition of public record, waiver principles do not apply). However, because this appeal only pertains to the October 1, 2009 documents provided to the BIE, the PGCB did not need to address those issues, as there is no personally identifying information, nor are there any architectural renderings in the October 1, 2009 submissions, as there may be in future submissions, as required.

### Conclusion

The PGCB has met its burden to show why the PGCB’s denial of the requested records was correct. Having met its burden, the OOR should deny the Requesters’ appeal and uphold the PGCB’s denial of their RTKL requests.

Respectfully Submitted,



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