



## FACTUAL BACKGROUND

The Requesters each submitted right-to-know requests to the Board seeking the following:

All documents and records, including any correspondence or appendices associated with them, submitted to the [Board], including to any of its bureaus, offices or employees, by [Foxwoods], or any person acting on behalf of [Foxwoods] or any of its partners or investors, pursuant to the [Board's] September 1, 2009 Order.

("Requests"). Andrew Bender, Board Open Records Officer, responded by denying the requests. The Board advised that the records were investigative in nature and not subject to disclosure pursuant to the Gaming Act, citing 4 Pa.C.S. §1206(f) and §1207, and the RTKL sections 708(b)(3)(iii) (records related to building plans and infrastructure that could expose vulnerability of critical systems, (b)(6) (personal financial information), and (b)(17) (noncriminal investigation records).

The Requesters each appealed and by approval of all parties the appeals were consolidated into one appeal. During the course of the appeal, Foxwoods submitted information as an interested party in support of the Board's position.

### **Background:**

Applicants for licensure as a Category 2 Slot Machine Licensee must submit an application which includes information as to the applicant's family, habits, character, reputations, criminal history background, business activities, financial affairs, and business, professional and personal associates over a 10 year period. 4 Pa. C.S. §1310. Foxwoods submitted this information and was subject to a background investigation by the Board's Bureau of Investigation and Enforcement ("BIE") which required a security, criminal, credit, and a suitability investigation. 4 Pa.C.S. §1103. Financial viability must be maintained. 4 Pa.C.S. § 1313.

Based upon the investigation and with the understanding that Foxwoods would maintain financial viability and that the casino would be built at the proposed site using the proposed design, on February 1, 2007 the Board awarded a Category 2 Slot Machine License (“License”) to Foxwoods. Delays prevented Foxwoods from commencing with the construction. On February 11, 2008 Foxwoods filed a renewal application. The Board granted an extension of time and required Foxwoods to provide BIE with evidence of its progress in meeting all requirements to hold a License by providing updates to the Board at specific milestones. As part of the renewal application Foxwoods is required to submit to an investigation by BIE pursuant to 4 Pa.C.S. §1517(a.1)(2) to produce the same/similar information it produced at the time of its application in order to show that it has maintained its initial requirements for licensure.

Foxwoods lost its financial backing and it applied for additional time to open a facility. After an August 28, 2009 public hearing at which Foxwoods provided oral updates regarding its progress, the request was granted and on September 1, 2009 the Board issued an Adjudication and Order requiring Foxwoods to send information and documents to BIE in monitor Foxwoods’ compliance with the Board’s Order. It is this information provided by Foxwoods on October 1, 2009 that is sought by the Requesters. The Requesters argue that it is untenable for the Board to maintain that the oral update at the August 28 hearing could be conducted publicly, but that the written update 34 days later (on October 1) is confidential.

The parties’ positions as to each ground for denial are summarized and set forth below.

**Noncriminal Investigation:**

**The Requesters’ position:**

1. The records are not confidential pursuant to the September 1, 2009 Order because
  - a. the Order does not dictate that the information is confidential and

- b. Foxwoods' submission of its initial plan via an October 16, 2009 letter (October 16 Letter) to the Board was made public "through various sources, including . . . local media."
2. Chief Enforcement Counsel for the Board admitted at the August 28 hearing that the requested records are not part of an investigation when he stated: "Now, with 21 months remaining in order to get those slot machines up and running, we do have some proposed conditions that we would like to impose upon them, certain benchmarks that we would like to see them meet, if the Board so ordered." *See* Aug. 28 Tr. At 43:22-44:5.
3. The Board's invitation to allow Foxwoods to "move some of the dates around to accommodate what [Foxwoods] perceive[d] is good business practice" (Id. at 74:4-75:14) is "not how an investigation walks, talks or quacks."
4. Absent disclosure of the records "the public would lose the ability to monitor the [Board's] enforcement of its [] Order."
5. The Gaming Act and RTKL section 708(b)(17) do not preclude release of the records because the Requesters are not seeking the information submitted by Foxwoods pursuant to section 1310(a) of the Gaming Act nor as part of a "background investigation" by the Board.
  - a. Foxwoods is not an applicant because it "already has a license, and has already gone through the good character and background investigations required."
  - b. The Board is no longer investigating, but simply reviewing Foxwoods' status.
  - c. Not every inquiry and activity conducted by an agency rises to a noncriminal investigation exempt under section 708(b)(17), citing *HCR-ManorCare v. Pa. Department of Health*, OOR Dkt. AP 2009-0121.

- d. The records must be part of a specific investigation, rather than a potential future investigation, in order to be covered by section 708(b)(17), citing *Oyugi v. Police Advisory Commission*, OOR Dkt. AP 2009-0576.
- e. “Not one element of the requested records or the underlying September 1 Order, lends itself to the identification of a trigger, . . . as distinct from the mere monitoring of compliance with the timetables set in the Order.” They argue that the Order is more akin to a permit with conditions rather than a complaint or agency citation.

**The Board and Foxwoods’ positions:**

- 1. *ManorCare, supra* is distinguishable because there the agency was conducting inspections that were not triggered by a complaint or other “trigger.”
  - a. The records are part of the agency monitoring compliance and thus part of a noncriminal investigation, citing *Benevy v. Borough of Lansford*, OOR Dkt. AP 2009-0365
  - b. The September 1 Order triggered the collection of the information to monitor compliance.
- 2. The BIE is an investigative body, independent of the Board, 4 Pa.C.S. §1517, which conducts noncriminal investigations.
  - a. By way of its statutory authority any records provided to or collected by BIE are *per se* investigative in nature.
  - b. “Unlike other Bureaus in the [Board] 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."

3. Disclosure would reveal the progress of the investigation, and noncriminal agency investigation are best left to the agency to conduct, free from the potentially disruptive effects of public disclosure, citing *Adams v. Department of Health*, 967 A.2d 1082, 1087, 1089 (Pa. Cmwlth Ct. 2009).
4. In his affidavits of Paul Mauro, Deputy Director for BIE and Cyrus Pitre, Chief Enforcement Counsel for the Board, state:
  - a. "The records requested by [the Requesters] 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, including its financial applications, documents and information of both the entity and its owners; architectural renderings; general and detailed projections regarding expenses, construction financing, expenditures, etc. These documents will be utilized as evidence by BIE in future proceedings before the Board regarding the ongoing suitability of [Foxwoods]." Mauro Affidavit, ¶3, Pitre Affidavit, ¶2.

#### **The Pennsylvania Race Horse Development and Gaming Act**

##### **The Board and Foxwoods' position:**

1. The Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. §1101 *et seq* ("Gaming Act") strictly protects information provided by its applicants, licensees, permittees, and certificate holders. Disclosure of the information violates section 1206(f) of the Gaming Act.

2. Section 1207 authorizes the Board to restrict access to confidential information in the possession of the Board.

a. The Board adopted regulations setting forth the types of documents and information that it considers confidential. This information includes:

Home addresses, telephone numbers, Social Security numbers, educational records, medical records, tax returns, financial account records, credit-worthiness or **financial condition relating to an applicant, licensee or permittee** or the immediate family, documents and information relating to **proprietary information, architectural and engineering plans** and information relating to **competitive marketing materials and strategies**, security information including risk prevention plans, emergency management plans, security and surveillance plans, equipment, information with respect to which there is a reasonable possibility that public release or inspection of the **information would constitute and unwarranted invasion into personal privacy as determined by the Board, and records or information that is designated confidential by statute or the Board.**

See 58 Pa.C.S. §407a.3. (emphasis supplied by Board).

3. Due deference and great weight must be given to an 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. *See Pennsylvania Bankers Ass'n v. Pennsylvania Dept. of Banking*, 981 A.2d 975 (Pa. Cmwlth 2009) (citing *Rinaldi v. Bd. Of Vehicle, Manufacturers, Dealer, and Salespersons*, 843 A.2d 418 (Pa. Cmwlth. 2004).
4. A licensee maintains an on-going obligation to provide information that it can fund its project and that the status update information is confidential just as the information provided during the application process.

