



## 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.

- a. The information in the requested records is the same information provided/updated during renewal applications.
  - b. “The records that have been provided in accordance with the Board’s September 2, 2009 Order includes correspondences that contain information made confidential by law. Additionally, BIE is currently conducting a background investigation of the renewal application of [Foxwoods] and the information provided in accordance with the Board’s September 1, 2009 Order is being utilized as evidence and points of inquiry as part of the ongoing pending renewal investigation.” Mauro Affidavit, ¶ 3. Pitre Affidavit, ¶ 2.
  - c. “Release of this information would reveal significant information regarding general and financial suitability that has been obtained by BIE as part of an ongoing background investigation and is confidential pursuant to Title 4 Pa.C.S. §1206(f).” Mauro Affidavit, ¶3.
5. In addition to the investigation pursuant to the Board’s order the BIE reviews the status update information as part of Foxwoods required annual filing of its renewal application.

**The Requesters’ Position:**

1. Pursuant to the licensing conditions no order is required to obtain updates. Therefore, the requested records were not submitted as part of the original application/licensure requirements.
2. The records are not part of an investigation related to the renewal application because that is entirely separate from a licensee’s obligation to open its casino within one year of the original licensure.



- a. Much of the information “likely included in Foxwoods’ renewal application was already made public at an April 8, 2009 public hearing.”
- b. The Requesters list the categories of types of information that was publicly disclosed by Foxwoods including the project status, progress, zoning at alternate locations, lease negotiations, and funding sources.”
- c. Public disclosure demonstrates that the information was not considered confidential.

### **LEGAL ANALYSIS**

The OOR is authorized to hear appeals for all Commonwealth and local agencies. 65 P.S. §67.503(a). The Board qualifies as a Commonwealth agency subject to the RTKL and its obligations of mandatory disclosure. *See* 65 P.S. §67.102, §67.301.

Records of a Commonwealth agency are 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 or regulation or judicial order or decree. *See* 65 P.S. §§67.102 and 305. Accordingly, the records sought in the Request are presumed by law to be public unless the Board asserts one of these three grounds for withholding the record.

The agency bears the burden of proving the application of its cited exception to the information at issue by a preponderance of the evidence. 65 P.S. §67.708(a). To prove by “preponderance of the evidence” means to prove by the “greater weight of the evidence.” *Com. v. Brown*, 567 Pa. 272, 786 A.2d 961 (2001).

**The Records are Exempt from Disclosure Pursuant to the Gaming Act.**

The RTKL does not supersede or modify the public or nonpublic nature of a record or document established in other State laws or regulations, 65 P.S. §67.306.

The Board contends that the requested records are not public records as they are exempt from disclosure pursuant to the Gaming Act §1206(f) which states:

(f) Confidentiality of information.--All information submitted by an applicant pursuant to section 1310(a) (relating to slot machine license application character requirements) or obtained by the board or the bureau as part of a background investigation from any source shall be considered confidential. Except as provided in section 1517(f) (relating to investigation and enforcement), the information shall be withheld from public disclosure in whole or in part, except that any information shall be released upon the lawful order of a court of competent jurisdiction or, with the approval of the Attorney General, to a duly authorized law enforcement agency or shall be released to the public, in whole or in part, to the extent that such release is requested by an applicant and does not otherwise contain confidential information about another person. The board may not require any applicant to waive any confidentiality provided for in this subsection as a condition for the approval of a license or any other action of the board. Any person who violates this subsection shall be administratively disciplined by discharge, suspension or other formal disciplinary action as the board deems appropriate.

The Gaming Act § 1207(2) grants the Board the power and duty to:

(2) Restrict access to confidential information in the possession of the board which has been obtained under this part and ensure that the confidentiality of information is maintained and protected.

The Board promulgated regulations regarding the confidential nature of its records. See 58

Pa.C.S. §407a. Section 407a.3(a) provides the type of information considered confidential.

(a) Confidential information may include background investigation information, including information provided under section 1310(a) of the act (relating to slot machine license application character requirements), submitted in connection with an application required for the issuance of any license, permit, certification or registration under this part, discovery procedures, or cross-examination or that is provided as a courtesy to a party in a formal proceeding received by the Board or the Department as well as records **obtained or developed by the Board or the Department as part of an investigation related to an applicant for or holder of a license**, permit, certification or registration containing any of the following: . . .

58 Pa.C.S. §407a.3(a) (emphasis added). Pursuant to the Board's regulations the Board, "may issue protective orders or establish standards governing the protection of proprietary or confidential documents for a given proceeding or a given type of proceeding." *Id.* at 407a.1.c. The parties to a proceeding are required to "submit, classify and mark documents in accordance with the directives of the Board or its designee. In the absence of any protective order or standard, parties shall clearly mark documents that are deemed to be proprietary or confidential. The documents will be treated as marked by the Board." *Id.*

There is no evidence in the record that the requested records had been submitted or marked as confidential or were required to be so marked. However, the Board provides competent evidence in the form of affidavits signed subject to penalties of 18 Pa.C.S. §4904 that it considers the requested records confidential pursuant to the Gaming Act. The RTKL is not the proper venue to dispute the Board's designation of a document. The Board's regulations provide as follows:

(d) Any party or member of the public may dispute the designation of a document as submitted by filing a notice of dispute with the Board. The Board will determine the proper classification of documents subject to a notice of dispute as soon as administratively possible.

58 Pa.C.S. §407a.1(d).

Therefore, the Board has met the burden of proving that it may withhold the requested records from disclosure under the RTKL as the Board deems the records wholly confidential under the Gaming Act. Because the records are determined to be nonpublic pursuant to the Gaming Act, it is unnecessary to analyze whether the records would be considered exempt from disclosure as noncriminal investigation records as that term is defined by the OOR's final determinations interpreting the meaning of the term as it is used in the RTKL.

## CONCLUSION

For the foregoing reasons, the Requesters' appeal is **denied**. The Board is not required to take any further action. This Final Determination is binding on the parties. Within thirty (30) days of the mailing date of this Final Determination, either party may appeal to the Commonwealth Court. 65 P.S. §67.1302(a). All parties must be served with notice of the appeal. The OOR also shall be served notice and have an opportunity to respond according to court rules as per Section 1303 of the RTKL. This Final Determination shall be placed on the OOR website at: <http://openrecords.state.pa.us>.

**FINAL DETERMINATION ISSUED AND MAILED: January 4, 2010**



**AUDREY BUGLIONE, ESQ.**  
APPEALS OFFICER

SENT TO: PAUL BONI, ADAM CUTLER, DENISE MILLER-TSHUDY, JOHN DONNELLY, III