

December 18, 2006

Sent Via Facsimile

Richard A. Waples
410 N. Audubon Road
Indianapolis, IN 46219

Re: Formal Complaint 06-FC-201; Alleged Violation of the Access to Public Records Act by the Hoosier Lottery

Dear Mr. Waples:

This is in response to your formal complaint alleging that the Hoosier Lottery violated the Access to Public Records Act by denying you records.

BACKGROUND

As part of a Notice of Tort Claim filed on October 5, 2006, you requested 36 categories of records from the Hoosier Lottery. The tort claim raised the allegation that the Hoosier Lottery overstated the number and cash value of prizes still available in the Cash Blast instant win lottery game (also known as "Game 743"). The records you sought involved information about the Cash Blast game during the period you allege the overstatements occurred, December 17, 2004 until approximately July, 2006.

Specifically, you requested the following:

1. Documents of all communications between or among Lottery employees or agents relating in any way to any problems with the Cash Blast Instant Ticket Game #743, including any attempts to rectify those problems.
2. Documents of all communication between or among the Hoosier Lottery and Scientific Games, Inc., relating in any way to any problems with the Cash Blast Instant Ticket Game #743, including any attempts to rectify those problems.

3. Documents of all communication between or among the Hoosier Lottery and Scientific Games, Inc., relating in any way to any problems with the Cash Blast Instant Ticket Game #743, including any attempts to rectify those problems.
4. Documents of all communication between or among the Lottery and members of the public, including players, relating in any way to any problems with the Cash Blast Instant Ticket Game #743.
5. Documents of all communication between the Lottery and the media relating in any way to any problems with the Cash Blast Instant Ticket Game #743.
6. Documents of any and all other internal or external communication by the Lottery relating in any way to any problems with the Cash Blast Instant Ticket Game #743, including any attempts to rectify those problems.
7. Documents concerning the overstatement by the Lottery of the prizes remaining in the Cash Blast instant game.
8. Documents that establish the beginning and end date of the Cash Blast instant game.
9. Documents which establish the amount, categories, and range of prizes available in Cash Blast instant game and the number of winning tickets corresponding to each prize.
10. Documents that establish the actual number of winning and non-winning Cash Blast tickets that were available for purchase and that were actually purchased.
11. Documents that establish the actual number of winning Cash Blast tickets sold by the Lottery or its retailers.
12. Documents that establish the actual number of non-winning Cash Blast tickets sold by the Lottery or its retailers.
13. The first document publicly released by the Lottery overstating the number and/or amount of prizes available, including the date of such publication.
14. Documents which identify the time period when the Lottery was overstating the number and/or amount of prizes available.
15. Documents that establish the actual number of winning Cash Blast tickets sold by the Lottery or its retailers during the time that the Hoosier Lottery was overstating the number and/or amount of prizes remaining.
16. Documents that establish the actual number of non-winning Cash Blast tickets sold by the Lottery or its retailers during the time that the Hoosier Lottery was overstating the number and/or amount of prizes remaining.

17. Documents distributed on the Hoosier Lottery's website and/or to retailers detailing the number of winning tickets available for the entire time the Lottery offered Cash Blast tickets for sale.
18. Documents that support the Lottery's claim on their website that Scientific Games, Inc., was responsible for a printing error, and documents that explain the nature of any such error.
19. Documentation of the Lottery's investigation that led to the discovery of the alleged printing error, and any attempts to rectify or alleviate the consequences of that error.
20. Electronic copies of any Hoosier Lottery radio or television commercials promoting the Cash Blast game.
21. Documents which establish the revenue generated by the sale of Cash Blast instant game tickets during the entire period of the game.
22. Documents which establish the revenue generated by the sale of Cash Blast instant game tickets during the time period when the Lottery publicly overstated the number and/or amount of prizes remaining.
23. Documents which established the revenue generated by the sale of non-winning Cash Blast instant game tickets during the time period when the lottery publicly overstated the number and/or amount of prizes remaining.
24. Documents which established the actual number of non-winning Cash Blast instant game tickets sold during the time period when the Lottery publicly overstated the number and/or amount of prizes remaining.
25. Correspondence (including e-mails) received from individuals regarding the Cash Blast instant game.
26. Correspondence (including e-mails) sent by the Hoosier Lottery to individuals regarding the Cash Blast instant game.
27. Any documents regarding any Hoosier Lottery administrative procedure for aggrieved ticket purchasers.
28. Any administrative claims received by the Hoosier Lottery regarding the Cash Blast instant game, and all documents associated therewith.
29. A copy of the contract between the Hoosier Lottery and Scientific Games, Inc.
30. Any documents discussing the printing problem involving Scientific Games, Inc. 2.5 million potentially defective tickets for the Cash Blast instant ticket game.

31. Any documents detailing possible or actual solution of this printing problem related to the Cash Blast game.
32. Any documents related to the disposition/status of the 2.5 million potentially defective tickets in the Cash Blast instant ticket game.
33. Hard copies of the Lottery's internal website page:
<http://www.in.gov/hoosierlottery/games/scratchoffgames.asp> (or other URL if the naming/hosting of the web page where the Lottery provides information about its scratch off games has changed during the period covered by this request) available on the internet from December 17, 2004 through July 7, 2006.
34. All correspondence not otherwise produced between the Lottery and Jeff Koehlinger.
35. All correspondence not otherwise produced between the Lottery and Jeff Frazer.
36. All documents concerning any potential insurance coverage for acts complained about in this correspondence.

The Hoosier Lottery responded initially within seven days of your request to say that records were being compiled and would be provided at a later date. A follow-up response dated November 3, 2006 is the subject of your complaint.

For requests #3, 4, 5, 7, 8, 9, 10, 17, 20, 22, 25, 26, 27, 28, 33, 34, 35 and 36, records were produced. You have not raised any issue with respect to the completeness of the production of records under those requests.

For requests # 1, 2, 6, 14, 18, 19, 30, 31 and 32, (the "denied requests") the Hoosier Lottery cited the Access to Public Records Act Ind. Code 5-14-3(b)[sic] and parts of an administrative rule of the Hoosier Lottery. The Hoosier Lottery cited 65 Ind. Admin. Code 1-2-3(b)(1) for all but one of the requests, #32. Ind. Admin. Code 1-2-3(b)(1) is for investigatory records of the security division of the lottery commission. This exemption is no longer at issue in this complaint—the Hoosier Lottery's legal representative has told me that as of the date of this opinion, following a supplemental production of records, no records have been withheld solely on the basis of the investigatory records exception. In addition, the Hoosier Lottery has admitted that the records were not compiled in the course of a criminal investigation.

In addition, the Hoosier Lottery withheld records on the basis of Ind. Admin. Code 1-2-3(b)(5), for administrative or technical information that would jeopardize a record keeping or security system, including (A) information concerning the manner, systems, and procedures relating to the printing, production, packaging, shipping, delivery storage, and verification of tickets, and (C) information relating to prize structure and detailed game specifications. As with investigatory records, the Hoosier Lottery has stated that no records continue to be withheld on the basis of Ind. Admin. Code 1-2-3(b)(5)(A) or (B).

All the denied requests except #32 were withheld on the basis of Ind. Admin. Code 1-2-3(b)(3), for documents containing advisory or deliberative materials. Since the filing of this complaint, the Hoosier Lottery has provided you with additional records that were initially withheld under this exemption, redacted to remove only that part of the records that fit the exemption.

For requests #21 and 29, the response of the Hoosier Lottery stated: “The Hoosier Lottery does not have a record that is responsive to this request since this request does not identify a record with reasonable particularity pursuant to Ind. Code 5-14-3-3(a).”

For requests #11, 12, 13, 15, 16, 23, and 24, the Hoosier Lottery stated that no responsive records existed. You contend that for requests # 11, 12, 16, 23, and 24, records must exist.

I sent a copy of your complaint to the Hoosier Lottery. Deputy Attorney General Lyman C. Taylor responded on behalf of the Lottery. You have received a copy of this response.

For the denied requests (1, 2, 6, 14, 18, 19, 30, 31 and 32) the Hoosier Lottery stands by its denial for only the deliberative materials exception. The Hoosier Lottery contends that due to the nature of the problem related to Game 743, there are numerous documents that can only be described as “deliberative” since they contain nothing more than predecisional speculation by the employees of the Hoosier Lottery regarding what may have caused the overstatement of Game 743’s unclaimed prizes and how the Hoosier Lottery may respond. However, in light of Ind. Code 5-14-3-6(a), the Hoosier Lottery has further reviewed documents and intended to provide redacted documents to you (which has occurred.)

For requests #11, 12, 16, 23, and 24, no records exist, because the Hoosier Lottery is unable to determine how many winning tickets have been purchased but are yet unclaimed. The Hoosier Lottery does not separately track sales of winning versus non-winning tickets, only claimed and unclaimed prizes.

For requests that the Hoosier Lottery denied because the record requested was not stated with reasonable particularity (requests #21 and 29), the Hoosier Lottery denies that it withheld these records in violation of the Access to Public Records Act. For request #21, the Hoosier Lottery could not provide information regarding revenue generated by the sale of Cash Blast instant game tickets during the entire period of the game, because Game 743 was still an active game and had not ended on the date of your request. Accordingly, the Hoosier Lottery had no way of knowing what period of time you were referring to. Nevertheless, sales of Game 743 as of the date of your request would have been evident from Exhibit 9, disclosed with the November 3 letter to you. For request #29 for the contract between the Hoosier Lottery and Scientific Games, Inc., your request did not identify the record with reasonable particularity because the Hoosier Lottery has multiple contracts with Scientific Games, Inc., each one having different information or attachments that may be exempt from public disclosure. With your November 9 letter protesting the denial of some of the records, the Hoosier Lottery was able to determine which contract you wanted and has provided this document to you.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act (“APRA”). Ind. Code 5-14-3-3(a). A request for inspection and copying must identify the record requested with reasonable particularity. IC 5-14-3-3(a)(1). The Access to Public Records Act shall be liberally construed to implement the policy of openness and place the burden of proof for the nondisclosure of a public record on the public agency that would deny access to the record and not on the person seeking to inspect and copy the record. Ind. Code 5-14-3-1.

If a request is made orally, either in person or by telephone, a public agency may deny the request orally. However, if a request initially is made in writing, by facsimile, or through enhanced access, or if an oral request that has been denied is renewed in writing or by facsimile, a public agency may deny the request if:

- (1) the denial is in writing or by facsimile; and
- (2) the denial includes:

(A) a statement of the specific exemption or exemptions authorizing the withholding of all or part of the public record; and (B) the name and the title or position of the person responsible for the denial.

A record may be withheld from disclosure by a public agency if any one exemption stated in section 4 applies to the record.

A public agency may, at its discretion, withhold records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making. IC 5-14-3-4(b)(6). If a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under this chapter, separate the material that may be disclosed and make it available for inspection and copying. IC 5-14-3-6(a).

The November 3, 2006 Denial Letter

I write as a preliminary matter to point out two problems with the Hoosier Lottery’s first substantive response of November 3. First, the Hoosier Lottery has not cited to the state statute that exempts the records from disclosure under the various exemptions. Although the Hoosier Lottery relies on its administrative rule, the administrative rule of the Hoosier Lottery is mainly a recodification of the APRA exemptions. It is not evident to me that the Hoosier Lottery has specific statutory authority to exempt records in addition to those exemptions provided by the APRA. Hence, the Hoosier Lottery should have provided the specific statutory exemption from section 4 of the APRA that applied to each request. In addition, the Hoosier Lottery provided an incomplete cite to a state statute, Ind. Code 5-14-3(b). It is unclear what was meant by this citation.

Second, I note that the denial letter of November 3, 2006 fails to set out the specific record being exempted. Your numbered requests were broad, and it is likely that several records of various types (reports, e-mails, letters, etc.) met a category of requested records. In my opinion, at a minimum, section 9(c) requires a public agency to set out a description of the specific record or type of record subject to the specific exemption or exemptions.

The “Denied Requests”

The Hoosier Lottery is now claiming that only the deliberative materials exception applies to the records that are part of the denied requests. This exception applies only if the record is: 1) intraagency or interagency advisory or deliberative material; 2) is expression of opinion or are of a speculative nature, and 3) is communicated for the purpose of decision making. IC 5-14-3-4(b)(6). Only if all three elements of the exception are met is the record exempt. The Hoosier Lottery has argued that it has provided additional records not provided with the November 3 response, with certain parts that meet the deliberative materials exception redacted, pursuant to IC 5-14-3-6(a). In a court action challenging the denial, the Hoosier Lottery bears the burden of showing that the redacted portion of the record is deliberative material, in accordance with IC 5-14-3-9(g).

Reasonable Particularity

A request for inspection and copying must identify with reasonable particularity the record being requested. IC 5-14-3-3(a)(1). There is no Indiana case law defining “reasonable particularity,” so were it necessary to interpret the APRA to determine what the General Assembly intended this phrase to mean, courts would rely upon the common and ordinary, dictionary meanings of the word used. *Crowley v. Crowley*, 588 N.E.2d 576, 578 (Ind. Ct. App. 1992) “Particularity” is defined as “the state of being particular rather than general.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981), 956. Rules of statutory interpretation also require that one construe the phrase “reasonable particularity” in light of the entire APRA. *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind. Ct. App. 1991). In legal terms, what is “reasonable” is measured with respect to the particular facts and circumstances.

Since the public policy of the APRA favors disclosure and the burden of proof for nondisclosure is placed on the public agency, if an agency needs clarification of a request, then the agency should contact the requester for more information if it is necessary in order to provide the records. *See generally* IC 5-14-3-1; *Opinion of the Public Access Counselor 02-FC-13*. It is my opinion that the response of the Hoosier Lottery falls short of the requirements of the APRA. Rather than issuing an outright denial of your request, the Hoosier Lottery should have contacted you to explain why your request was not reasonably particular. The denial did nothing to provide information concerning why your request was not reasonably particular. For example, your request for the revenue from the Cash Blast game “during the entire period of the game” reasonably raised a question concerning whether you sought records showing only “to date” revenues since the game had not then ended. Similarly, for the contract with Scientific Games, Inc., more than one contract existed, making your request ambiguous. The Hoosier Lottery should have provided you with essentially the same information that Mr. Taylor provided in the complaint response. You now have the contract you requested and the revenue information, but

I still find that the November 3 response of the Hoosier Lottery was not in compliance with the APRA.

No Records Exist

You complain that records must exist for five of the requests that were denied because no record exists (11, 12, 16, 23, and 24.) You believe the records likely exist because the Hoosier Lottery would have compiled this information in the course of investigating the overstatement problem with the Cash Blast game, even if this type of information is not generally compiled for instant games. If you believe that the Hoosier Lottery has withheld records that are responsive to these requests, your recourse is to file a lawsuit to compel the Hoosier Lottery to disclose the records, under IC 5-14-3-9(e).

CONCLUSION

For the foregoing reasons, I find that the Hoosier Lottery bears the burden of proof that the records withheld as deliberative material are exempt under section 4 of the APRA. Also, the Hoosier Lottery should have contacted you to seek clarification of two of your requests deemed not reasonably particular.

Sincerely,

Karen Davis
Public Access Counselor

cc: Lyman C. Taylor III