



STATE OF INDIANA

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November 10, 2011

Robert Segall
o/b/o WTHR
1000 N. Meridian
Indianapolis, Indiana 46204

Re: Formal Complaint 11-FC-244; Alleged Violation of the Access to Public Records Act by the Hoosier Lottery

Dear Mr. Segall:

This advisory opinion is in response to your formal complaint alleging the Hoosier Lottery ("Lottery") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et seq.* Andrew Klingler, General Counsel, responded to your formal complaint. His response is enclosed for your reference.

BACKGROUND

In your formal complaint, you allege that on September 15, 2011 you submitted to the Lottery, via e-mail and a hand-delivered letter, a request for records pursuant to the APRA. While the Lottery has provided a partial disclosure in response to your request, it has failed to provide full access to three major parts of the request. You have provided the following timeline of events subsequent to your September 15, 2011 request:

September 28, 2011 – You met with Mr. Larsen at Lottery headquarters to allow you to inspect invoices and receipts that had been requested. Your original request asked to inspect, not for the Lottery to provide, copies of the records requested. While inspecting the records, you informed Mr. Larsen that you would like photocopies of all of the records that had been made available that morning. Mr. Larsen informed you that he would make copies and would drop them off to you that afternoon. As a result of Mr. Larsen informing you that he would have copies to you that afternoon, you did not inspect the copies as thoroughly as you otherwise would have. You also inquired with Mr. Larsen the status of the other records in response to your September 15, 2011 request. Mr. Larsen, after checking on the status of the request, informed you that some of the records would likely be ready that day and all remaining items would be ready for inspection by the end of the week. After leaving Lottery headquarters, you called Mr. Larsen to inquire if the records were ready for delivery and informed him that WTHR

planned to air a report that evening at 5 p.m. and 6 p.m. about expenses related to the Lottery's new headquarters. It is not clear if you personally spoke to Mr. Larsen or left a message. You did not receive any records from Mr. Larsen that afternoon and received an e-mail at 5:37 p.m. that he was unable to make any progress on the photocopies that you had reviewed as a result of his other day-to-day activities. He apologized for the inconvenience.

September 29, 2011 – You requested via e-mail and phone to stop by the Lottery to pick up the records that you had been informed would be available the previous day. You received no response from the Lottery.

September 30, 2011 – You requested via e-mail and phone to stop by the Lottery to pick up the records that you have been informed would be available on September 28, 2011. You received no response from the Lottery. You also submitted a new request for records from the Lottery that had not been previously requested.

October 1, 2011 – You requested via e-mail and phone to stop by the Lottery to pick up the records that you had been informed would be available on September 28, 2011. You received no response from the Lottery.

October 2, 2011 – You requested via e-mail and phone to stop by the Lottery to pick up the records that you had been informed would be available on September 28, 2011. You received no response from the Lottery.

October 3, 2011 - Mr. Larsen provided via e-mail that the Lottery received your September 30, 2011 request and provided some records that had been part of your initial request. He did not provide any guidance on your repeated request for copies of the records that you had inspected on September 28, 2011 and had been informed that copies would be provided to you that same day. You contacted the Public Access Counselor's Office for assistance in working with the Lottery.

October 4, 2011 – Mr. Larsen contacted you via e-mail and provided that the drawings you asked to inspect as part of your September 15, 2011 request would be ready to pick up at the Lottery after 12 p.m. that day. Mr. Larsen informed you that you would be out of the office the remaining of the day and will check on the progress of the other outstanding items when he returned to the office of October 5, 2011. You responded to Mr. Larsen's e-mail and again inquired about the records that you had inspected on September 28, 2011. You made arrangements to have the drawing picked up at the Lottery.

October 5, 2011 – Mr. Larsen responded to your previous e-mail and provided that the records you had inspected on September 28, 2011 would be available no later than the end of the day on October 6, 2011 and you would not need to bring a copier to the Lottery to make copies. In a separate e-mail, Mr. Larsen provided that additional redactions would need to be made to the drawings and for security purposes the Lottery had withdrawn the records for pickup. The Lottery would make the redactions as soon as

possible and notify you immediately when they are ready to pick up. You were able to speak personally with Mr. Larsen that day and he again provided that all records from your September 15, 2011 inspection would be available the following day.

October 6, 2011 – Mr. Larsen informed you via e-mail that the records would not be available that day and would notify you when they became available. You responded to Mr. Larsen that you were disappointed with the Lottery's response and offered to bring a copy machine to the Lottery to make copies. Mr. Larsen failed to respond to your e-mail.

October 7, 2011 – Mr. Larsen provided you information responsive to your September 30, 2011 request but did not acknowledge the pending September 15, 2011 request. You e-mailed Mr. Larsen and asked again for an update on the September 15, 2011 request. You received no response.

October 12, 2011 – Having not received any records responsive to the September 15, 2011 request, you filed a complaint with the Public Access Counselor's Office.

You allege that the Lottery violated both the spirit and letter of the APRA by either failing to provide the records that had been requested or continually changing the dates for when the records would actually be produced.

In response to your formal complaint, Mr. Klinger advised that the Lottery did not act contrary to the APRA in responding to your requests. The APRA does not prescribe timeframes for the actual production of records. Records must be produced within a reasonable period of time based on the facts and circumstances of the request. Factors determining whether an agency has responded within a reasonable time frame include the volume of the records requested, quantity of requests received by the agency, and whether the records must be reviewed and redacted prior to disclosure.

WTHR's requests submitted to the Lottery were voluminous. The September 15, 2011 correspondence included seven (7) separate requests. The September 30, 2011 request contained three additional items. On October 13, 2011, an additional request was submitted by WTHR, bringing the total to eleven (11) independent requests. The sum of all of the requests included thousands of pages of information. During this time, the Lottery was responding to a minimum of seven (7) other records requests that had been submitted. Due to the demand placed on the Lottery for information relating to headquarters move, the Lottery posted many of the records online.

The records requested by WTHR also required legal review. The APRA requires public agencies to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. The building drawings and plans required extensive review, in light of the sensitive nature of the records that were requested. The APRA further provides that public agencies shall regulate any material interference with the regular functions or duties of the office. In addition to responding to the records request at issue here, the Lottery hosted an

international lottery conference in Indianapolis which demanded a significant amount of staff time and effort in planning and providing volunteer support.

Ultimately, all records requested by WTHR were provided within eight weeks of their initial request. The Lottery also made periodic disclosures of records that were responsive to the request due to the broad nature of the requests that had been received. While the Lottery does admit that it erred in attempting to provide a specific timeframe for production of the documents, it believed it still maintained regular communication with WTHR during the pendency of the request.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *See* I.C. § 5-14-3-1. The Lottery is a public agency for the purposes of the APRA. *See* I.C. § 5-14-3-2(m)(8). Accordingly, any person has the right to inspect and copy the Lottery’s public records during regular business hours unless the records are excepted from disclosure as confidential or otherwise nondisclosable under the APRA. *See* I.C. § 5-14-3-3(a).

A request for records may be oral or written. *See* I.C. § 5-14-3-3(a); § 5-14-3-9(c). If the request is delivered in person and the agency does not respond within 24 hours, the request is deemed denied. *See* I.C. § 5-14-3-9(a). If the request is delivered by mail or facsimile and the agency does not respond to the request within seven (7) days of receipt, the request is deemed denied. *See* I.C. § 5-14-3-9(b). Under the APRA, when a request is made in writing and the agency denies the request, the agency must deny the request in writing and include a statement of the specific exemption or exemptions authorizing the withholding of all or part of the record and the name and title or position of the person responsible for the denial. *See* I.C. § 5-14-3-9(c). A response from the public agency could be an acknowledgement that the request has been received and information regarding how or when the agency intends to comply. Here, the Lottery responded to your request within the timelines provided by the APRA.

The APRA does not prescribe timeframes for the actual production of records. The public access counselor has stated repeatedly that records must be produced within a reasonable period of time, based on the facts and circumstances of the request. Considering factors such as the nature of the requests (whether they are broad or narrow), how old the records are, and whether the records must be reviewed and edited to redact nondisclosable material is necessary to determine whether the agency has produced records within a reasonable timeframe. Section 7 of the APRA requires a public agency to regulate any material interference with the regular discharge of the functions or duties of the public agency or public employees. *See* I.C. § 5-14-3-7(a). However, Section 7 does not operate to deny to any person the rights secured by Section 3 of the Access to Public Records Act. *See* I.C. § 5-14-3-7(c). The ultimate burden lies with the public

agency to show the time period for producing documents is reasonable. *See Opinion of the Public Access Counselor 02-FC-45.*

In determining whether the Lottery provided records that were responsive to your request within a reasonable period of time pursuant to the APRA, I have broken down your request to the following three categories, which I will address separately:

- (A) Records responsive to the September 15, 2011 request that you inspected on September 28, 2011
- (B) All other records responsive to the September 15, 2011 request
- (C) The September 30, 2011 request

I would also note that the Lottery has advised that as of November 4, 2011, all records responsive to all your requests have been provided.

(A) Records responsive to the September 15, 2011 request that were inspected on September 28, 2011

In response to your September 15, 2011 request, the Lottery allowed you to inspect a portion of the request at its headquarters on September 28, 2011. While inspecting the records, you informed the Lottery that you would like a copy of all the documents that had been provided, to which you were informed that copies would be made and dropped off at WTHR later that day. After leaving the Lottery's headquarters, you were later informed that the copies would not be available that day. Over the course of the next four (4) business days, you attempted to contact the Lottery by phone and e-mail and failed to receive a response. On October 3, 2011, the Lottery contacted you via e-mail only to acknowledge the receipt of the September 30, 2011 records request, but did not comment on the status of the copies that had already been inspected on September 15, 2011. During this time, you also offered to bring in your own copier to make copies of the records that had already been inspected, to which the Lottery declined. As of October 12, 2011, the date you filed your formal complaint with the Public Access Counselor, you had yet to receive copies of the records that had been inspected on September 28, 2011.

Under the circumstances provided, it is my opinion that the Lottery violated the APRA by failing to provide you copies of records that you had been inspected on September 28, 2011 within a reasonable period of time. The Lottery is correct that the APRA requires public agencies to separate and/or redact confidential information in public records before making the disclosable information available for inspection and copying. However, here the obligation to review records as required by APRA would have already been required to have taken place as you were allowed to inspect the documents on September 28, 2011. As the documents were already collected and inspected, the only requirement that remained for the Lottery was for the actual copies to be made. During this time, you offered and were declined the opportunity to make copies using WTHR's equipment. As of the date you filed the formal complaint, fourteen (14) days had passed since the inspection that occurred on September 28, 2011, and you still

had not received copies of the records. While I am mindful of the extensive nature of the request made of the Lottery and the requirements that it shall regulate any material interference with the regular functions or duties of the office, it is my opinion it violated the APRA in failing to respond to this portion of your request within a reasonable period of time.

(B) All other records responsive to the September 15, 2011 request

The Lottery indicated on September 28, 2011 that as to all other records that were responsive to your September 15, 2011, a portion of the records would be available that day, and all remaining items would be available by September 30, 2011. On October 4, 2011 the Lottery provided that the drawings that had been requested would be available by the end of the day. On October 5, 2011, the drawings were determined to require further redactions and would not be available. The Lottery indicated that it would inform you as soon as the documents were ready and later on that day, indicated in person that all of the materials had been gathered and would be available on October 6, 2011. On October 6, 2011, the Lottery contacted you and indicated the materials would not be ready, but would update you on the status as soon as they become available. In a November 4, 2011 correspondence to WTHR, the Lottery indicated that all records responsive to the September 15, 2011 request had been disclosed.

Here, it is my opinion that the Lottery responded to your request within a reasonable period of time pursuant to the APRA. The Lottery was responding to seven (7) separate requests as part of the September 15, 2011 correspondence that ultimately produced thousands of pages of records. Unlike the documents inspected on September 28, 2011 that had already been collected and reviewed, the remaining documents had yet to be collected or reviewed by Lottery staff. In part, the Lottery provided periodic disclosures of documents that remained from the September 15, 2011 request. The Lottery indicated while responding to your request it was required to maintain the normal duties of the office, respond to seven other requests received by it for public records, and host an international conference of lottery officials. As such, it is my opinion that the Lottery responded to your request within a reasonable period of time as to this part of the request.

(C) The September 30, 2011 request

On September 30, 2011, you submitted in writing to the Lottery three additional records requests. On October 3, 2011 the Lottery acknowledged your request and provided a partial response to your request on October 7, 2011. In a November 4, 2011 correspondence to WTHR, Mr. Klinger provided that all records responsive to your September 30, 2011 request had been produced. Specifically as to your September 30, 2011 request, you do not allege that the Lottery failed to respond to any inquires regarding the status of this particular request. The Lottery produced all records responsive to your request within approximately thirty (30) days. As detailed prior, the Lottery was required to collect and review all documents in response to your request, maintain the normal duties of office, and response to all other records requests that had been submitted. Accordingly, it is my opinion that the Lottery provided records

responsive to your request within a reasonable period of time as to your September 30, 2011 request.

Lastly, I would note that this office has often suggested a public agency make portions of a response available from time to time when a large number of documents are being reviewed for disclosure. *See Opinions of the Public Access Counselor 06-FC-184 and 08-FC-56.* I would encourage all public agencies in responding to broad record requests to communicate and/or be responsive to inquiries from the requestor regarding the status of the request. This does not require an agency to provide daily updates, however when an agency provides a specific date that the records will be produced and thereafter is unable to meet said deadline, the agency should timely communicate this fact with the person making the request. Many of the issues involved here could have been avoided had the Lottery responded to inquiries made as to the status of the pending requests that it had previously provided would be available by a specific date. Although it is my opinion that the Lottery's actions in this regard did not violate the letter of the APRA, I would strongly encourage it to conduct its future actions accordingly when receiving and responding to similar requests.

CONCLUSION

For the foregoing reasons, it is my opinion that the Lottery violated the APRA by failing to provide copies of the records that you were allowed to inspect on September 28, 2011 within a reasonable period of time. As to all other issues, it is my opinion that the Lottery has not acted contrary to the APRA.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: Andrew Klinger