

August 22, 2002

Ms. Grace Schneider  
Courier Journal & Times Co.  
Southern IN News Bureau  
525 W. Broadway  
Louisville, KY 40202

*Re: Advisory Opinion 02-FC-34; Alleged Denial of Access to Public Records by the Indiana Gaming Commission.*

Dear Ms. Schneider:

This is in response to your formal complaint, which was received on July 26, 2002. You have alleged that the Indiana Gaming Commission ("Commission") has violated the Indiana Access to Public Records Act ("APRA"), Indiana Code chapter 5-14-3. Specifically, you complain that the Commission is improperly denying you access to information about persons who have notified the Commission that they wish to be excluded from Indiana riverboats. Mr. Jack Thar, Executive Director of the Commission responded to your complaint and a copy of his response is enclosed for your reference.

For the reasons stated below, it is my opinion that the Commission did not violate the APRA by denying you access to the social security numbers or to identifying information for self-exclusion that was provided to the Commission by mental health providers. It is also my opinion that the Commission did deny you access in violation of the APRA with respect to the identifying information, other than the social security number, that you requested when that information was provided by the person to be excluded or his or her family. This denial is actionable under Indiana Code section 5-14-3-9.

## BACKGROUND

According to your complaint, in a letter dated June 11, 2002 you requested access to and copies of the following:

1. The names of persons excluded by the Commission, the reason for the exclusion and the date that such action was taken;
2. Any letters from any persons who asked to be excluded from any Indiana riverboats;
3. The total number of self-exclusions for each riverboat licensee during each year since each licensee's commencement of gaming, the number of patrons readmitted after asking that their self-exclusion be revoked and any numbers involving any riverboat licensees that approved a second or additional self-exclusions requested by an individual patron;
4. Any and all letters, memos, e-mails or other communications between the riverboats and the casinos involving the handling or other issues related to self-exclusion;

5. Any and all letters, memos, e-mails or other communications from the state police on the riverboats involving such self-exclusion issues;
6. Any complaints filed with the Commission involving self-exclusion issues; and
7. Any documentation of disciplinary action taken as the result of a licensee's handling or other involvement in a self-exclusion matter.

After making your request, Ms. Jennifer Arnold of the Commission contacted you and advised you that due to the special legislative session, the Commission staff had additional demands on their time but they would pull together what they could when there was more time to do so. You responded that this arrangement was acceptable to you.

After more than one (1) month passed and the Commission had made no further contact with you, you re-contacted Ms. Arnold to inquire about the status of your request.

On July 19, 2002, Mr. Thar contacted you by telephone and advised you that the Commission intended to provide "99%" of the requested documents, to the extent the Commission maintained them. Mr. Thar also advised you in that conversation that due to "privacy" concerns and the potential that such letters may touch upon the persons' medical records, the Commission would redact personal information such as the last name, address etc. This response was verbal but the Commission pledged to provide a written denial to you. You filed your formal complaint with this Office on July 26th, but the Commission's written response to your June 11th request, including the denial of certain pieces of information was dated August 12, 2002.

In response to your complaint, Mr. Thar provided me with a copy of his written response to you dated August 12th. He addressed each of your requests individually:

1. The Commission maintains an exclusion list, a copy of which was attached to the response, but under Indiana Code section 5-14-3-4(a)(3), the social security numbers of the individuals were redacted as confidential under federal law.
2. The Commission will provide all letters from persons asking to be excluded and follow-up documents from Indiana riverboats with the last name, street address, date of birth, photo and social security number redacted. The statutory authority cited for this denial was Indiana Code section 5-14-3-1, which sets forth the public policy of the APRA and Indiana Code sections 5-14-3-4(a)(3) and (a)(4), for records required to be kept confidential by federal law and records containing trade secrets, respectively.
3. As to records related to self-exclusions for each riverboat licensee during each year of operation, Mr. Thar stated that the Commission does not maintain this information as each licensee is responsible for such recordkeeping. Any documents the Commission may have on this subject are addressed in their responses to your first two requested items.
4. As to records that are communications between the riverboat licensees involving the handling of self-exclusions, Mr. Thar stated that the Commission has provided you with responsive information in response to your first requested item. Also, the Casino Association provided the

Commission with information concerning a statewide self-exclusion program, a copy of which was provided to you.

5. In response to your request for records documenting communications from the Indiana State Police on the riverboats involving self-exclusion issues, the Commission provided one document, an incident report with the redactions noted under your first requested item.
6. With respect to any complaints file regarding self-exclusion, the Commission provided documents to you, but with redactions noted in response to your first requested item.
7. No response was provided with respect to your request for information on any disciplinary actions taken as the result of a riverboat licensee's handling or other involvement in a self-exclusion matter.

In support of the nondisclosures, Mr. Thar also provided a copy of his legal analysis of this issue, in which he cites to particular authority for the nondisclosure of personal information from the Commission's files. Mr. Thar cites to the federal Freedom of Information Act, 5 U.S.C. section 552 ("FOIA") as authority to withhold personal information. He also cited to the public policy statement of the APRA, Indiana Code section 5-14-3-1 that references the "information regarding the affairs of government and the official acts of those who represent them." Mr. Thar states that the information concerning persons excluded from Indiana riverboats is not the type of information contemplated by the APRA.

## 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." Ind. Code § 5-14-3-1. Furthermore, "[t]his chapter shall be liberally construed to implement this policy 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.

The Commission is clearly a public agency for the purposes of the APRA. Ind. Code § 5-14-3-2. Public records are defined under the APRA to include any writing that is received or maintained by a public agency. Id. Any person is entitled to inspect and copy public records unless the records are excepted from disclosure as confidential or otherwise nondisclosable under Indiana Code section 5-14-3-4. Ind. Code §5-14-3-3(a).

There are two types of documents at issue in your complaint. First, the exclusion list that is prepared by the Commission for persons who, after adjudication, have been excluded from Indiana riverboats. The only identifying information not provided to you from these lists was the social security numbers. The second type of document concerns letters in which individuals, their families or their medical provider have contacted the Commission to request that they be excluded from Indiana's riverboats. You were denied access to the last name, street address, date of birth, photo and social security number from these documents. The issue to be determined in this Opinion is whether the Commission violated the APRA

by denying you access to this information.

It is clear that the exclusion list created after Commission action is a public record. 68 IAC 6-1-2. It is important to address Mr. Thar's assertion that the self-exclusion records in question are not governed by the APRA. "Public records" are defined under Indiana Code section 5-14-3-2 as "any writing, paper, report . . .that is created, received, retained, maintained, used or filed by or with a public agency." Certainly, the records in question are in writing and are maintained by the Commission. Mr. Thar states that since the information that has been redacted is not "information regarding the affairs of government" or the "official acts of those who represent them as public officials" the APRA does not apply to them.

After reviewing the enabling act for the Commission, however, it appears that the Indiana General Assembly has determined that the act of excluding someone from Indiana riverboats is in fact a governmental function. Indiana Code section 4-33-4-7 provides that the Commission may exclude a person from a riverboat for a variety of reasons. For this reason, it is my opinion that these records concerning exclusion are in fact the public records of the Commission.

As noted above, however, some public records, or portions of them, are not disclosable under the APRA. The Commission has produced much of the information you requested, but redacted "identifying information" from these public records. In order for the Commission to withhold the last name, street address, date of birth, photo and social security number of individuals excluded from Indiana riverboats, there must be statutory authority for denying you access to that information. First I will address the denial of access to the social security numbers from both the exclusion list and the self-exclusion documents.

### *Social Security Numbers*

The Commission has denied you access to social security numbers in response to your June 11, 2002 request. The authority cited for this denial is Indiana Code section 5-14-3-4(a)(3), for records declared confidential by federal law. The Commission did not cite to any specific federal authority.

It appears that there is some federal statutory authority that requires the Commission not to disclose the social security numbers they have collected to you. Under 42 U.S.C.A. §405, Congress has recognized that state governments may collect social security numbers, in particular in licensing functions such as motor vehicles or professions. In addition, under this statute, Congress determined that when authorized persons, which includes an officer or employee of any state or political subdivision, maintain social security number information that information is confidential in their hands:

Social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record.

42 USCA § 405( c)(viii)(I). This provision only applies to statutes enacted after 1990, and the Commission's enabling act was enacted in 1993. For this reason, it is my opinion that the Commission's denial of access to the social security information in the exclusion list and the self-exclusion letters was authorized under federal law and the APRA at Indiana Code section 5-14-3-4(a)(3).

### *Other Identifying Information*

With respect to the other information from the self-exclusion letters that was not provided to you, the Commission cited to two provisions of the APRA that permit them not to disclose the identifying information to you. The first is Indiana Code section 5-14-3-4(a)(3), for records declared confidential under federal law. Also, the Commission cited to Indiana Code section 5-14-3-4(a)(4), which requires public agencies to withhold information that is considered a trade secret.

While no specific citation to federal law was provided in Mr. Thar's August 12th letter to you, he did provide a memorandum explaining this legal position. The federal authority cited for nondisclosure of this identifying information was the federal Freedom of Information Act, ("FOIA") 5 U.S.C.A. §552.

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . .

5 USCA §552(b)(6) & (7). For the purposes of FOIA, an agency

includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the [federal] Government (including the Executive Office of the President), or any independent regulatory agency.

5 USCA §552(f)(1). While some of the cases cited in Mr. Thar's memorandum may be instructive, the FOIA does not apply to the Commission. For this reason, it is my opinion that the Commission cannot rely on the exemptions provided under FOIA as support for their denial of your request.

The Commission also cited to Indiana Code section 5-14-3-4(a)(4), for records containing trade secrets. A "trade secret" for the purposes of the APRA has "the meaning set forth in IC 24-2-3-2," the Indiana Uniform Trade Secrets Act (IUTSA. Ind. Code § 5-14-3-2.

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process, that:

(1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

A trade secret that may be protected under the IUTSA has four key characteristics:

1. it is information
2. which derives independent economic value
3. that is not generally known, or readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and
4. it is the subject of efforts reasonable under the circumstances to maintain its secrecy.

*Ackerman v. Kimball International, Inc.*, 634 N.E.2d 778, 783 (Ind. App. 1994), vacated in part, adopted in part, 652 N.E.2d 507 (Ind. 1995).

The public records that you requested, in particular the identifying information you were denied, certainly qualify as information. The Commission did not provide any basis for claiming that this identifying information derives any independent economic value. This information, at least to date, has not been generally known or readily ascertainable to anyone except the Commission and riverboat licensees as only the Commission and their licensees keep it. It appears that this information has been the subject of reasonable effort to maintain its secrecy in that apparently there have been no prior requests for this nor has this information been provided as the result of a public records request or otherwise.

It is clear to me that the Commission has made efforts to withhold this information and that is certainly significant under the trade secret definition. However, it is my opinion that this information does not have any independent economic value, at least on its face, and since the Commission provided no justification for this information as a trade secret it is difficult for me to guess what that value may be. The burden for proving that information is subject to a certain exception to disclosure under the APRA lies with the Commission. It is my opinion that the Commission has failed to show how the identifying information withheld from you in response to your June 11th request constituted a trade secret under Indiana Code section 5-14-3-4(a)(4).

In the Commission's response to your complaint, Mr. Thar also raised the issue of privacy as it relates to the persons who have contacted the agency indicating that they had a medical problem, in other words an addiction to gambling, that necessitated them being barred from entering any Indiana riverboat. With respect to protections under Indiana law for personal information, the kind of information not disclosed to you by the Commission, I have examined the Indiana Fair Information Practices Act, Indiana Code chapter 4-1-6 ("FIPA.") This statute governs personal information records systems that are maintained by

state agencies. The FIPA provides that state agencies shall

(a) collect, maintain, and use only that personal information as is relevant and necessary to accomplish a statutory purpose of the agency;

\* \* \*

(d) assure that personal information maintained or disseminated from the system is, to the maximum extent possible, accurate, complete, timely, and relevant to the needs of the state agency;

(e) inform any individual requested to disclose personal information whether that disclosure is mandatory or voluntary, by what statutory authority it is solicited, what uses the agency will make of it, what penalties and specific consequences for the individual, which are known to the agency, are likely to result from nondisclosure, whether the information will be treated as a matter of public record or as confidential information, and what rules of confidentiality will govern the information;

\* \* \*

(j) make reasonable efforts to furnish prior notice to an individual before any personal information on such individual is made available to any person under compulsory legal process;

\* \* \*

(l) establish appropriate administrative, technical and physical safeguards to insure the security of the information system and to protect against any anticipated threats or hazards to their security or integrity.

Indiana Code §4-1-6-2.

Under Indiana Code section 4-1-6-8(a), the General Assembly provided that state agencies are to adhere to the policy stated in the APRA, but that the FIPA is to be "construed to provide access to public records to the extent consistent with the due protection of individual privacy." There is no case law interpreting this provision, but it is clear that the FIPA does not supersede the provisions of the APRA. In fact, under Indiana Code section 4-1-6-2(e), a state agency is required to inform the person providing this personal information of the disclosure status of that information. In other words, there still must be statutory authority for the Commission not to disclose this information upon request under the APRA. This argument is certainly compelling and raises issues of whether identifying information about persons who have identified themselves as gambling addicts should be disclosed. In order for the Commission not to disclose, however, there must be some legal authority, by federal law or state statute, to authorize

its nondisclosure.

The Commission raised one final argument with respect to the identifying information that concerns whether the information constitutes the medical records of the person to be excluded from Indiana riverboats. There are instances when the information concerning self-exclusion has been provided by a mental health provider to the Commission.

Under Indiana Code section 5-14-3-4(a)(9), patient records are confidential public records in the hands of the Commission. The Commission may not disclose those patient records without written consent of the patient under Indiana Code chapter 16-39. Pathological gambling is recognized as a mental illness in the DSM-IV. Under Indiana law, mental health records are defined, in relevant part, as "recorded or unrecorded information concerning the diagnosis, treatment, or prognosis of a patient receiving mental health services." Ind. Code §16-18-2-226. Under Indiana Code section 16-39-2-3, a patient's mental health record is confidential with limited exceptions. It is my opinion that if the identifying information concerning an individual has been provided to the Commission by a mental health provider, the Commission may not disclose this information to you under Indiana Code section 5-14-3-4(a)(9) unless you have obtained the written consent of the patient.

This does not address the situation, however, in which the identifying information has been provided to the Commission by the person to be excluded or his or her family. There appears to be no statutory authority to authorize the denial of access to identifying information in the non-medical records letters received by the Commission. It is my opinion that, to the extent that the Commission has received identifying information from the person to be excluded or his or her family for the purpose of self-exclusion from Indiana riverboats, the Commission's denial was not proper under the APRA.

## CONCLUSION

It is my opinion that the Indiana Gaming Commission did not violate the APRA by denying you access to the social security numbers or to identifying information for self-exclusion that was provided to the Commission by mental health providers. It is also my opinion that the Commission did deny you access in violation of the APRA with respect to the identifying information, other than the social security number, that you requested when that information was provided by the person to be excluded or his or her family. This denial is actionable under Indiana Code section 5-14-3-9.

Sincerely,

Anne Mullin O'Connor

Enclosures

cc: Mr. Jack Thar, Executive Director, IGC w/o enclosures