

Chief FOIA Officer Report for National Indian Gaming Commission March 2010

I. Steps Taken to Apply the Presumption of Openness

1. Description

The National Indian Gaming Commission (NIGC) is a small federal agency of approximately 115 employees nationwide. Our primary mission is to regulate gaming activities on Indian lands for the purpose of shielding Indian tribes from organized crime and other corrupting influences; to ensure that Indian tribes are the primary beneficiaries of gaming revenue; and to assure that gaming is conducted fairly and honestly by both operators and players. To Achieve these goals, the Commission is authorized to conduct investigations; undertake enforcement actions, including the issuance of violation, assessment of civil fines, and/or issuance of closure orders; conduct background investigations; conduct audits; and review and approve, where appropriate, Tribal gaming ordinances and agreements. The FOIA office handles all agency requests and has a staff of one employee.

In keeping with President Obama's FOIA Memorandum of January 21, 2009 and Attorney General Holder's FOIA Memorandum of March 19, 2009, the NIGC's FOIA office has taken a hard look at the way it processes agency documents pursuant to FOIA requests. Documents generated in the course of the agency's mission of regulating gaming on Indian lands routinely contain confidential and proprietary information. When processing this type of information every effort has been made to make discretionary disclosure of information that would normally be heavily protected pursuant to exemption (b)(4). This process has involves working with the submitter of documents to discuss any competitive harm if the information is released. Documents are now routinely processed in part whenever they cannot be released in full. When requests are for a gaming-related contract, such as a development, lease, or consulting agreement, which by their nature contain trade secrets and commercial or financial information, a review is made of similar documents previously released to look for standard pitches commonly used, to ensure that this information is not withheld in current release. The FOIA office received 67 requests during fiscal year 2009 and 107 requests in fiscal year 2008. The application of (b)(4) was applied in 34% of releases in fiscal year 2009 as opposed to 33% of releases in fiscal year 2008.

Another area closely scrutinized is our application of exemption (b)(5). Requests for documents, working papers and emails concerning decisions or opinions are usually originate within the Office of General Counsel (OGC). The vast majority of documents created by OGC are for the most part inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency. The documents may contain information which disclosure "would reveal the attorneys' thought processes and litigation strategy and would reveal the agency's deliberations prior to the decision or opinion". Every effort is made to reduce redactions and make partial releases of information while protecting the privileges of this exemption. The application of (b)(5) was applied in 15% of releases in fiscal year 2009 while 24% of releases in fiscal year 2008 applied this exemption.

The NIGC has received three appeals in each of fiscal years 2009 and 2008. In fiscal year 2009, two appeals were remanded for additional release and one appeal was upheld. In fiscal year 2008, two appeals were remanded for additional release and one appeal was withdrawn. Appeal were reviewed and responded to within the 20 day period per 25 C.F.R. § 517.8.

Though NIGC receives a low volume of requests, we strive to release as much information as possible. The FOIA Officer attends all training supplied through the Department of Justice, Office of Information Policy in order to keep up with current policy. President Obama's FOIA Memorandum of January 21, 2009 and Attorney General Holder's FOIA Memorandum of March 19, 2009 are available in electronic format for agency personnel on our internal shared drive.

2. Disclosure Comparisons

We have a slight increase in the number of requests released in full and releases in part for fiscal year 2009. Of the 67 requests received during fiscal year 2009, 14 requests or 20% were granted in full. This is a 1% increase over fiscal year 2008, wherein of the 107 requests received in 2008, 23 requests or 21% were granted in full. Of the requests where partial releases were made, 28 or 41% were released in part in fiscal year 2009 and 42 or 39% were released in part in fiscal year 2008. This is an increase of 2%.

II. Steps Taken to Ensure that Your Agency has an Effective System for Responding to Requests

The NIGC has one employee to handle all FOIA requests for the agency. This FOIA Officer is responsible for working with agency personnel in order to facilitate an effective system for responding to requests. When the FOIA Officer

receives a new request, a tracking number is assigned to it and the pertinent information is entered into an Excel spreadsheet. Request letter is then scanned and saved in an electronic format. An email search request is sent to all offices where records could be located. These search requests are to be returned within 14 days. Attention is being focused to working with agency personnel to complete search requests within the 14 day time period or sooner and provide assistance in locating and copying responsive documents. Once search requests are returned a quick review of responsive documents is performed to determine how long the processing will take. If processing will exceed the 20 business day time period from the date the letter was received, as required by the FOIA, an acknowledgement letter is sent to the requester explaining what needs to be done to complete processing of the request along with an estimate of the additional time needed. The requester may modify his request at this time to shorten the processing time.

The NIGC has implemented a multi-tracking system when processing FOIA requests pursuant to 5 U.S.C. § (a)(6)(D) and 25 C.F.R. § 517.6 (b). Requests within each track are processed on a “first-in, first-out” basis. Track 1 is for those requests that seek and receive expedited processing. Track 2 is for those requests that do not require lengthy consultations with other entities or for requests that do not involve voluminous records. Track 3 is for those requests that involve voluminous records or records requiring lengthy or numerous consultations, to include records that include confidential commercial information (See 25 C.F.R. § 517.5 for more information.) Documents are reviewed line-by-line using paper copies of documents. Material that is exempted from release under FOIA is manually redacted using white out tape, then, copied for a redacted release to requester. NIGC has recently begun scanning these redacted documents in to an electronic format for easy retrieval in any future requests and possible posting on the NIGC Reading Room webpage. We have also completed the scanning into electronic format all FOIA releases for the years 2007 and 2008 for ease of future retrieval. The Information Technology office supports our mission of openness to ensure that documents are posted on our website as requested and to create or update web pages as needed.

Due to the mission of our agency, the majority of documents contain financial and proprietary information. Submitter notices are required under both the FOIA and NIGC regulations for information deemed commercial or confidential business information. Prior to sending out submitter notices, documents are reviewed for information that qualifies for withholding, information is highlighted and copies are sent to the submitters explaining why the information was withheld. If the submitters believe more information needs to be withheld, or the documents need to be withheld in full, they are required to provide written justification within 10 days. Extensions on the timeframe are generally granted when requested. Submitter response letters are reviewed to see if any additional information has been requested to be withheld and whether that information qualifies for withholding under any FOIA exemption. This is an area

we are working on to speed the completion of the submitter notice requirement. We are working telephonically with submitters to discuss questionable withholdings to reduce the additional time needed for review. A final determination letter is sent to the submitters letting them know the final agency action and allowing them an opportunity to seek judicial relief prior to the NIGC release of any documents. Once the submitter notices are completed, a final release to the requester is made. While we acknowledge there is always room for improvement and will implement changes as identified, the current system the FOIA Officer has in place for handling and responding to requests is adequate for the low volume of requests received.

III. Steps Taken To Increase Proactive Disclosures

The NIGC has responded to the need and demand of posting agency documents onto our website. We currently have the following material available for viewing and downloading via www.nigc.gov :

- *All compacts that gaming tribes have in place with their states.
- *All Bulletins issued by the NIGC
- *All enforcement actions issued by the NIGC for violations relating to the Indian Gaming Regulatory Act (IGRA) and its implementing regulations.
- *All Commission final agency decisions.
- *All advisory opinions issued by the NIGC's Office of General Counsel on whether certain games fall within the IGRA definition of Class II or Class III games.
- *All current tribal gaming ordinances that must be approved by the NIGC Chairman before opening a gaming operation as required by the IGRA.
- *All Indian lands advisory opinions issued by the NIGC and the Department of the Interior on whether a tribe may game on certain lands.
- *A list of all gaming tribes and their gaming facility locations.
- *Redacted versions of the management contracts approved by the NIGC Chairman that are in force between any gaming Indian tribe and its management contractor.

Over the past year, we have proactively posted two additional types of highly requested material: Sole Proprietary Interest letters and Management Review letters. These letters are issued by the NIGC's Office of General Counsel in response to tribes requesting NIGC review of contracts and agreements on whether they constitute management or violate the sole proprietary interest of the tribe.

The NIGC also posts numerous documents and information related to the agency itself, such as organizational charts, Commission structure, Laws & Regulations, to name a few.

IV. Steps Taken to Greater Utilize Technology

1. Does your agency currently receive requests electronically.

Requests have been received electronically by sending requests through the ContactUs@nigc.gov email address located on the NIGC website or emailing the FOIA Officer directly.

2. If not, what are the current impediments to your agency establishing a mechanism to receive requests electronically.

The current procedures in place are adequate for the low volume of requests received.

3. Does your agency track requests electronically.

No. All requests are manually entered into an Excel spreadsheet, which captures all necessary information concerning request needed for annual reporting, and also provides a place for description of documents requested and notes detailing action taken and the status of case. Information can be retrieved using a request number, requester name, or the subject of request.

4. If not, what are the current impediments to your agency utilizing a system to track requests electronically.

The current procedures in place are adequate for the low volume of requests received. Funding is an issue as the NIGC is solely funded through fees collected from gaming operations under its jurisdiction.

5. Does your agency use technology to process requests.

No. Documents are reviewed line-by-line using paper copies of documents. Material that is exempted from release under FOIA is manually redacted using white out tape, and then copied for a redacted release to requester. NIGC has recently begun scanning these redacted documents in to a database for use in any future requests and possible posting on the NIGC Reading Room webpage.

6. If not, what are the current impediments to your agency utilizing technology to process requests.

The current procedures in place are adequate for the low volume of requests received. Funding is an issue as the NIGC is solely funded through fees collected from gaming operations under its jurisdiction.

7. Does your agency utilize technology to prepare your agency Annual FOIA Report.

No. The FOIA Officer manually prepares the report.

8. If not, what are the current impediments to your agency utilizing technology in preparing your agency Annual FOIA Report.

The current procedures in place are adequate for the low volume of requests received. Funding is an issue as the NIGC is solely funded through fees collected from gaming operations under its jurisdiction.

V. Steps Taken to Reduce Backlogs and Improve Timeliness in Responding to Requests

1. Backlog Status

The backlog of pending FOIA requests did not decrease for the fiscal year 2009, it increased by one request. Fiscal year 2008 showed one backlogged request and fiscal year 2009 showed two backlogged requests. We have no backlog of appeals for either fiscal year 2008 or 2009.

The NIGC has implemented a multi-tracking system when processing FOIA requests pursuant to 5 U.S.C. § (a)(6)(D) and 25 C.F.R. § 517.6 (b). Requests within each track are processed on a “first-in, first-out” basis. Track 1 is for those requests that seek and receive expedited processing. Track 2 is for those requests that do not require lengthy consultations with other entities or for requests that do not involve voluminous records. Track 3 is for those requests that involve voluminous records or records requiring lengthy or numerous consultations, to include records that include confidential commercial information (See 25 C.F.R. § 517.5 for more information.).

Of the two pending requests backlogged for fiscal year 2009, one request was received May 19, 2009, and the second request was received August 18, 2009. Both of the pending requests were Track 3 requests involving lengthy consultations. The May 19, 2009 request was closed December 16, 2009. In

2008, the one pending request backlogged was received August 11, 2008 and was a Track 3 request involving a voluminous amount of documents. This request was closed November 4, 2008.

2. Backlog Reduction Steps

The backlogged pending requests of 2008 and 2009 were Track 3 requests involving lengthy consultations and a voluminous amount of documents. We are working toward handling the consultations in a shorter period by telephonically working with submitters on final determination of material. Requesters are being consulted when a large volume of responsive documents have been identified to determine if all documents need to be processed or if they are willing to negotiate what they are requesting. In view of the low volume of requests, current procedures are adequate.

3. Steps to Improve Timeliness

As stated in a Part V.2 cases are handled in the order that they are received, according to tracks. For the small volume of requests received each year this system is adequate to process requests in a timely method. Appeals are routinely handled within the 20 day period per 25 C.F.R. § 517.8. Once an appeal is received, the FOIA Officer gathers the responsive case folder and advises the Office of General Counsel of appeal. The attorney assigned to the appeal is given the responsive material for handling. This system is adequate to process appeals within the timeframe allowed.