

Content of 2017 Chief FOIA Officer Reports (Low-Volume Agencies)

Name and Title of your Agency's Chief FOIA Officer: Michael Hoenig, General Counsel

Please provide a short narrative (at least 500 words) for how your agency implemented the President's **FOIA Memorandum** and the DOJ's **2009 FOIA Guidelines** during the reporting period. Your narrative may include any steps taken to: apply the presumption of openness, ensure that your agency has an effective system in place for responding to requests, increase proactive disclosures, greater utilize technology, and improve timeliness in responding to requests and reducing any backlogs. Please include in this narrative a description of your efforts to ensure that the FOIA is administered in a "spirit of cooperation," highlighting, for example, steps taken to ensure that there is good communication and good customer service when working with requesters.

Narrative:

Since the President's FOIA Memorandum and the Department of Justice's 2009 FOIA Guidelines were issued, the National Indian Gaming Commission (Commission) has worked vigorously to implement all of their requirements. As part of that process, the Commission took several steps to better utilize emerging technology in the FOIA process and to establish an improved system for receiving and responding to requests. In addition, it established procedures to (1) increase proactive disclosures and (2) improve the quality of records reviews and the timeliness of agency responses. Significantly, the Commission expanded the number of full-time employees dedicated to reviewing and responding to requests and incorporated legal oversight into the FOIA process to ensure compliance with the Act's requirements. During Fiscal Year 2016, the Commission's FOIA Office continued to carry out all aspects of the aforementioned documents, while also beginning implementation of the newly enacted FOIA Improvements Act of 2016 and welcoming new staff into the FOIA process to manage the Commission's FOIA priorities. The sections below describe not only how the Commission complies with the President's FOIA Memorandum and DOJ Guidelines, but also demonstrate how the Commission administers the FOIA to best serve the regulated community and public at large.

The Presumption of Openness

The Commission's FOIA Office goes to great efforts to implement the presumption of openness. In many instances, the information that individuals seek from the Commission pursuant to the FOIA includes commercial and financial information submitted by third parties. For that information, the Commission has no discretion with which to release the information. *See* 25 U.S.C. § 2716(a). However, with regard to all other requested records, the Commission's FOIA attorney reviews all information subject to release and makes a determination as to whether disclosure of any of the information is prohibited by law. Then, as the presumption of openness requires, the attorney considers the purposes of any potential exemption's use. A

determination is made as to whether release of the information would potentially harm an interest protected by the exemption or if its application would merely (1) protect against embarrassment, (2) obscure errors or failures, or (3) protect the personal interests of public officials. Following the FOIA attorney's review of the information, controversial applications of exemptions are discussed with other attorneys within the Commission's Office of General Counsel. In this way, various perspectives on the information subject to withholding are considered. If, following these discussions, doubt remains as to whether the exemption should apply, a determination is made that the presumption has not been met and the information is not withheld. It should also be noted that the Commission's FOIA professionals and Office of General Counsel attorneys are encouraged and regularly attend substantive FOIA training provided by the Department of Justice. This ensures that the Commission's legal representatives and FOIA staff are updated on new and relevant case law and recognize the limits of each exemption's applicability.

Effective Systems for Responding to Requests

The Commission has an effective system in place for responding to requests. Aside from changes brought about by the FOIA Improvements Act of 2016 (which are currently being implemented through regulatory updates), the Commission has designated FOIA personnel to receive requests, interact with requesters, gather responsive records, and process those records for release. The NIGC FOIA Office is located at the Commission's headquarters office and is reachable in person, by telephone, e-mail, and facsimile. Requests received by field offices are immediately forwarded to the headquarters office for processing. Individuals who submit requests are contacted by Commission FOIA personnel to confirm aspects of their request, clarify search parameters, and to assign fee categories. Any questions directed at the Commission are answered either by the established FOIA contacts or by the Commission's FOIA Public Liaison. It is also the Commission's practice to regularly communicate with requesters during the search and review process. If particular search terms return voluminous responsive records or records identified are subject to complex reviews, FOIA staff work with requesters to refine the scope of their request and to identify ways to provide the requesters with the information they need in the shortest amount of time.

After records are located and compiled by FOIA personnel, they are converted to adobe acrobat files where they can efficiently be reviewed for exemptions. Once an initial review is completed, all records are forwarded to the Commission's FOIA attorney. At this point, any records which are subject to third party review, whether by submitters or other federal government agencies, are forwarded to the appropriate party. If no other parties have equity in the record, a final decision is made and a response is forwarded to the requester. For those records that are forwarded to third parties, when a response is received, those objections and recommendations on withholdings are independently evaluated by the Commission's attorney before those records are released.

In addition to maintaining good communication with requesters and incorporating attorneys into the review process, the Commission also utilizes a multi-track system for reviewing requests. In this way, the agency prioritizes requests based on their volume and complexity. While all requests are processed on a first in, first out basis, the Commission strives

to keep its response times as low as possible. By quickly assigning each request to a track, difficult requests do not unnecessarily interfere with closing simpler requests.

Increasing Proactive Disclosures

The Commission proactively posts several kinds of agency records to its website when possible. It not only discloses final versions of agency opinions and decisions to its website, but also keeps matters that may be of interest to requesters updated in its reading room. Even though the Indian Gaming Regulatory Act reinforces that certain information must be kept confidential pursuant to the FOIA (25 U.S.C. § 2716(a)), the Commission discloses as much as it can to the public. Aside from final agency decisions, the Commission places final versions of opinions generated by its General Counsel, as well as transcripts and comments generated from the Commission's consultation meetings with tribes on its website. *See* <https://www.nigc.gov/commission/tribal-consultation-2015>. Proactively disclosed General Counsel opinions include game classification opinions, declination letters, as well as Indian lands opinions. *See* <https://www.nigc.gov/general-counsel/management-review-letters>; <https://www.nigc.gov/general-counsel/game-classification-opinions>; <https://www.nigc.gov/general-counsel/indian-lands-opinions>. Furthermore, the Commission posts gaming ordinances and management contracts after they have been approved by the NIGC Chair. Accordingly, most, if not all, of the agency's important records are placed online for easy access by the requester community.

Finally, the NIGC Public Affairs Office uses Twitter and Facebook to highlight important decisions and actions taken by the agency. While such postings do not always correspond with a pro-active disclosure, in many cases they do. For example, the Commission recently announced that it had reached a settlement agreement with a Tribe that was the subject of an enforcement action. While the release did not link to the actual settlement agreement, it was already available on the website. *See* <http://www.nigc.gov/commission/enforcement-actions>.

Technology

The NIGC recently upgraded its website in an effort to enhance the visual appeal and usefulness of its site to the regulated community. The new site has increased search capabilities and makes it easier for the public to locate relevant documents. To further assist website visitors, all documents that are published on the website recognize text and are searchable in their entirety. The Commission is also working to use its website as a tool to assist requesters. It is working internally to develop a page dedicated solely for the receipt of FOIA requests and to assist requesters with questions they may have regarding request submission.

Timeliness and Reduction of Backlogs

The Commission is committed to providing its FOIA Office with the resources necessary to respond to requests quickly and efficiently and to ensure that backlogs are kept to a minimum. During the fiscal year, the Commission had attrition within its FOIA Office resulting in a slowdown in its FOIA processing. In order to combat this, the Commission transferred new personnel to assist not only in the routine processing of FOIA requests, but also to the managing of its FOIA responsibilities. Commission employees have been re-

assigned to assist with the search and review portions of FOIA processing in order to more quickly process incoming requests. In addition, the Commission assigned a new FOIA Public Liaison to manage the actions of the FOIA Office and to increase the FOIA Office's overall efficiency. Finally, the Commission is also preparing to hire a full-time employee to assist with all aspects of FOIA processing.

“Spirit of Cooperation”

In the spirit of cooperation, the NIGC continues to ensure that there is good communication and good customer service when working with requesters. As previously mentioned in this report, the NIGC FOIA Office communicates with requesters throughout the processing of their request. FOIA personnel assist requesters with perfecting their requests, clarifying the types of records being sought, and refining the scope of requests to ensure that requests are only as broad as necessary to serve the requester's needs. This communication continues during the review phase of processing requests as well. As records undergo review, requesters are consulted regarding the potential application of exemptions so that they have the option of narrowing their request to obtain only releasable records and thereby avoiding the delays associated with submitter notices or complex legal reviews. This ultimately saves the requester money in terms of fees and allows them the option of receiving records more quickly. Finally, the agency also utilizes the services of the FOIA Public Liaison to work with requesters to prevent and resolve disputes. This ensures that communications between the Commission and requesters run smoothly and that issues with the processing of a FOIA request are resolved prior to appeal or litigation.

Conclusion

As can be seen from the above, the Commission takes seriously its obligations to administer the FOIA. It is committed to transparency and providing information to requesters proactively. When requests are submitted, it strives to keep channels of communication open and to respond to requester needs. By doing so, the Commission not only builds relationships with the public and regulated community, but also increases its efficiency in processing requests. In Fiscal Year 2016, the Commission updated its website and FOIA Office to be more responsive to requesters and to more easily process requests. In the same vein, it maintained its commitment to the presumption of openness as established by the 2009 Presidential Memorandum and Department of Justice Guidelines.