



National Indian Gaming Commission
Chief FOIA Officer Report
March 2011

I. Steps Taken to Apply the Presumption of Openness

1. Description

The National Indian Gaming Commission (NIGC) is a small federal agency of approximately 113 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 notices 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, which is exempt under FOIA exemption (b)(4). The Indian Gaming Regulatory Act mandates that all information coming within the purview of FOIA exemptions (b)(4) and (b)(7) must be kept confidential, with the only exception being that when such information indicates a violation of Federal, State, or Tribal law, it is provided to the appropriate law enforcement officials. 25 U.S.C. § 2716. Thus, when processing this type of information every effort has been made to release nonexempt material after consulting with submitter of material. Likewise, when requests for gaming-

related contracts, such as a development, lease, or consulting agreement, which by their nature contain trade secrets and commercial or financial information, are received, a review is made of similar documents previously processed and released to look for standard language commonly used, to ensure that this information is not withheld in current release.

Moreover, documents are routinely processed in part whenever they cannot be released in full. The FOIA office received 70 requests during Fiscal Year 2010 and 67 requests in Fiscal Year 2009. The application of (b)(4) was applied in 27% of releases in Fiscal Year 2010 as opposed to 34% of releases in Fiscal Year 2009.

Another area closely scrutinized is our application of exemption (b)(5). Requests for documents, working papers, and emails concerning agency decisions or legal advice or opinions 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 – meaning that the majority of the documents would be privileged in the civil litigation discovery context. Every effort is made to reduce redactions of information under exemption (b)(5). The application of (b)(5) was applied in 8% of releases in Fiscal Year 2010 while 15% of releases in Fiscal Year 2009 applied this exemption.

The NIGC received two FOIA appeals in Fiscal Year 2010 and three appeals in Fiscal Year 2009. In Fiscal Year 2010, both appeals were upheld. In Fiscal Year 2009, two appeals were remanded for additional release and one appeal was upheld. Appeals were reviewed and responded to within the 20 day period in accordance with NIGC FOIA regulations, 25 C.F.R. § 517.8.

Though NIGC receives a low volume of requests, we strive to release as much information as possible. Concerning requests for high profile material, in addition to the FOIA Officer's review, the program office responsible for the records will review the proposed release and application of exemptions to determine whether discretionary release of additional material is possible. At this time, we do not track the number of cases where discretionary releases were made, and therefore, cannot provide statistics as to the amount or extent of discretionary releases. However, we will be tracking discretionary releases for Fiscal Year 2011.

Finally, the FOIA Officer attends all training supplied through the Department of Justice, Office of Information Policy in order to keep up with current policy and guidelines. 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 access by all agency personnel on our internal shared drive.

As of this time, the agency has not created any new internal guidance to address the presumption of openness. Nonetheless, to ensure that the presumption of openness is being applied, regular meetings are attended by agency personnel to discuss ways to improve openness and transparency as well as to discuss potential new postings of documents to our website not otherwise available except through FOIA requests. Moreover, the agency enhanced the search capability of all PDF documents on its website as well as improved the website's indexing and search functions. Thus, the agency is addressing access to information and transparency.

2. Disclosure Comparison

There is a 6% increase in the number of requests released in full for Fiscal Year 2010. Of the 72 requests processed during Fiscal Year 2010, 19 requests or 26% were granted in full. Of the 67 requests processed during Fiscal Year 2009, 14 requests or 20% were granted in full. Of the requests where partial releases were made, 23 requests or 31% were released in part in Fiscal Year 2010 and 28 or 41% were released in part in Fiscal Year 2009. This is a decrease of 10%.

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 electronic spreadsheet. The request letter is then scanned and saved in an electronic format. An email search request is sent to all offices where records could reasonably be located. Attention is focused on working with agency personnel to complete search requests within the requested 14 day time period or sooner and providing assistance in locating and copying responsive documents. Once search requests are returned with responsive documents, a quick review of the responsive documents is performed to determine how long 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. § 552(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.*) 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. Release of redacted documents are scanned and saved in an electronic format for easy retrieval in any future requests and possible posting on the NIGC webpage.

Due to the mission of our agency, the majority of documents contain confidential financial and proprietary information. Submitter notices are required under both the FOIA and NIGC regulations for information deemed commercial or financial information that is confidential or privileged. 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 is categorized as 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. However, the FOIA Officer continues to work on accelerating the time period needed to complete the submitter notice requirement. To that end, the FOIA Officer works telephonically with submitters to discuss questionable suggested 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 that 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. The FOIA Office is currently comprised of one individual, which has been assessed as adequate because the backlog of requests has remained under 4% in the last few years.

The Information Technology (IT) 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. IT also provides assistance for searching for responsive documents within our email system and other tasked as needed. Thus, the IT department provides sufficient support to the FOIA Office.

Finally, the FOIA officer, IT personnel, and Open Government personnel take part in regular meetings to discuss ways to improve openness and transparency within the agency.

III. Steps Taken To Increase Proactive Disclosures.

The NIGC has responded to the need and demand of posting agency documents onto our website. The FOIA Office continues to update this material on the agency's website as it is issued. As a consequence, the FOIA Office is adding new material to the agency's website on a frequent basis upon each new document's issuance. We currently have the following material available for viewing and downloading via www.nigc.gov, which as noted above is continually being updated:

- *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 legal 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 were approved by the NIGC Chair;
- *All Indian lands advisory legal opinions issued by the NIGC Office of General Counsel and the Department of the Interior's Solicitor's Office 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 Chair;
- *Redacted versions of the declination letters or other letters issued by the NIGC Office of General Counsel in response to tribes or others' requests for review of contracts and agreements for a legal opinion regarding whether the contracts constitute a management contract or violate the sole proprietary interest of the tribe in its gaming activity.

The agency also posts numerous documents and information related to the agency itself, such as organizational charts, Commission structure, laws and regulations, Commission testimony, and press releases, to name a few. As noted above, over the past fiscal year, we continued to keep the above information current by posting new documents when each document was issued.

In addition, as of this fiscal year, we took the proactive step of posting a new category of material on our website that consists of all letters and comments received from tribes and others in response to tribal consultations regarding potential regulatory priorities. These materials would not otherwise be available except through FOIA requests. Also, as of this fiscal year, the agency's records retention and disposition schedule is available on our website.

In an effort to routinely identify records that are appropriate for posting on the agency's website, regular meetings are convened and attended by various agency personnel to identify records that are appropriate for posting to our website that would not otherwise be available except through FOIA requests.

Finally, this fiscal year, the agency took steps to enhance the search capability of all PDF documents on its website as well as improve the website's indexing and search functions. To proactively increase disclosure of information, we routinely review FOIA requests received to ensure that the types of documents being requested are available on our website. Thus, the agency has improved ways to retrieve information from the website and added new documents to the website.

At this time, the NIGC does not utilize social media in disseminating information.

IV. Steps Taken to Greater Utilize Technology.

1.) Electronic receipt of FOIA requests:

a. What proportion of the components within your agency which receive FOIA requests have the capability to receive such requests electronically?

The NIGC, as a small agency, has only one FOIA office which handles all agency requests and has a staff of one employee. Nonetheless, when requests for information are conveyed to different divisions of the agency by e-mail, those components are advised to forward such requests to the FOIA Office to be processed as FOIA requests.

b. To what extent have you increased the number of components doing so since the filing of your last Chief FOIA Officer Report?

There is no increase to the number of components since the filing of last year's report. The NIGC has only one office to handle all FOIA requests.

c. What methods does your agency use to receive requests electronically?

The NIGC's sole FOIA office receives request electronically through the info@nigc.gov email address located on the NIGC website or by emailing the FOIA Officer directly. And, as mentioned above, when requests for information are conveyed to different divisions of the agency by e-mail, those components are advised to forward such requests to the FOIA Office to be processed as FOIA requests.

2.) Electronic tracking of FOIA request:

a. What proportion of components within your agency which receive FOIA requests have the capability to track such requests electronically?

All.

b. To what extent have you increased the number of components doing so since the filing of your last Chief FOIA Officer Report?

There is no increase to the number of components since the filing of last year's report. The NIGC has only one office to handle all FOIA requests.

c. What methods does your agency use to track requests electronically?

The NIGC tracks requests though an generic data-processing system .

3.) Electronic processing of FOIA requests:

a. What proportion of components within your agency which receive FOIA requests have the capability to process such requests electronically?

The NIGC's FOIA office does not process requests electronically.

b. To what extent have you increased the number of components doing so since the filing of your last Chief FOIA Officer Report?

There is no increase to the number of components since the filing of last year's report.

c. What methods does your agency use to process requests electronically?

The NIGC FOIA office does not process requests electronically. 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. The FOIA Officer scans these redacted documents in to a database for use in any future requests and possible posting on the NIGC webpage.

4.) Electronic preparation of your Annual FOIA Report:

a. What type of technology does your agency use to prepare your agency Annual FOIA Report, i.e., specify whether the technology is FOIA specific or a generic data-processing system.

The FOIA Officer manually prepares the report. The FOIA Officer manually retrieves the information for calculation and input into the report from the generic data-processing system used to track requests.

b. If you are not satisfied with your existing system to prepare your Annual FOIA Report, describe the steps you have taken to increase your use of technology for next year.

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

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

The agency makes every effort to respond to requests in a timely manner. We are working to shorten the submitter process by telephonically working with submitters on final determination of non-exempt material. Requesters are being consulted when a large volume of responsive documents has been identified to determine if all documents need to be processed or if they are willing to limit the request to specific material.

This year, the agency's backlog of pending FOIA requests increased by two requests. In Fiscal Year 2009 there were two backlogged requests and in Fiscal Year 2010 there were four backlogged requests. We have no backlog of appeals for either Fiscal Year 2009 or 2010. All pending requests from Fiscal Year 2009 were closed during Fiscal Year 2010.

The increase in the backlog of pending requests is the result of the complexity of total requests received and the submitter process for determining the exempt commercial and financial information that is confidential or privileged. At times, the process of submitting documents to the tribe or other gaming related company for their review and input on exemption (b)(4) information can be lengthy. The increase of three incoming requests for Fiscal Year 2010 over Fiscal Year 2009 is negligible and not an issue to the backlog increase. This backlog increase was not a result of loss of staff or any other cause; rather, it is due to the complexity of the requests.

As stated in a Part II.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 manner. Appeals are

routinely handled within the 20 day period in accordance with NIGC regulations, 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 the 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.

As of this time, the agency has not increased its FOIA staff. The FOIA Officer routinely reviews the FOIA tracking log to ensure cases within each track are progressing in accordance with the goal of handling each in a timely manner. The Chief FOIA Officer is advised of all new FOIA requests. Periodic updates of current backlog are provided to the Chief FOIA Officer for review and discussion concerning processing requests.

In regard to IT improvements to assist with FOIA processing and timeliness, as mentioned above, the agency enhanced the search capability of all PDF documents on its website and improved the website's indexing and search functions. IT also provides assistance for searching for responsive documents within our email system. Otherwise, no IT improvements have been identified that would increase the timeliness of responses.

Spotlight on Success

The FOIA Officer continues to emphasize dialogue with requesters to improve timely disclosures. For example, one FOIA request originally sought information that resulted in a voluminous amount of responsive documents. After locating responsive documents and doing quick review of them, the FOIA Officer reached out to the requester to discuss the material and processing time. Because of the dialogue between the FOIA Officer and the requester, the requester streamlined her request, which resulted in a significantly reduced number of responsive documents. This request was processed and redacted copies of documents were released in a short amount of time.