



STATE OF INDIANA

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July 3, 2013

John S. Keeler
Centaur Gaming
10 West Market Street, Suite 200
Indianapolis, IN 46204

Re: Informal Inquiry 13-INF-30; Senate Enrolled Act 609

Dear Mr. Keeler:

You have submitted an inquiry regarding the application of the Open Door Law (“ODL”), Ind. Code. § 5-14-1.5 *et seq.* to certain provisions of Senate Enrolled Act 609 (“SEA 609”). Pursuant to I. C. § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on the applicable provisions of the Open Door Law (“ODL”) I.C. § 5-14-1.5 *et seq.*

BACKGROUND

In your informal inquiry you provide that Section 13, 15, 16, and 17 of SEA 609 create a statutory scheme wherein a negotiation committee (“Committee”) is created to determine the percentage of adjusted gross revenues (“AGR”) that are distributed for sundry purposes in support of horse racing as directed by the provisions of I.C. § 4-35-7-12. The Committee is comprised of members representing each horseman’s association (“Association”) that have a contract with a racetrack licensed under I.C. 4-31 and a representative of each Permit Holder. SEA 609 provides mechanisms to eliminate deadlocks in the event that there are an equal number of Associations and Permit Holders, establishes the requirements for a distribution agreement (“Agreement”) and the approval of the Agreement by the Indiana Horse Racing Commission (“Commission”), The provisions further set forth the factors the Commission should consider when approving the Agreement or determining the applicable percentage of AGR, in the event the representatives of Association and Permit Holders fail to reach an agreement. Section 13 of SEA 609 requires the State Board of Accounts (“SBOA”) to annually audit the accounts, books, and records of the Commission, Association, and Permit Holders that are related to the funds distributed.

You provide that you followed SEA 609 as it made its way through the legislative process and the topic of compliance with the ODL was never discussed. The purpose of the Committee is only to arrive at an Agreement that is to be presented to and approved

by the Commission, presumably at a Commission meeting that complies with the ODL. The function of the Agreement is to specify the percentage of a Permit Holder's AGR that will be distributed according to the formula set forth in I.C. § 4-35-7-12. The Committee has not further responsibilities following the approval of the Agreement by the Commission. No public monies flow through the Committee or are controlled by the Committee. The Committee does not exercise any executive, administrative, or legislative power of the state or any political subdivisions thereof. SEA 609 establishes the makeup of the Committee, but does not provide for the election of officers, imposed record keeping requirements, authorize budget reviews, establish an advisory role, or confer any of the characteristics or indicia of a "public agency" as defined under I.C. § 5-14-1.5-2.

ANALYSIS

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* I.C. § 5-14-1.5-3(a).

As applicable to your inquiry, the Indiana Code provides the following:

IC 4-35-7-16 **Negotiation of distribution agreement**

Sec. 16. (a) The amount of slot machine revenue that must be distributed under section 12(b)(2) of this chapter must be determined in a distribution agreement entered into by negotiation committees representing all licensees and the horsemen's associations having contracts with licensees that have been approved by the Indiana horse racing commission.

(b) Each horsemen's association shall appoint a representative to a negotiation committee to negotiate the distribution agreement required by subsection (a). If there are an even number of horsemen's associations appointing representatives to the committee, the members appointed by each horsemen's association shall jointly appoint an at-large member of the negotiation committee to represent the interests of all of the horsemen's associations. The at-large member is entitled to the same rights and privileges of the members appointed by the horsemen's associations.

(c) Each licensee shall appoint a representative to a negotiation committee to negotiate the distribution agreement required by subsection (a). If there are an even number of licensees, the members appointed by each licensee shall jointly appoint an at-large member of the negotiation committee to represent the interests of all of the licensees. The at-large member is entitled to the same rights and privileges of the members appointed by the licensees.

(d) If a majority of the members of each negotiation committee are present, the negotiation committees may negotiate and enter into a distribution agreement binding all horsemen's associations and all licensees as required by subsection (a).

(e) The initial distribution agreement entered into by the negotiation committees:

(1) must be in writing;

(2) must be submitted to the Indiana horse racing commission before October 1, 2013;

(3) must be approved by the Indiana horse racing commission before January 1, 2014; and

(4) may contain any terms determined to be necessary and appropriate by the negotiation committees, subject to subsection (f) and section 12 of this chapter.

(f) A distribution agreement must provide that at least ten percent (10%) and not more than twelve percent (12%) of a licensee's adjusted gross receipts must be distributed under section 12(b)(2) of this chapter. A distribution agreement applies to adjusted gross receipts received by the licensee after December 31 of the calendar year in which the distribution agreement is approved by the Indiana horse racing commission.

(g) A distribution agreement may expire on December 31 of a particular calendar year if a subsequent distribution agreement will take effect on January 1 of the following calendar year. A subsequent distribution agreement:

(1) is subject to the approval of the Indiana horse racing commission; and

(2) must be submitted to the Indiana horse racing commission before October 1 of the calendar year preceding the calendar year in which the distribution agreement will take effect.

(h) The Indiana horse racing commission shall annually report to the budget committee on the effect of each distribution agreement on the Indiana horse racing industry before January 1 of the following calendar year.

IC 4-35-7-17

Approval of distribution agreement; commission determined distribution amount in absence of a distribution agreement

Sec. 17. (a) Subject to subsection (b), if:

(1) a distribution agreement is not submitted to the Indiana horse racing commission before the deadlines imposed by section 16 of this chapter; or

(2) the Indiana horse racing commission is unable to approve a distribution agreement; the Indiana horse racing commission shall determine the percentage of a licensee's adjusted gross receipts that must be distributed under section 12(b)(2) of this chapter.

(b) The Indiana horse racing commission shall give the negotiation committees an opportunity to correct any deficiencies in a proposed distribution agreement before making a determination of the applicable percentage under subsection (a).

(c) The Indiana horse racing commission shall consider the factors used to evaluate a distribution agreement under section 18 of this chapter when making a determination under subsection (a).

IC 4-35-7-18

Criteria for evaluating distribution agreement or for establishing a distribution amount

Sec. 18. The Indiana horse racing commission shall evaluate any proposed distribution agreement submitted under section 16 of this chapter using the following criteria:

- (1) The best interests of pari-mutuel horse racing in Indiana.
- (2) Maintenance of the highest standards and greatest level of integrity.
- (3) Fairness to all parties.
- (4) The financial stability of licensees.
- (5) Any other factor considered relevant by the Indiana horse racing commission.

The statutes provide that that the Committees' sole function is to submit a proposed Agreement to the Commission. The Committee is not comprised of public employees or public officials; rather representation is comprised of representatives from the Associations and Permit Holders. The Code does not provide that the Committee is a division or department of the Commission. The Commission, not the Committee, is provided with the statutory authority to approve the Agreement. Although the Commission is required to evaluate the proposed Agreement submitted by the Committee, minus the Commission's approval, the Agreement has no legal effect. While the funds disbursed pursuant to the statute are audited by the SBOA, the Committee itself is not subject to audit. You note that the Commission's approval of the submitted proposal would likely occur during a meeting of the Commission that is open to the public under the ODL.

Pursuant to the ODL, a "public agency" means any of the following:

- (1) Any board, commission, department, agency, authority, or other entity, by whatever name designated, exercising a portion of the executive, administrative, or legislative power of the state.
- (2) Any county, township, school corporation, city, town, political subdivision, or other entity, by whatever name designated, exercising in a limited geographical area the executive, administrative, or legislative power of the state or a delegated local governmental power.
- (3) Any entity which is subject to either:

- (A) budget review by either the department of local government finance or the governing body of a county, city, town, township, or school corporation; or
 - (B) audit by the state board of accounts that is required by statute, rule, or regulation.
- (4) Any building corporation of a political subdivision of the state of Indiana that issues bonds for the purpose of constructing public facilities.
 - (5) Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medicals staffs or the committees of any such staff.
 - (6) The Indiana Gaming Commission established by I.C. 4-33, including any department, division, or office of the commission.
 - (7) The Indiana Horse Racing Commission established by I.C. 4-31, including any department, division, or office of the commission.

As applicable here, I do not believe that the Committee would qualify as a “public agency” pursuant to (a)(1), as it will not be exercising any portion of the executive, administrative, or legislative power of the state. The Committee will be submitting a proposed Agreement to the Commission, which the Commission must approve. The Commission will be exercising authority of the state in adopting the Agreement. Minus Commission approval, the proposed Agreement submitted by the Committee is not valid. If the Commission does not approve the proposed Agreement, the Commission shall determine the percentage of AGR to be distributed under section 12(b)(2). Based on these factors, it is my opinion that the Committee is advising the Commission, and the Commission, not the Committee, will be exercising the state’s legal authority in approving the proposed Agreement that has been submitted by the Committee.

The statutes does not provide that the Committee will be exercising any local governmental authority, therefore it is my opinion that it would not qualify as a “public agency” pursuant to (a)(3). The Committee is not subject to audit by the SBOA or subject to budget review by either the Department of Local Government Finance of the governing body of a county, city, town, township, or school corporation. Therefore, it is my opinion that the Committee does qualify as a public agency pursuant to (a)(3). On its face, the Committee would not qualify as a “public agency pursuant to either (a)(4) or (a)(6). As to (a)(7), the statutes does not provide that the Committee is a department or division of the Commission; further the Committee is not comprised of members of the Commission, or its employees. Thus, it is my opinion that the Committee would not qualify as a “public agency” pursuant to (a)(7).

However, it is my opinion that the Committee qualifies as a “public agency” under the ODL pursuant to I.C. § 5-14-1.5-5(a)(5). The Committee is created by statute and is charged with submitting a proposed Agreement to the Commission regarding the distribution of AGR under section 12(b)(2). As noted *supra*, minus Commission

approval, the proposed Agreement has no legal effect. The Committee is advising the Commission as to how the AGR should be properly distributed; the collection and distribution of AGR is performed pursuant to state law. The Commission, prior to making a determination, is required to give the Committee an opportunity to correct any alleged deficiencies to the proposed Agreement that has been submitted. Although the Committee does not have final authority in approving the Agreement or will be exercising any executive, administrative, or legislative power of the state, the Committee is a statutorily active participant in the process and the Commission cannot simply ignore the Committee's proposals. In light of such factors and that the Committee is not considered to be a medical staff or the committee of a medical staff, it is my opinion that the Committee qualifies as a "public agency" pursuant to I.C. § 5-14-1.5-5(a)(5).

Under the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* I.C. § 5-14-1.5-3(a). A governing body is defined as:

- (b) "Governing body" means two (2) or more individuals who are:
 - (1) a public agency that:
 - (A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and
 - (B) takes official action on public business;
 - (2) the board, commission, council, or other body of a public agency which takes official action upon public business; or
 - (3) any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter. *See* I.C. § 5-14-1.5-2(b)

"Official action" means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). "Public business" means to any functions upon which the public agency is empowered or authorized to take official action. *See* I.C. 5-14-3-2(e). As I believe that the Committee is a public agency pursuant to I.C. § 5-14-1.5-5(a)(5), it is my opinion it qualifies as a "governing body" pursuant to I.C. § 5-14-1.5-2(b)(1), as it is a committee that will be taking official action on public business. Thus when a majority of the Committee convenes to taken official action on public business (e.g. the proposed Agreement), as a governing body of a public agency, it is my opinion that it must comply with the requirements of the ODL.

Please let me know if I may be of any further assistance.

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 distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor