

TESTIMONY OF NORA WINKELMAN, ESQUIRE
EXECUTIVE DEPUTY GENERAL COUNSEL
GOVERNOR'S OFFICE OF GENERAL COUNSEL

BEFORE THE

SENATE COMMITTEE ON COMMUNITY, ECONOMIC AND RECREATIONAL
DEVELOPMENT

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Good morning. My name is Nora Winkelman. I am an Executive Deputy General Counsel and I serve as the Governor's legislative counsel. Thank you for the opportunity to participate in today's discussion.

Because recent reports in the press – all of which have been written without input from anyone in the Administration - have mischaracterized and mis-interpreted certain events that the Office of General Counsel has been involved with regarding issues surrounding the background investigation process required by Act 71, I thought it would be important and helpful to the Committee to hear the details of those events from someone with first-hand knowledge of them.

OGC's involvement in the background investigation issues started in the summer of 2005 when then Chairman Tad Decker approached General Counsel Barbara Adams and then Chief of Staff John Estey for help with an issue that had arisen between the Gaming Control Board and the PSP relating to the question of to whom the PSP could provide the results of background checks it would be performing. As the Committee is probably aware, the Criminal History Record Information Act (18 Pa.C.S. Ch. 91), commonly referred to as CHRIA, prohibits the dissemination of certain criminal

background information about a person in the possession of a criminal justice agency. There are a similar Federal law and regulations that apply if the agency participates in a federally funded program. Simply put, such information may only be disseminated to another criminal justice agency. Act 71, in section 1202(b)(3), gave the Gaming Control Board the authority to receive information otherwise protected by CHRIA for purposes of background investigations that the Act required for licensing applicants. According to Chairman Decker, it was PSP's position that because Act 71 provides that the "Board" was permitted to receive this information, then only the Board members themselves could receive the information and members of the Bureau of Investigations and Enforcement, which was established by the Board under the authority of section 1202(b)(17) of the Act, could not. The Gaming Control Board had asked its outside legal counsel for an opinion on this issue. The opinion disagreed with the PSP's narrow reading of the statute. It should be noted that, contrary to newspaper accounts regarding this opinion, the opinion only spoke to the issue of whether BIE was entitled to receive the information that PSP claimed it could only give to individual Board members – not to the broader issue of whether, under Federal or State CHRIA laws, PSP could share the information with the Board or BIE in the first instance.

We agreed with the Board's outside counsel opinion and we told Chairman Decker that. We also confirmed the PSP position as articulated by Chairman Decker with Barbara Christie, PSP chief legal counsel. We suggested to her that the position taken was too narrow given the intent of the statute – that in order to assure the integrity of gaming in the Commonwealth, applicants for licenses under the Act must be fully

investigated and the Board must have all relevant information in its possession before making a decision.

This turned into a larger discussion of just what role PSP would play in the background investigation process. Chairman Decker had told us that the Gaming Board was leery about using the PSP exclusively for background checks because the Board felt PSP would take too long and their costs would be excessive. Moreover, the Gaming Board's position was that Act 71 did not require PSP to conduct background investigations. PSP, on the other hand, had the completely opposite interpretation of the Act and had determined that PSP and only PSP was permitted to conduct background investigations.

OGC again agreed to help mediate this dispute in an attempt to come up with a workable solution that would accommodate everyone's needs. Because any solution would have to be crafted against the backdrop of the provisions of Act 71, the first thing that we did was to go through the entire Act and pick out each time there is a requirement for background checks to determine what the General Assembly's intention was. I would note that since all of the events in question occurred prior to the enactment of amendments to Act 71 contained in SB862, my references to the Act are to the Act as it existed prior to those amendments.

When we went through Act 71 we realized a couple of things.

(a) First, there is only one provision that clearly requires PSP to conduct background investigations. Section 1201(g) of the Act requires that appointees to the Gaming Control Board are subject to background investigations "conducted by the

Pennsylvania State Police.” Section 1202(b)(2) gives the Board the authority to enter into an agreement with PSP for the reimbursement of the costs of these investigations. The only other provisions that link the PSP to the conduct of background investigations are (i) section 1318(b)(3) (which requires that applicants for occupation permits provide with their applications “the criminal history record of the person as well as the person’s consent for the Pennsylvania State Police to conduct a background investigation”) and (ii) section 1801 (which requires the PSP, “at the request of the commissions or the board” to “provide criminal history background investigations” on applicants under the Race Horse Industry Reform Act or Act 71). While section 1318(b)(3) suggests that the PSP would be conducting a background investigation on this category of applicant, it does not mandate that action. Section 1801 clearly suggests that the Board has the right to request that PSP provide the background investigation or not. Finally, there are two additional provisions relating to fingerprints. Section 1202(b)(9) gives the Board the authority to require that applicants for licenses and permits be fingerprinted by the PSP. Again, this provision is not a mandate that such fingerprinting be conducted or that it be conducted by the PSP. Section 1802 requires “applicants under this part” to submit to fingerprinting by the PSP. This probably should read “applicants under this chapter” since it goes on to say that the fingerprints are to be submitted to the FBI, if necessary, to confirm the identity of the applicant and to obtain records of criminal arrests and convictions “in order to prepare criminal history background investigations under *section 1801.*” (emphasis added) Finally, section 1517(c)(1) provides that one of the powers and duties

of the PSP is to “promptly investigate all licensees, permittees and applicants *as directed by the board...*” (emphasis added), clearly giving the Board control over this process.

(b) Second, there are several provisions in the Act that clearly indicate that the Board and/or the BIE would have a substantial role to play in background investigations. First, the obligation that an applicant for a slots license must have a background investigation performed is found in Section 1309(a)(9) which states that the applicant must “consent to [the] conduct [of] a background investigation *by the board*, the scope of which shall be *determined by the board* in its discretion...” (emphasis added). Similarly, supplier and manufacturer license applicants, in section 1317(b)(2), are required to “consent to a background investigation of the applicant, its officers, directors, owners, key employees or other persons required by the board...” with no mention of who would be conducting such investigations. Finally, section 1517(a)(1) provides that one of the powers and duties of the BIE is to “promptly investigate all licensees, permittees and applicants *as directed by the board...*” (emphasis added)

Another issue arose around the fact that Act 71 defines “background investigations” to include “a security, criminal, credit and suitability investigation of a person as provided for in this part.” While the criminal and arguably the security investigation of a person would be within the PSP’s expertise to conduct, it was not so clear that PSP was well equipped to conduct credit and suitability investigations. BIE believed that those latter aspects of the investigation were ones that could better be handled by BIE or a third party vendor engaged by the Board. However, the PSP legal office took the position that PSP could not conduct just one or two aspects of a

background investigation and that the Act required them to conduct every aspect of a background investigation as it was defined in the Act. Again, we thought this was too narrow a reading of the language and intent of these provisions and we told Barbara Christie that. She expressed a concern to us that PSP would be asked to turn over raw investigative materials to BIE, which she did not feel was appropriate or permissible under the law. We agreed with that assessment and told her we thought that they could summarize the information for BIE so long as they did not offer specific recommendations based on the raw material that they could not disclose to BIE. We also discussed this with Mike Schwoyer, who was chief legal counsel to BIE at the time and with whom we were working closely regarding these issues, and he agreed that a summary would be acceptable. Barbara Christie also agreed and promised to discuss it with Commissioner Miller. She did that and reported back that the Commissioner was in agreement as well.

A third issue that arose was the fact that the Act seemed to provide for contradictory and overlapping enforcement roles for the BIE and the PSP. In Section 1517, both the BIE and the PSP are charged with:

- (a) The investigation of licensees, permittees and applicants as directed by the Board (§1517(a)(1) and (c)(1)).
- (b) The enforcement of the rules and regulations promulgated under the Act (§1517(a)(2) and (c)(2)).

(c) Providing the Board with all information “necessary for all action” under the Act and for enforcement proceedings under the Act and the regulations promulgated under the Act (§1517(a)(4) and (c)(4)).

(d) Conducting “administrative inspections” of licensed facilities to ensure compliance with the Act and the regulations promulgated under the Act (§1517(a)(6) and (c)(11)).

(e) Conducting audits of slot machine operations including reviews of accounting, administrative and financial records and management control systems, procedures and records used by a slot machine licensee (§1517(a)(8) and (c)(12)).

Moreover, although the BIE, under Section 1517(a)(10), was required to refer possible criminal violations of the Act to the PSP and to “cooperate fully in the investigation and prosecution of a criminal violation” of the Act, and the PSP, under Section 1517(c)(6), was required to “enforce the criminal provisions of the Act,” Section 1517(d) gave the local district attorneys the authority to also investigate and institute criminal proceedings for any violation of the Act.

As a result of our review, we came to the conclusion that (i) there was no clear cut mandate in the Act that the PSP, and only the PSP, would conduct background investigations on applicants, (ii) the Act did not require that PSP do the entirety of a “background investigation” if it did any portion of it, and (iii) there was a need to delineate the enforcement responsibilities between the Board and BIE on the one hand and the PSP on the other so that they were not tripping over each other. We thought we

could fashion a compromise that would serve all purposes – give the Board some assurance that it could control the expense and turnaround time of background investigations, make sure each agency knew what their respective enforcement responsibilities would be so that nothing slipped through the cracks and give the citizens of the Commonwealth the assurance that proper background investigations would be conducted on applicants for all licenses under the Gaming Act and that appropriate enforcement mechanisms would be in place to ensure the integrity of the industry. We also had to incorporate the separate but very important understanding regarding the reimbursement to the PSP for the costs of the investigations it would be performing.

So, for approximately 3 months in the fall of 2005 we drafted and redrafted the Interagency Agreement that was finally signed in December of that year which did the following:

- (a) Set forth the category of applicants that the PSP, when requested by the BIE, would fingerprint, photograph and take a handwriting sample from.
- (b) Establish the process by which the PSP would act on referrals from BIE for background investigations and what those investigations would consist of – depending upon the needs that BIE had identified – and the timeframe that PSP had for producing their reports.
- (c) Delineate the PSP's responsibilities with respect to criminal investigation and enforcement and establish a process for the PSP to notify the BIE if certain incidents occur at a facility.

(d) Set forth the PSP's and Gaming Board's mutual understanding of the costs for investigations that PSP would seek reimbursement for as well as an understanding of what the PSP staffing levels would be at its central Gaming Enforcement Office and at each licensed facility.

Following execution of the Interagency Agreement, we kept in touch with both PSP and the Gaming Board to ascertain that the provisions were capable of being implemented and to offer our assistance if any disputes arose.

As far as we knew at the time, until the spring of 2006, the two agencies were working quite well together under the Interagency Agreement. Then we learned about another disagreement that arose between the PSP and the Gaming Board with respect to issues relating to the manner in which the PSP was conducting background investigations, the fact that PSP were not turning around their reports within the timeframe agreed to in the Interagency Agreement and once again asserting that the PSP could not share certain information with the BIE. At that time, it came to our attention that the status of the Board and BIE – that is, that neither one of them is a “criminal justice agency” – could jeopardize the PSP's ability to provide federal CHRIA-protected information to BIE. We learned this because we had received copies of a letter from Mary McDaniel, then Executive Director of the House Judiciary Committee that was sent to the FBI in November of 2005, and the February 2006 response from the FBI. Ms. McDaniel's letter asked the FBI for an advisory opinion on whether under Federal law the BIE was entitled to the receipt of National Crime Information Center (NCIC) criminal history information and intelligence information and if not, would designating BIE as a

“criminal justice agency” in statute solve that problem. The FBI response was that the Board was not performing criminal justice functions and as a result BIE could not receive NCIC information, even if it was designated as a “criminal justice agency” in legislation.

In order to better understand how other states handled this issue, we did a survey of other states’ gaming laws and concluded that either the Gaming Act would have to be amended to re-establish the Gaming Board in the Office of Attorney General or there had to be another way for the PSP to get valuable information to the BIE and the Gaming Board. Since the General Assembly could have structured the Board this way when it passed the legislation in 2004 but did not, we decided that that was probably not a feasible solution, especially since it would take more time to accomplish than we had under the circumstances of ongoing review of license applications then occurring at the Board. As a result, we negotiated a letter agreement in June 2006 between the BIE and the PSP in which PSP agreed to tell the BIE that the PSP might have information in its possession about an applicant that might be relevant to the Board’s licensing decision and that PSP was prevented from disclosing to a non-criminal justice agency, give the names of the jurisdictions from which that information was obtained, and include a general description of the type of information received and the names and contact information of the agencies from whom that information was obtained so that BIE could follow up with the agencies on its own. The letter agreement also required that any further contact with the US Justice Department or the Pennsylvania Attorney General’s office would be undertaken jointly by the PSP and the Gaming Board. Once the letter was executed and the agencies began operating under it, however, there did not seem to be any need to

make such contact and as a result the provisions of paragraph 5 of the letter were never carried out. As documented in the letter agreement, and contrary to Mr. Periandi's assertions as reported in the press, the information sharing provisions were specifically NOT contingent upon approvals from the US DOJ and the State Attorney General. The inclusion of that provision in the letter agreement was to address the fact that the House Judiciary Committee had already requested such an opinion from the US DOJ and it was recognized that any future contact with that agency or with the State Attorney General's Office should be a joint effort by both agencies. I have no information evidencing Mr. Periandi's assertion as reported in the press that he "lobbied" the board for those requests in December of 2006.

I think it is important to note here that regardless of some of the bumps in the road that this process has encountered over the past couple of years as implementation of the still relatively new Gaming Act has unfolded, the relationship between the PSP and the Gaming Board has never been better and there is no evidence as we sit here today that the manner in which they have been cooperating with each other has resulted in anything but the thorough investigation of all applicants for gaming licenses as contemplated by the General Assembly by the passage of Act71.

Thank you. We are happy to take your questions now.