

SUBPOENAS

CGCC-GCA-2022-06-R

COMMENTS AND RESPONSES FOR PROPOSED REGULATIONS

45-DAY WRITTEN COMMENTS

The California Gambling Control Commission (Commission) received the following written comments/objections/recommendations regarding the text of the proposed action during the 45-day written comment period that commenced November 18, 2022 and ended January 3, 2023:

A. COMMENTS MADE ON THE PROPOSAL IN GENERAL.

These comments are made on the proposal, in general, and are not directed at any specific regulatory section.

- a. **Jarhett Blonien, on behalf of J. Blonien, A Professional Law Corporation:** Mr. Blonien expressed concern that the Administrative Procedure Act (APA) is applicable to Gambling Control Act hearings (GCA hearings) conducted by the Commission. Mr. Blonien notes that Business and Professions Code section 19825 specifically states that adjudicative hearings are required to be conducted pursuant to the APA. Mr. Blonien cites that the APA has an entire section devoted to subpoenas (Government Code sections 11450.05 through 11450.50) and that the Commission does not have statutory authority to exempt itself from these requirements through regulations.

Recommended Response: This comment was considered but was not incorporated. Mr. Blonien conflated the procedural requirements for the two alternative types of hearings the Commission is authorized to conduct, including those pursuant to Business and Professions Code section 19825. Mr. Blonien stated that "...Business and Professions Code...[section] 19825 specifically states that adjudicative hearings are required to be conducted pursuant to the rules the APA provides for formal hearings." (Emphasis added.) In fact, Business and Professions Code section 19825 provides:

"The commission may require that any matter of an adjudicative nature regarding a license, permit, or finding of suitability, that the commission is authorized or required to consider in an evidentiary hearing, including a hearing held pursuant to Section 19870, be heard and determined in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code." (Emphasis added.)

This language is clearly permissive and not mandatory. Additionally, the proposed regulation does not exempt the Commission from the statutory requirement to follow the APA when it refers a matter to be heard pursuant to the APA. The proposed regulation impacts only hearings conducted pursuant to Business and Professions Code section 19871 (GCA hearings). GCA hearings are required to be conducted pursuant to Chapter

4.5 (commencing with section 11400) of Part 1 of Division 3 of Title 2 of the Government Code, where applicable, as required by Government Code section 11410.20. However, not all sections under Chapter 4.5 apply to a GCA hearing unless specifically adopted by the Commission. This is the case for subpoenas under Government Code section 11450.05, which authorizes an agency to adopt the section as the agency's subpoena protocol. To that end, Business and Professions Code section 19840 provides that "[t]he commission may adopt regulations for the administrative and enforcement of this chapter." Therefore, because a GCA hearing is separate and distinct from an APA hearing, the Commission is authorized to implement procedures for a GCA hearing, which include adopting subpoena requirements with reasonable limitations that further the purpose of the GCA hearing.

B. AMEND SECTION 12014. SUBPOENAS.

This section provides the Commission's guidelines for subpoenas and subpoenas duces tecum.

1. Subsection (a) [pg. 1, line 13] provides that the issuance and enforcement of a subpoena or subpoena duces tecum in any adjudicative proceeding held pursuant to the Act for which a notice of hearing has been issued will be in accordance with Article 11 (commencing with section 11450.05) and Article 12 (commencing with section 11455.10), respectively, of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code. Further, the issuance of a subpoena or subpoena duces tecum may be on the form entitled "Subpoena," CGCC-CH1-02 (New 05/20), or in a manner that otherwise complies with Article 11 of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code. Lastly, all subpoenas and subpoenas duces tecum must be served, in accordance with Government Code section 11450.20 and with a copy to the presiding officer, at least 30 days prior to the date specified for commencement of the hearing in the notice of hearing, or the date specified in the subpoena for the appearance of a witness or the production of records.

- a. **Jeremy Stevens, on behalf of the Department of Justice, Indian and Gaming Law Section (IGLS)**: Mr. Stevens suggested the following amendment to the subsection:

(a) The issuance and enforcement of a subpoena or subpoena duces tecum in any adjudicative proceeding held pursuant to the Act for which a notice of hearing has been issued will be in accordance with Article 11 (commencing with section 11450.05) and Article 12 (commencing with section 11455.10), respectively, of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code. The issuance of a subpoena or subpoena duces tecum may be on the form entitled "Subpoena," CGCC-CH1-02 (New 05/20), which is attached in Appendix A to this chapter, or in a manner that otherwise complies with Article 11 of Chapter 4.5 of Part 1 of Division 3 of Title 2 of the Government Code. All subpoenas and subpoenas duces tecum must be served, in accordance with Government Code section 11450.20 and with a copy to the presiding officer, at least 30 days prior to the date specified for commencement of the hearing in the notice of hearing, or the date specified in the subpoena for the appearance of a witness or the

production of records. [No subpoena duces tecum may be served upon an applicant or complainant.](#)

Mr. Stevens notes that IGLS' proposed amendment is consistent with the Commission's proposed change to California Code of Regulations, section 12060 (Section 12060), subsection (g) and expresses concern that without this addition a party may argue that because the amendment language in Section 12060 does not explicitly prevent a party from serving a subpoena duces tecum upon another party, it is permissible.

Recommended Response: This comment was accepted in part and a conforming change has been made to the text which reads as:

[No subpoena duces tecum may be served by an applicant or complainant upon the other party.](#)

2. Subsection (b) [pg. 1, line 24] provides that any motion made pursuant to subdivision (a) of section 11450.30 of the Government Code must be filed with the presiding officer no later than 15 days prior to the date specified for appearance or for the production of records. The party bringing the motion must serve copies of the motion on all parties and persons who are required by law to receive notice of the subpoena. Any response to the motion must be filed with the presiding officer and served no later than 5 days before the motion is scheduled to be heard. On the presiding officer's own motion, or upon a timely motion of a party or a witness, after notice to the parties and an opportunity to be heard, upon a showing of good cause, the presiding officer may order the quashing of a subpoena or subpoena duces tecum entirely, may modify it, or may direct compliance with it upon other terms and conditions.

- a. **Jarhett Blonien, on behalf of J. Blonien, A Professional Law Corporation:** Mr. Blonien expressed concern that allowing a presiding officer to quash or modify a subpoena upon its own motion is antithetical to the precepts of justice. Mr. Blonien expressed concern that since a presiding officer can be an employee of the Commission, this would empower an employee of the subpoenaed party to decide upon a subpoena issued by an applicant, and that this could result in self-dealing and workplace intimidation, and would result in depriving the applicant of the right to present all relevant issues and have a fair hearing.

Recommended Response: This comment was considered but was not incorporated. Government Code section 11450.30, applicable to APA hearings, also authorizes the presiding officer to resolve motions for protective orders, including a motion to quash a subpoena or a subpoena duces tecum, "on terms and conditions that the presiding officer declares. The presiding officer may make another order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands, including violations of the right to privacy." (*Id.*, sub. (b).) Since GCA hearings routinely involve unrepresented applicants, it is appropriate to authorize the presiding officer, on their own motion, to resolve issues related to a subpoena or subpoena duces tecum.

On the issue of self-dealing and workplace intimidation, it bears noting that the presiding officer is not a decision maker and under Commission regulations will have no communication with the Commission or Commission staff prior to the evidentiary hearing upon the merits of the application. Additionally, a presiding officer can already review motions concerning subpoenas or subpoenas duces tecum from the Commission or Commission employee along with other aspects of a GCA hearing under the current regulation. Moreover, “bias [even] in an administrative adjudicator must be established with concrete facts rather than inferred from mere appearances.” (*Independent Roofing Contractors v. California Apprenticeship Council* (2003) 114 Cal.App.4th 1330, 1340; see *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219-220, 79.) Furthermore, Evidence Code section 664 states, in part, that: “It is presumed that official duty has been regularly performed.” Therefore, there is every reason to assume that in the context of a GCA hearing, the presiding officer will perform their duty as authorized by law.

C. AMEND SECTION 12060. GCA HEARINGS.

This section provides the specifics of a GCA hearing.

1. Subsection (g) [pg. 2, line 31] provides that the exclusive right to and method of discovery between the applicant and complainant during a GCA hearing is as provided in subsection (f). Additionally, it provides that discovery is not permitted upon a member of the Commission or an advisor of the Commission except in limited circumstances.
 - a. **Jarhett Blonien, on behalf of J. Blonien, A Professional Law Corporation:** Mr. Blonien expressed concern that not allowing discovery to be propounded on a member of the Commission or an advisor to the Commission may undermine an applicant’s rights to a full and fair hearing. Mr. Blonien provides an example, that when a Commissioner receives an *ex parte* communication, such communication should be subject to a subpoena duces tecum as the subject of the *ex parte* communications may show bias, prejudice, or animus to the applicant. Additionally, Mr. Blonien expressed concern that there is no indication that Commissioners undergo judicial training or meet APA obligations to comply with the Code of Judicial Ethics.

Recommended Response: This comment was considered but was not incorporated. The proposed regulation, in subsection (g), provides an exception authorizing a subpoena to obtain the type of record described by the commentator. Specifically, the proposed regulation permits a subpoena upon a member of the Commission or an advisor of the Commission when “...a showing is made that they have direct personal factual information pertaining to material issues...and the information to be gained from the Commission member or advisor of the Commission is not available through any other sources.” As such, in the example provided in the comment, a member of the Commission would likely have to comply with a subpoena or subpoena duces tecum issued to them, if the party can show that the Commission member or advisor has direct personal factual information pertaining to a material issue in the hearing and the information is not available through any other source.

The additional concerns about the training a member of the Commission may or may not receive is not specifically directed at the Commission's proposed action or to the procedures followed by the agency in proposing or adopting this action, and therefore does not require a response in the final statement of reasons, as provided in Government Code section 11346.9, subdivision (a)(3).