NATIONAL INDIAN GAMING COMMISSION BULLETIN

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Subject: Procedures for Processing Fingerprint Cards

The National Indian Gaming Commission (NIGC) is currently implementing procedures to process fingerprint cards submitted by tribes as part of their employee background investigations. This bulletin is intended to provide you with information concerning the steps to be followed to ensure the prompt processing of all submitted fingerprint cards.

Under the NIGC's ordinance regulations, prior to the issuance of a license, a tribe is required to perform a fingerprint check, through the FBI records system, as part of the background investigation on each individual who has applied for a position as a key employee or primary management official in its gaming operation[s]. The information obtained as a result of this fingerprint check will assist the tribe in determining the applicant's suitability for employment.

The FBI has recently issued a policy statement concerning access to criminal history record information (CHRI) by the NIGC, state agencies and tribal governments. A copy of this policy statement is enclosed for your information. As you will note, under this policy the NIGC is authorized to process fingerprint cards and issue copies of the reports of the fingerprint checks directly to the requesting tribes. Because of the highly sensitive nature of the reports, the FBI has required the NIGC to take steps to ensure that there is no improper dissemination of CHRI, that the information is used only for authorized purposes, and that the CHRI is securely maintained.

In order to ensure compliance with these FBI requirements, it is necessary for each tribe receiving CHRI to execute the enclosed Memorandum of Understanding (MOU). The MOU also places certain restrictions on the use of CHRI in administrative and judicial proceedings, reserves NIGC's right to furnish the tribe CHRI in the form of summary memoranda, restricts the availability of NIGC employees to testify relative to CHRI, reserves NIGC's right to discontinue providing CHRI where a tribe has failed to comply with the terms of the MOU, and acknowledges the FBI's right to impose additional restrictions on the release of CHRI.

FBI policy also authorizes CHRI access by state regulatory agencies and tribal governments under certain specified conditions (see Policy Statement at pages 4-5). Tribes should determine if the conditions exist which would permit them to process fingerprint cards directly or through a state agency. Where the qualifying conditions have been met, the tribe may elect to use such agencies to process its fingerprint cards. It should be noted, however, that under current FBI policy, such requests will not routinely be processed through Bureau of Indian Affairs (BIA) law enforcement offices. The language contained in the Preamble to the NIGC's final ordinance regulations indicating that the BIA is available for such purposes is inaccurate and should be disregarded. BIA law enforcement offices may, however, continue to take the fingerprints of applicants for key employee and primary management official positions and forward the subject fingerprint cards to the NIGC for processing.

Set forth below are the steps to be followed whenever a tribe elects to use the NIGC to process the fingerprints cards of applicants for employment in its gaming operations:

1. A duly authorized official of the tribe should execute the enclosed MOU and return it to the NIGC at the earliest possible date. No copies of criminal history reports will be forwarded to a tribe until the NIGC has received a properly executed MOU.

2. The tribe should notify the NIGC which law enforcement agency/office(s) will be taking the fingerprints for the tribe and designate a contact person at the identified agency/office(s). In addition, the tribe should indicate the number of cards which the NIGC should send to this agency/office making allowances for lost or damaged cards. The forwarded cards will reflect the Originating Agency Identifier (ORI) number assigned to the NIGC by the FBI.

3. The tribe should provide NIGC with a list of individuals whose fingerprint cards the NIGC will be receiving from the law enforcement agency/office and a check to the National Indian Gaming Commission to cover the cost of processing those cards (number of cards X $35.00). The list should also contain the social security number and date of birth of each listed individual and the name of the law enforcement agency/office taking the fingerprints. The $35.00 per card charge for processing consists of a $17.00 fee charged by the FBI and $18.00 to cover NIGC's costs, including personnel, postage and telephone.

4. Once fingerprints have been taken, the agency taking the prints should forward the completed cards directly to the NIGC. The NIGC will process only those cards received directly from a law enforcement agency.

5. Once the NIGC receives: 1) the completed fingerprint card; 2) the required list of the individuals whose fingerprint cards the NIGC will be receiving and 3) a check to cover costs, it will forward the fingerprint cards to the FBI for processing. The FBI is currently averaging 21 working days to process a fingerprint card.

6. Upon completion of the fingerprint check, the FBI will forward a report of the findings to the NIGC. Subject to compliance with the conditions set forth in the enclosed Memorandum of Understanding (MOU), NIGC will forward a copy of this report to the submitting tribe to be used in determining of the suitability of the applicant for employment in the tribe's gaming operation.

7. The NIGC will retain the original reports and the processed fingerprint cards and will incorporate them into the Indian Gaming Individual Records System. This system will be subject to the Commission's Privacy Act Procedures. see 25 CFR Sections 515.1-12 (58 FR 5814-5818, January 22, 1993).

NIGC regulations require a tribe to perform a background check on applicants for key employee or management official positions following approval of a tribal ordinance by the Chairman. In order to facilitate the prompt distribution of CHRI, however, the NIGC will process fingerprint card submissions which meet the requirements of Paragraph 5 prior the approval of a gaming ordinance.

It is important to note, however, that until such time a tribe's gaming ordinance has been approved by the Chairman, the procedures for forwarding employee applications and investigative reports set forth in Sections 558.3 and 558.4 cannot be initiated by the tribe and the time periods contained in those provisions do not begin to run. It should be further noted that if the tribe is conducting a background investigation consistent with the requirements of Part 556, the CHRI constitutes only one of a number of sources of information which the tribe must consider in making eligibility determinations for employment in its gaming operation.

These procedures are effective immediately.

For additional information contact Fingerprint Processing at (202) 632-7003.

FBI POLICY ON INDIAN GAMING REGULATORY ACT SUBMISSIONS BY THE NATIONAL INDIAN GAMING COMMISSION (NIGC), STATE IDENTIFICATION BUREAUS, AND TRIBAL GOVERNMENTS

Pursuant to the Indian Gaming Regulatory Act (codified at Title 25, United States Code, Section 2701 et.seq.), the NIGC promulgated regulations defining various NIGC gaming responsibilities (25 Code of Federal Regulations, Part 501 et.seq., published January 22, 1993 in the Federal Register). NIGC contacted the Access Integrity Unit (AIU), Audit Section, Criminal Justice Information Services Division (CJIS), and the Identification Division (ID), with respect to access to FBI criminal history record information under the Act and NIGC regulations. AIU has also been contacted by several state identification bureaus on the same subject. This statement of policy, intended for distribution to the NIGC, Indian tribal governments, and state bureaus, sets out FBI policy and procedures with respect to requests for access to FBI criminal history records under the Act, the NIGC regulations, state/tribal compacts, and state law.

1) Requests from the NIGC -

The Indian Gaming Regulatory Act does not specifically authorize NIGC access to FBI criminal history record information (CHRI) for background screening purposes. Section 2708 of Title 25 of the United States Code (U.S.C.)(which is part of the Indian Gaming Regulatory Act, as codified) reads as follows:

> "The Commission may secure from any department or agency of the United States information necessary to carry out this Act. Upon the request of the Chairman, the head of such department or agency shall furnish such information to the Commission, unless otherwise prohibited by law."

We believe that Section 2708 itself provides sufficient basis for providing FBI CHRI to NIGC "unless otherwise prohibited by law." The Menard case effectively prohibited dissemination of CHRI to state and local agencies for licensing and employment purposes. Menard did not impose a similar prohibition on dissemination of CHRI to Federal agencies. 28 C.F.R., Section 20.33 explicitly authorizes dissemination to Federal agencies authorized by Federal statute or executive order. It is our opinion that Section 2708 authorizes direct dissemination of CHRI to NIGC for, under the standard established by 28 U.S.C., Section 534, its "official use."

The extent to which "official use" encompasses access to CHRI by NIGC is determined by NIGC's duties as defined by the Act. NIGC has direct authority to approve management contracts for both Class II (bingo and related activities) and Class III (casino-type operations) activities. 25 U.S.C., Section 2705(a)(4). The nature of the background screening to be undertaken, at least as to Class II management contracts and particular persons stated therein, is defined by Section 2711 (a)(1) and (e). Clearly Class II management contract approvals require criminal history screening of persons intimately connected to the management contractor (such as directors of a corporate contractor). Submissions to the FBI by NIGC for this purpose are authorized.

NIGC'S responsibility with respect to approval of Class III management contracts does not appear to include screening based on criminal history information. Authority for Class III screening is found in Section 2710(d)(9), which specifically excludes the reviews in Section 2711(a) and (e), which establish criminal history record screening. NIGC's own interpretation in its commentary to 25 C.F.R., Parts 531, 533, 535, 537, and 539 is consistent with this interpretation, insofar as this exclusion assigns responsibility to the tribes for performance of preapproval criminal history screening. NIGC's regulations (and commentary), however, express its determination, under NIGC's general authority to protect tribes from organized crime and corrupting influences, to disapprove or revoke management contracts, including Class III contracts, if management personnel have disqualifying criminal records. See 25 C.F.R., Sections 533.6 and 533.1. This interpretation is entirely consistent with the purposes of the Act, and therefore, submissions by NIGC relating to approval, disapproval, or revocation of Class III management contracts will also be accepted and processed by the FBI.

NIGC, in its regulations, also asserts authority to conduct background screening of primary management officials and key employees for gaming conducted by tribes without third-party management contracts. Under Section 2710(c)(1) and (2), NIGC is authorized to consult with law enforcement officials concerning Class II gaming licenses issued by a tribe, and to facilitate license suspension if "primary management official(s) or key employee(s)" fails to meet standards set out in Section 2710(b)(2)(F)(ii)(II). That subparagraph provides for disqualification of primary management officials or key employees for, among other reasons, "criminal record...pose(s) a threat to the public interest or to the effective regulation of gaming." Based on the combination of these provisions, NIGC's official use of CHRI extends to background screening of Class II primary management officials and key employees.

NIGC's authority as to Class III primary management officials and key employees is less clear, but in our view, valid nonetheless. Parts 556 and 558 of the NIGC regulations assert this authority unless a tribal-state compact has allocated this responsibility exclusively to the state or state agencies. As the agency charged with effectuation of the IGRA, NIGC's interpretation of its provisions must be viewed as authoritative. As such, NIGC fingerprint submissions for Class III primary management officials and key employees, absent a preemptive tribal-state compact, are within NIGC's "official use" and will be processed by the FBI.

Our review of the Act reveals no explicit authority for direct access to FBI CHRI by Indian tribal governments. As previously stated, Section 2708 does not constitute, in our view, such an authorization because of the ending phrase "unless otherwise prohibited by law." The Menard case is such a prohibition. This prohibition is now set out in 28 C.F.R., Section 20.33. The only exception by which state and local agencies may access FBI CHRI is through state enactment of Pub.L. 92-544 statutes or an express Federal statute. As stated, Section 2708 by its own terms is not such a Federal statute.

We also do not believe that language in the Act requiring criminal background checks or defining eligibility in relation to the existence or nonexistence of criminal records constitutes such an express Federal statute. Our longstanding policy has been that Congress must clearly define an exception to the Menard prohibition authorizing access to CHRI for non-Federal licensing purposes. The FBI has never recognized such an exception solely from language indicating that background screening should be undertaken, nor from language indicating that some form of criminal record is a disqualification from licensing or employment. We have reviewed the statutory history of the Act and can find no indication that Congress intended for tribal governments to access FBI CHRI. In fact, we believe Section 2708 to state the contrary intent.

Access by the tribes may be claimed based on Section 2710(c)(3) and (4) of the Act. Under that Section, NIGC may issue a certificate of self regulation to a tribe operating Class II games, based on, inter alia, the implementation of an adequate system for "investigation...of all employees." Perhaps more importantly, NIGC must review tribal ordinances authorizing Class II gaming to ensure, inter alia, that the ordinance ensures that background investigations are conducted in primary management officials and key employees. Section 2710(b)2)(F). This ordinance must also establish a standard for disqualification of such officials or key employees, which includes "criminal record" which would "pose a threat to the public interests or to the effective regulation of gaming." Section 2710(b)(2)(F)(ii)(II).

These provisions discussed are not similar to nor do they approach the explicitness of previous Federally legislated authorizations for non-Federal agency access to CHRI. See for example 15 U.S.C., Section 78q ("Notwithstanding any other provision of law, in providing identification and processing functions, the Attorney General shall provide the Commission and self-regulatory organizations designated by the Commission with access to all criminal history record information."). An assertion by a tribe of direct access to FBI CHRI under these provisions would be, in our view, erroneous.

Secondary dissemination of CHRI by NIGC is controlled by 28 C.F.R., Section 20.33(b) and 28 U.S.C., Section 534(b). Both provisions authorize sanctions for secondary dissemination outside the receiving department or "related agencies." A related agency logically could be a tribal government or subdivision thereof which is participating with NIGC in background screening or activity related to official NIGC use of CHRI as described above. The requirement of Section 534(a) that the related agency must be a "governmental agency" must also be met, so that secondary dissemination of CHRI to a tribal government could only occur to a tribe recognized by the U.S. or a state as a valid tribal government.

The FBI has traditionally defined the boundaries of authority for access to CHRI (in the absence of a more authoritative definition, such as by the Courts), and then allows the accessing agency to screen its requests to ensure those boundaries are respected. NIGC will be provided with an Originating Agency Identifier (ORI) to allow for proper submissions under its authority and should be informed of the extent of that authority. Thereafter, submissions would not be reviewed by the FBI for compliance, except to the extent that any future audit program will review submissions and dissemination logs.

2) Requests from State Regulatory Agencies -

Responsibility for regulation of Class III gaming is joint between states and tribes. There is no language in the Act authorizing states or tribes to receive FBI criminal history for background screening, and as discussed, Section 2708 does not authorize access to CHRI by the tribes or state agencies. For this reason Pub.L. 92-544 can be the only avenue by which authorization can be established for access to FBI CHRI. If a state enacts or has enacted a law pursuant to Pub.L. 92-544 for background screening for gambling purposes and a state agency designated thereunder has assumed responsibility for Indian gaming (by state-tribal compact, for example), access to FBI CHRI is authorized.

Note that the existence of a tribal-state compact alone does not authorize access to FBI records. Pub.L. 92-544 requires a state "statute." Our interpretation, supported by OLC opinions, is that any law authorizing access under Pub.L. 92-544 must be legislatively enacted (or the equivalent to legislative enactment). A state executive order or administrative regulations cannot create a Pub.L. 92-544 authorization. The compact we have previously reviewed, between the State of Connecticut and the Mashantucket Tribe has been legislatively recognized and is, therefore, a "state statute" under Pub.L. 92-544. Submissions will be accepted thereunder by the terms created in that Compact.

Secondary dissemination to tribal governments would be permissible under the same conditions specified in section one (1) above. Such dissemination could occur to a lawfully recognized tribal government which is assisting the designated state agency with a background investigation and therefore has need for such information.

3) Requests from Tribal governments -

As previously stated, the Act contains no language purporting to authorize access to FBI records by tribal governments and therefore, Pub.L. 92-544 is the only avenue for such access. Pub.L. 92-544 authorizes such exchanges with state and local governments' for noncriminal justice purposes pursuant to a state statute. We believe that a recognized tribal government can be an eligible governmental entity under Pub.L. 92-544, and therefore, can receive FBI records directly if authorized by state statute (approved by AIU). A tribal ordinance could not effect that authorization. A tribal-state compact, as previously discussed, can effect such authorization only if <u>enacted</u> (or the equivalent thereof) by a state legislature.

No secondary dissemination would be permitted outside the tribal government in any case, except to governmental agencies assisting in any authorized background screening activity.

As to both state and tribal requests, our mission will be to review and approve the authorization requests by reviewing statutes submitted under Pub.L. 92-544 and 28 C.F.R., Section 0.85(j). Once approved, the burden, as with all Pub.L. 92-544 submissions, then falls on the state bureaus to screen submissions to ensure that any submission falls appropriately under the authorized purpose.

Our analysis above reconciles existing law and regulations concerning the FBI's authority to exchange criminal history information with Federal, state, and local governmental agencies and the IGRA and NIGC's regulations. As noted, the Act, in distinguishing Class II and Class III gaming, creates somewhat different regulatory schemes and, therefore, may impose different duties on NIGC. Bingo (Class II) is widely legal for both charitable and noncharitable purposes in most states. Thus, as to Class II gaming, the Act clearly establishes NIGC responsibility for screening of management contractors and associated individuals, when gaming is contracted out by a tribe, and primary management officials and key employees, when the gaming is conducted by a tribe itself.

NIGC's role is more limited in Class III gaming under the IGRA, especially when tribal-state compacts are in existence. NIGC will be able to submit fingerprints for management contractors and associated individuals. In all other areas, the high degree of regulation accorded to Class III gaming is generally to be accomplished jointly by tribes and states. Background screening of primary management officials and key employees may be conducted by NIGC, unless preempted by a tribal-state compact which places this responsibility elsewhere. It should be noted that background screening on gaming employees who do not fall within the definition of "primary management official" or "key employee" is within the exclusive province of Pub.L. 92-544 approved statutory enactments.

Submission Procedures

1) NIGC will be informed of the interpretation contained herein, along with the following information:

a) That NIGC will be assigned an appropriate ORI and given fingerprint cards for its submissions as authorized;

b) That NIGC submissions will be billed to NIGC at the existing governmental rate of $17.00.

2) That state identification bureaus will be informed of the interpretation contained herein, along with the following information:

a) That state statutes and supporting materials will require review under 28 C.F.R., Section 0.85(j) and Pub.L. 92-544 by the Access Integrity Unit;

b) That where such processes are in existence the processing of fingerprint cards for authorized state agencies will be subject to the existing Federal user fee of $23.00.

c) That authorized tribal governments may submit through the appropriate state identification bureau on a tribal ORI to be paid at $23.00.