

Commissioners:

J. Winston Krause,  
Chairman

Carmen Arrieta-Cancelaria

Peggy A. Heeg

Doug Lowe

Robert Rivers



# TEXAS LOTTERY COMMISSION

Gary Grief, Executive Director

Alfonso D. Royal, Charitable Bingo Operations Director

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OPINION COMMITTEE

February 10, 2016

The Honorable Ken Paxton  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

Via Certified Mail: 9171999991703056778090

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FILE # ML-47961-16  
I.D. # 47961

Dear General Paxton:

Pursuant to Texas Government Code section 402.042, I respectfully request an official opinion on the extent of the Texas Lottery Commission's (Commission) authority to deny, suspend, or revoke a lottery ticket sales agent license in instances described below, where the Commission has evidence (either developed through an in-house investigation or obtained from a third party, including but not limited to a local law enforcement authority) that an applicant or licensee has conducted or allowed illegal gambling activity at its retail location but has not been convicted of gambling or a gambling-related offense.

The Commission issues sales agent licenses pursuant to subchapter D of the State Lottery Act (SLA).<sup>1</sup> Under SLA section 466.155(a)(1)(A), the Commission has express authority and is required to deny a license application, and to suspend or revoke a license, if the Commission finds the applicant or licensee is an individual who has been convicted of gambling or a gambling-related offense and less than 10 years has elapsed since the termination of the sentence, parole, mandatory supervision, or probation served for the offense. Our understanding of Texas law is this provision requires a final conviction, including an adjudication of guilt.<sup>2</sup>

In this request, I seek an opinion on the following questions regarding the Commission's authority under the SLA (express or implied) in instances where there has not been a final adjudication of guilt; and, I also ask if the opinion regarding any question would differ depending on whether the applicant/licensee either has or has not been placed on deferred adjudication for gambling or a gambling-related offense:<sup>3</sup>

<sup>1</sup> Tex. Gov't. Code Ch. 466.

<sup>2</sup> See *Beedy v. State*, 194 S.W.3d 595, 599 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2006), *aff'd*, 250 S.W.3d 107 (Tex. Crim. App. 2008) (a "conviction" always includes an adjudication of guilt, and a deferred adjudication is not a "conviction").

<sup>3</sup> We note that Occupations Code Chapter 53, specifically section 53.021(d), which authorizes a state licensing authority to consider certain deferred adjudications to be convictions when considering whether to deny, suspend or revoke an occupational license, does not expressly apply to lottery ticket sales agent licenses issued under the SLA.

1. Under SLA section 466.151(e), the Commission's Lottery Director "may issue a license to a person only if the director finds that the person's experience, character, and general fitness are such that the person's participation as a sales agent will not detract from the integrity, security, honesty, and fairness of the operation of the lottery."

Question: May the Commission or the Director consider the presence of illegal gambling activity at a proposed or existing lottery retail location in determining whether an applicant or licensee possesses the character or fitness required to serve as a lottery sales agent, and for that reason deny an application, or suspend or revoke a lottery license, under SLA section 466.151(e)?

2. Under SLA section 466.155(a)(1)(B), the Lottery Director shall deny a lottery license application or suspend or revoke a lottery license if he finds the applicant or licensee "is or has been a professional gambler". The current definition of "professional gambler" in the Commission's rules is "a person whose profession is, or whose major source of income derives from, playing games of chance for profit".<sup>4</sup>

Question: May the Commission adopt a rule defining "professional gambler" to include a person who conducts or allows illegal gambling activity at a proposed or existing lottery retail location?

3. Does the Commission's express function to generate revenue for the State Lottery Account (under SLA sections 466.351 and 466.355) imply authority for the Commission to consider the presence of illegal gambling activity at an applicant's or licensee's proposed or existing lottery retail location in deciding whether to deny, suspend, or revoke a lottery license, if the Commission determines the illegal activity threatens revenue generated from the lawful sale of lottery tickets?
4. If the answer to Questions 1, 2, and/or 3 above is "yes", does the Commission have authority under the SLA to determine (subject to an administrative hearing) whether (i) a particular activity is illegal gambling under Texas Penal Code section 47.02, or (ii) a particular machine is a gambling device under Penal Code section 47.01(4)?
5. If the Commission has the authority described in Questions 1, 3 and/or 4, is the Commission required to adopt a formal rule describing such authority before taking action to deny, revoke, or suspend a lottery license?

Should you need any additional information regarding this request, please contact Bob Biard, the Commission's General Counsel, at 512.344.5127.

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<sup>4</sup> 16 Tex. Admin. Code §401.153(b)(2).

Respectfully submitted,



J. Winston Krause, Chairman

cc: Carmen Arrieta-Candelaria, Texas Lottery Commissioner  
Peggy A. Heeg, Texas Lottery Commissioner  
Doug Lowe, Texas Lottery Commissioner  
Robert Rivera, Texas Lottery Commissioner  
Gary Grief, Executive Director, Texas Lottery Commission  
Bob Biard, General Counsel, Texas Lottery Commission  
Scott Fisher, Vice President of Policy & Public Affairs, Texas Food & Fuel Association  
Jim Sheer, Vice President of Government & Regulatory Affairs, Texas Retailers  
Association