

**Procedural Order No. 12**  
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Requested Party: Respondent	Date: 2014
	Author(s)/Sender(s)  Procuraduría General de la República (Attorney General's office) (PGR).
	Recipient(s)  Not Applicable. The case files pertain to criminal investigations initiated by the Attorney General's Office.
	Non-confidential, non-privileged description of document:  Case files of the criminal investigations launched against E-Games' representatives due to the operation of the Casinos without a valid permit: <ul style="list-style-type: none"> <li>• 717/UE/LE/30/2014</li> <li>• 718/EU/LE/29/2014</li> <li>• 720/UE/LE/21/2014</li> <li>• 721/UE/LE/21/2014</li> </ul>
	Basis for privilege or confidentiality claim:  Legal impediment under Mexican law (Item 15.1 of PO1 and Article 9.2.b of the IBA Rules).  Pursuant to the <i>Código Nacional de Procedimientos Penales</i> [National Code of Criminal Procedures], and <i>Ley Federal de Transparencia y Acceso a la Información Pública</i> [Federal Law on Transparency and Access to Public Information], access to the criminal case files requested is not allowed as explained below.  <b>National Code of Criminal Procedures</b>  The Code grants to a defendant access to a criminal case file. However, the Code also sets out the situations in which that access is granted. The Claimants have not alleged to be in any of those situations.  National Code of Criminal Procedures' Article 218, first paragraph, provides that the records of an investigation and all related documents are confidential,

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	<p>except to the parties but subject to specific situations set out in the Code and applicable provisions.<sup>1</sup></p> <p>Article 218, third paragraph, sets out the limitations to the defendant's access to a criminal case file. That provision provides that the defendant may have access to the case file when "<u>when he is detained, is summoned to appear as a defendant or is subject to an act of nuisance and it is intended to receive his interview</u>, from this moment on, the records will no longer be kept in reserve for the accused or his Defender in order not to affect his right of defense" (emphasis added).<sup>2</sup></p> <p>Code's Article 113(VIII) grants the defendant the right to access the file case,<sup>3</sup> but subject to Article 218 (and 219) described above.</p> <p>In May 2014 (days after the Casinos' closure), SEGOB requested the criminal authorities to investigate federal crimes set out in article 12(II) of the LFJS, due to the fact that SEGOB found that the Casinos were operating without a valid permit.<sup>4</sup> However, the investigations did not affect the Claimants or put them under any of the situations described in Article 218 (e.g., detained, summoned to appear as a defendant or subject to an act of nuisance), and the PGR made no criminal charges. As Mr. Gutierrez stated, the criminal investigations were never successful (CWS-52, ¶ 104). Under these circumstances, the law does not authorize access to the case files.</p> <p>Furthermore, Mexican law also imposes sanctions on government officials that provide information or access to a criminal case file not allowed by law, such as Code's Article 218.<sup>5</sup></p>
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<sup>1</sup> National Code of Criminal Procedures' Article 218, first paragraph ("**Article 218. Reservation of investigation acts.** Research records, as well as all documents, regardless of their content or nature, objects, voice and image records or things that are related, are strictly reserved, so that only the parties may have access to the same, with the limitations established in this Code and other applicable provisions.")

<sup>2</sup> National Code of Criminal Procedures' Article 218, third paragraph ("*The defendant and his defender may have access to them when he is detained, is summoned to appear as a defendant or is subject to an act of nuisance and it is intended to receive his interview, from this moment on, the records will no longer be kept in reserve for the accused or his Defender in order not to affect his right of defense. For the purposes of this paragraph, the provisions of article 266 of this Code shall be understood as an act of nuisance.*")

<sup>3</sup> National Code of Criminal Procedures' Article 113(VIII). ("*Rights of the Defendant. The accused shall have the following rights:... VIII. To have access to him and his defense, except for the exceptions provided in the law, to the investigation records, as well as to obtain a free copy, photographic or electronic record of them, in terms of articles 218 and 219 of this Code*").

<sup>4</sup> The documents produced to the Claimants under request 41 provide details about SEGOB's grounds and reasons submitted to the PGR as the basis to initiate criminal investigations.

<sup>5</sup> Federal Criminal Code's Article 225(XXVIII) ("*The following are crimes against the administration of justice, committed by public servants: ... XXVIII.- Make known to those who do not have the right, documents, records or information that are in an investigation folder or in a process criminal and that by provision of the law or resolution of the judicial authority, are reserved or confidential*").

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	<p><b>Federal Law on Transparency and Access to Public Information.</b></p> <p>With respect to criminal case files, Article 110 considers classified information the information that (i) is contained within the investigations of facts that the law designates as crimes and is processed before the Public Ministry (section XII), and (ii) by express provision of a law have such a character, provided that they are in accordance with the bases, principles and provisions established in this Law and do not contravene it (Section XIII). Due to the restrictions set out in the National Code of Criminal Procedures, as described above, the Transparency law would also apply as a limitation to provide the criminal case files.</p>
<i>Requesting Party</i>	<p>Respondent's privilege claims are without merit and should be rejected by the Tribunal for the following reasons:</p> <p><i>First</i>, Respondent's assertion is a gross misstatement of applicable Mexican law regarding access to information and documents from criminal investigations of the Claimants.</p> <p>Mexico claims that "Article 218, third paragraph, sets out the limitations to the defendant's access to a criminal case file" and that "[t]hat provision provides that the defendant may have access to the case file when <u>'when he is detained, is summoned to appear as a defendant or is subject to an act of nuisance and it is intended to receive his interview,</u> from this moment on, the records will no longer be kept in reserve for the accused or his Defender in order not to affect his right of defense.'" However, Respondent conveniently omits to mention that the second paragraph of Article 218 of the National Code of Criminal Procedure specifically provides that "[t]he victim or offended person and their Legal Advisor may have access to the investigation records <u>at any time.</u>"<sup>6</sup> Thus, Respondent's purported limitation to Claimants' right to access the references criminal case files under Mexican law is inapposite.</p> <p>Claimants and their legal counsel are clearly under the circumstances allowed for under the National Code of Criminal Procedure to access the criminal case file, as "[t]he victim or offended person and their Legal Advisor may have access to the investigation records <u>at any time.</u>"<sup>7</sup> Contrary to Respondent's assertion, the fact that Claimants were not detained, summoned to appear as a defendant or subject to an act of nuisance, and the PGR did not bring criminal charges is irrelevant. The second paragraph of Article 218 of the National Code of Criminal Procedure is clear in that "the victim"—in this</p>

<sup>6</sup> National Code of Criminal Procedures' Article 218, second paragraph ("*La víctima u ofendido y su Asesor Jurídico podrán tener acceso a los registros de la investigación en cualquier momento.*")

<sup>7</sup> *Id.*

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	<p>case, the Claimants, and more specifically, E-Games’ representatives—and their legal counsel may have access to the case file at any time.</p> <p>Therefore, Claimants, E-Games, and Quinn Emanuel are entitled to this information, and Respondent’s arguments to the contrary are legally incorrect.</p> <p><i>Second</i>, Respondent also states that Mexican public officials overseeing those proceedings would suffer administrative sanctions by providing information or access to these criminal case files. However, as explained above, Mexico’s legal system permits Mexican public officials to produce the requested documents in compliance with the Tribunal’s orders, as this is permitted under Article 218 of the National Code of Criminal Procedures.<sup>8</sup> Accordingly, those officials would not thereby commit any illegal act leading to an administrative or criminal sanction. The Tribunal should therefore reject Respondent’s unsupported assertion.</p> <p><i>Third</i>, Respondent’s assertion that it cannot provide the criminal case files because this information is considered classified (i.e. reserved or confidential) under the Federal Law on Transparency and Access to Public Information is equally inapposite. The fact that certain information contained in the investigations <i>may</i> be classified as reserved or confidential, does not imply that all such information <i>is</i> reserved or confidential. Similarly, an objection to the production of the requested information on this basis cannot be carried out <i>a priori</i>. Under Mexican law, in order to classify information as reserved or confidential—or to object to the production of such information on that basis—a case-by-case analysis must be carried out by the parties from whom the information is being requested (i.e. the PGR).</p> <p>Moreover, the classification of information as reserved or confidential must be done in accordance with the rules established in, among others, Articles 97, 98, and 99 Federal Law of Transparency and Access to Public Information. Therefore, Respondent’s assertion here—<i>a priori</i>—that it can withhold information simply because the requested information <i>could</i> be classified as reserved or confidential, is inapposite. Respondent is required under Mexican law to first perform an individualized, case-by-case analysis of the documents that would be produced to determine if the information can in fact be classified as reserved or confidential. Those documents that are not properly classified as such would be eligible to be produced to Claimants.</p> <p>Additionally, regardless of the foregoing, Articles 118, 119, and 120 of the Federal Law of Transparency and Access to Public Information establish that, in the event that the requested documents do in fact contain certain reserved or confidential information, the government entity must create a public</p>
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<sup>8</sup> *Id.*

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	<p>version of the requested documents or files. In the public version of the document or file, the government entity may redact only the names of the parties or the classified portions of the text, with respect to which it must indicate in a general manner the content of the redacted portions of the text, and must provide a legal basis for the classification. Mexican Collegiate Tribunals have confirmed that if the government entity considers that the requested document contains reserved or confidential information, it must provide a public copy of said document.<sup>9</sup></p> <p>Accordingly, the Tribunal should reject Respondent’s overly broad assertion of confidentiality and direct Respondent to produce the criminal case files to the extent permitted by Mexican law—which offers far more leeway than the total and preclusive confidentiality that Respondent claims.</p>
<i>Tribunal</i>	<p>The Tribunal upholds the Respondent’s objection based on legal impediment, for the following reasons:</p> <ul style="list-style-type: none"><li>- Both parties have argued the point by reference to Article 218 of the Mexican Criminal Procedure Code. The Tribunal agrees that this provision is relevant in determining the existence of a legal impediment within the meaning of the IBA Rules on the Taking of Evidence.</li><li>- Article 218(1) of the Mexican Criminal Procedure Code provides that the the parties may have access to the record of a criminal investigation “with the limitations established in this Code and other applicable provisions.”</li><li>- Article 218(3) of the Mexican Criminal Procedure Code provides that the subject of a criminal investigation must be given access to the record “when he is detained, is summoned to appear as a defendant or is subject to an act of nuisance and it is intended to receive his interview”. It is common ground between the parties that none of these circumstances apply to the Claimants here.</li><li>- Article 218(2) of the Mexican Criminal Procedure Code provides that “[t]he victim or offended person and their Legal Advisor may have access to the investigation records at any time.” The Claimants argue that they are entitled to access because they are the “victim” within the meaning of this clause. The Tribunal disagrees: the provision is clearly not referring to the persons who are being investigated but rather the victims of the alleged criminal conduct that is being investigated.</li></ul>

<sup>9</sup> See Epoca: Decima Epoca; Registro: 2018285; Instancia: Tribunales Colegiados de Circuito; Tipo de Tesis: Aislada; Fuente: Gaceta del Semanario Judicial de la Federacion; Libro 60, Noviembre de 2018, Tomo III, Materia(s): Penal; Tesis: I.9o.P.229 P (10a.); Pagina: 2181 (“De acuerdo con el articulo 118 de la Ley Federal de Transparencia y Acceso a la Informacion Publica, cuando un documento o expediente contenga partes o secciones reservadas o confidenciales, los sujetos obligados, a traves de sus areas, para efectos de atender una solicitud de informacion, deberan elaborar una version publica en la que se testen las partes o secciones clasificadas, indicando su contenido de manera generica, fundando y motivando su clasificacion.”)

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	<ul style="list-style-type: none"><li>- Article 218(5) of the Mexican Criminal Procedure Code provides that the Public Prosecutor must publish a public summary of certain documents in case of “<i>no ejercicio de la acción penal, archivo temporal o aplicación de un criterio de oportunidad</i>”. Based on the Respondent’s representation to this Tribunal that none of those three decisions have been taken by the Public Prosecutor in respect of the investigations in question, the Tribunal finds that this clause too is not applicable.</li><li>- Having determined the existence of a legal impediment on the basis of Article 218 of the Mexican Criminal Procedure Code, the Tribunal does not need to examine the Respondent’s objection insofar as it is predicated on the Federal Law of Transparency and Access to Public Information.</li></ul>
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