Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 180

Appeal 890034

Ontario Lottery Corporation

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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

The facts of this case and the procedures employed in making this Order are as follows:

1. On January 11, 1989, the Ontario Lottery Corporation (the "institution") received a request for access to "a list of all lottery prize winners from July 1, 1988 to present".

2. On February 16, 1989, the institution's Freedom of Information and Privacy Co_ordinator wrote to the requester advising that "access cannot be provided because this record does not exist. However, if it did, access would be denied under section 21(3)(f) (sic) of the Act. This provision applies as release of such information '...is presumed to constitute an unjustified invasion of personal privacy' as it 'describes an individual's finances...'."

3. On February 21, 1989, the requester appealed the decision of the institution. Notice of the appeal was given to the institution and the appellant.

4. Between February 21, 1989 and August 4, 1989, efforts were made by an Appeals Officer and the parties to settle the appeal.

5. In response to the institution's position that the record in question did not exist, a Compliance Officer from our office conducted an investigation at the institution. The investigation revealed that a list of names and addresses of lottery winners of $10,000 or more could be produced from the institution's computer data base.

6. During mediation, the appellant narrowed his request to include only a list of the names and communities of lottery winners of $10,000 or more and it is this record that is at issue in this appeal.

7. As a settlement could not be achieved, on August 14, 1989 notice that an inquiry was being conducted to review the decision of the head was sent to the institution and the appellant. In accordance with the usual practice, the notice of inquiry was accompanied by a report prepared by the Appeals Officer. This report is intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appeared to the Appeals Officer, or any of the parties, to be relevant to the appeal. The sections of the Act paraphrased in the report include those exemption sections cited by the head in refusing access to a record or a part of the record. The report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

8. Representations were received from the institution and the appellant and I have considered these representations in reaching my decision.

In considering the specific issues arising in this appeal, I have been mindful of the purposes of the Act as set out in section 1. Subsection 1(a) provides the right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter_balancing privacy protection purpose of the Act. The subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions in the Act lies with the head of the institution.

The issues in this appeal are as follows:

A. Whether the record at issue in this appeal contains "personal information" as defined in subsection 2(1) of the Act.

B. If the answer to Issue A is in the affirmative, whether the exception to the general rule of non_disclosure of personal information as provided by subsection 21(1)(a) of the Act, applies.

C. If the answer to Issue A is in the affirmative, whether disclosure of the personal information would be an unjustified invasion of the personal privacy of the persons to whom the information relates.

D. If the answer to Issue C is in the affirmative, whether the record can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.

E. If the answer to Issue C is in the affirmative, whether there is a compelling public interest in disclosure of the record that clearly outweighs the purpose of the exemption, as provided by section 23 of the Act.

ISSUE A: Whether the record at issue in this appeal contains "personal information" as defined in subsection 2(1) of the Act.

Where a request involves access to personal information I must, before deciding whether an exemption applies, ensure that the information in question falls within the definition of "personal information" in subsection 2(1) of the Act.

Subsection 2(1) of the Act provides the following definition:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or

employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

In my view, the information requested by the appellant qualifies as "personal information" under subparagraph (h) of the definition of personal information. The disclosure of the lottery winners' names and communities in this instance would "reveal other personal information" about them, namely, that they were winners of $10,000 or more in a lottery draw and that they reside in a particular community.

ISSUE B: If the answer to Issue A is in the affirmative, whether the exception to the general rule of non_disclosure of personal information as provided by subsection 21(1)(a) of the Act, applies.

Once it has been determined that a record or part of a record contains personal information, subsection 21(1) of the Act

prohibits the disclosure of this information except in certain circumstances. In Order 113, (Appeal Number 880261) dated November 9, 1989, Commissioner Linden stated:

> Section 21 of the Act provides for a general rule of non_disclosure of personal information to any person other than the person to whom the information relates. Certain exceptions to this general rule are set out in subsection 21(1). These exceptions include the consent of the person whose information it is, health and safety circumstances, information collected for the purpose of maintaining a public record, research purposes, or where it would not be an unjustified invasion of personal privacy to release the information.

Specifically, subsection 21(1)(a) provides that:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
>
> ...

In this appeal, certain facts exist which might lead to the conclusion that the individuals to whom the personal information relates have consented to the disclosure of their personal information. Specifically:

1. Each lottery ticket contains a paragraph which states that the Ontario Lottery Corporation has the right to publish the name, address, and photograph of any prize winner;

2. Section 8(c) of Regulation 719 made under the Ontario Lottery Corporation Act R.S.O. 1980, c.344, as amended, states:

> It is a condition for entitlement to collect any prize that the claimant,
>
> ...
>
> (c) give the Corporation the right to publish his name, address, photograph or picture without any claim on the Corporation for broadcasting, printing, royalty or other rights; and..."

3. The institution prepares weekly media releases giving the name, geographic location and amount of the win of any winners between $10,000 and $50,000; and,

4. If an individual contacts the institution and requests the name of the winner of a specified draw, the institution will advise that individual of the winner's name and the city or

> town of residence; however, it will not provide a list of winners of all lotteries. (This Order does not address the propriety of this type of disclosure; see Order 181.)

Considering the above noted facts, it might be argued that, while the individual lottery winners whose personal information is contained in the record in issue have not been approached by the institution for their consent to the release of the information, they have already consented to its publication. Accordingly, I will consider if consent to the disclosure of the information, for the purposes of subsection 21(1)(a) of the Act,

has been given. In so doing, there are three questions which I will address:

1. Does each lottery winner know what information about him or her is contained in the record?

2. Is it reasonable to assume that each lottery winner had knowledge of all of the institution's planned uses of the record containing his or her personal information?

3. Does an individual lottery winner have a choice regarding whether the personal information about him or herself would be included in the record?

In regard to the first question, it is clear that lottery winners know what personal information about themselves is held by the Ontario Lottery Corporation, since they provided that information themselves through the completion of a questionnaire.

In regard to the second question, it is also clear that the lottery winners know that the personal information they provided to the Ontario Lottery Corporation could be published. This knowledge is gained from the paragraph which appears on the

lottery ticket concerning the right of the Ontario Lottery Corporation to publish the name, address and photograph of any prize winner. This paragraph on the lottery ticket reflects the fact that subsection 8(c) of Regulation 719 supra, makes it a condition of entitlement to collect any lottery prize that the winner give the Ontario Lottery Corporation the right to publish his name, address, photograph or picture.

With respect to subsection 8(c) of Regulation 719 supra, the institution submitted that:

> Both this regulation and the Regulation made under the Interprovincial Lottery Corporation Act (which apply to some lotteries administered by [the institution]) permits the publication of a winner's name, address and picture or photograph. Publication, ensures the integrity of the game by allowing the general public the opportunity to learn of prize winners. Neither regulation dictates the information must be compiled for individual distribution.

In my view, it is reasonable to assume that the lottery winners knew that the personal information they provided to the Ontario Lottery Corporation could be published. This would come to the knowledge of the winners in the following ways:

a. through the paragraph which appears on the back of the lottery ticket;

b. in the course of giving the information to the institution prior to collecting the prize money;

c. presumably, because most people read newspapers or watch television, through which media it would become apparent that the identity of a winner may be published at the time of the win; and

d. because it might be within the knowledge of the winner that the institution prepared (as it regularly does) a written media release at the time of the win.

However, in my view, it is not reasonable to assume that lottery winners were aware that, after the publication made at the time

of the win, any member of the public could contact the institution at any time and obtain information as to the identity of the winner of the specified draw and his or her city or town of residence. I think it is fair to say that only the practices of the institution as they relate to a one_time publicity use of the personal information would have been known to the lottery winner at the time he or she gave the information to the institution. Accordingly, I do not think that the individual could reasonably be expected to have contemplated either the subsequent release of any of his or her personal information on a request basis by telephone, nor that the information would be used to compile a list to be distributed to the public upon request.

In these circumstances, I find that any consent given by the lottery winners is not a consent for the purpose of subsection 21(1)(a) of the Act.

Having made this finding, it is not necessary for me to address the third question pertaining to consent, namely whether the individual lottery winner had a choice regarding whether the personal information about him or herself would be included in the record.

ISSUE C: If the answer to Issue A is in the affirmative, whether disclosure of the personal information would be an unjustified invasion of the personal privacy of the persons to whom the information relates.

Subsection 21(2) of the Act sets out some of the criteria to be considered by the head when determining if disclosure of personal information constitutes an unjustified invasion of personal privacy.

In my view, subsections 21(2)(a) and (e) contain criteria which are relevant to this appeal. Subsections 21(2) (a) and (e) provide that:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> ...
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> ...

In its representations regarding subsection 21(2)(a), the institution made the following submission:

> The [institution] is subject to constant, thorough and public monitoring through the Provincial Auditor, special audits and periodic appearances before standing committees of the Legislature.
>
> The [institution] believes strongly in permitting public scrutiny of all aspects of its operation. For example, most draws are televised to ensure players have the opportunity of viewing the security and integrity of the game and prize winner information is released to the media at the time a major prize is claimed.
>
> However, after release, the Corporation also believes in the individual's right to privacy and protection of their preferred life_style.

In his representations, the appellant stated that:

> Do the facts of this case fit 21(2)(a)? Yes. As the disbursement of public funds is involved, disclosure of significant amounts is desirable and necessary. The information is not sensitive, confidential or harmful to the individuals to whom it relates.

In my view, subsection 21(2)(a) is not the determining factor regarding the weighing of the competing rights of access to information and protection of personal privacy. In this appeal, it is clear that the institution is publicly accountable by way of a one_time disclosure of information relating to lottery winners. There is nothing to indicate that further disclosure of the personal information of the lottery winners would make the institution more accountable.

While subsection 21(2)(a) contains a factor which tends to favour the disclosure of information, subsection 21(2)(e) is directed to the protection of personal privacy. Subsection 21(2)(e) addresses unfair exposure to "pecuniary or other harm". As previously stated, it has been ascertained that while the institution will provide a requester with the name of the winner of a specified draw, it will not provide a list of winners of all lotteries. If such a list were to be released by the institution to any member of the public, I cannot ignore what I feel would be the potential harm which could result.

Firstly, the individual lottery winners have received substantial sums of money. Disclosure of a list of all such winners could render the individual winners vulnerable to certain types of harm. In my view, the release of such a list would, in fact, increase the likelihood that the privacy of the lottery winners would be invaded. In reaching this conclusion, I have accepted the principle that disclosure of the record to

the appellant must be viewed as disclosure to the public generally.

It is my view that the fact that the personal information is contained in a list is of some significance. In the recent decision in United States Department of Justice, et al., v. Reporters' Committee for Freedom of the Press et al. 109 S.Ct. 1468(1989), the Supreme Court of the United States considered

the question of access to criminal identification records or "rap sheets" which contain descriptive information as well as history of arrest, charges, convictions and incarcerations. Much of the rap sheet information is a matter of public record. However, the rap sheet itself is a compilation of the information which may be otherwise publicly available. In considering whether or not the disclosure of the rap sheet would constitute an "unwarranted invasion" of the subject of the sheet, Justice Stevens, speaking for the majority, made the following statements which I feel are relevant to the issues that arise in this appeal. At page 1476, Justice Stevens stated that:

> To begin with, both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another. Thus the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private.

Further, at page 1477, Justice Stevens stated:

> But the issue here is whether the compilation of otherwise hard_to_obtain information alters the privacy interest implicated by disclosure of that

> information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives and local police stations throughout the country and a computerized summary located in a single clearing house of information.

Finally, at page 1480, Justice Stevens referred to an earlier decision of the Supreme Court in Whalen v. Roe 97 S.Ct 869 at page 872 where the Court stated:

> In sum, the fact that 'an event is not wholly private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information.

In arriving at my decision, I have also taken into account the degree of personal sensitivity of the information, the extent to which the information concerned is already a matter of public knowledge and the nature of the record itself.

In my view, in the circumstances of this appeal, the disclosure of the personal information would constitute an unjustified invasion of the personal privacy of the persons to whom the information relates.

ISSUE D: If the answer to Issue C is in the affirmative, whether the record can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under the exemption.

Having determined that the personal information qualifies for exemption under section 21, I must now determine whether the severability requirements of subsection 10(2) apply to this record.

Subsection 10(2) reads as follows:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

Commissioner Linden addressed the issue of severance in Order 24 (Appeal Number 880006), dated October 21, 1988. At page 13 of that Order he stated:

> The inclusion of subsection 10(2) reinforces one of the fundamental principles of the Act, that "necessary exemptions from the right of access should be limited and specific." (subsection 1(a)(ii)). An institution cannot rely on an exemption covered by sections 12 to 22 of the Act without first considering whether or not parts of the record, when considered on their own, could be disclosed without revealing the nature of the information legitimately withheld from release.

The key question raised by subsection 10(2) is one of reasonableness. As Commissioner Linden found in Order 24 supra:

> ...it is not reasonable to require a head to sever information from a record if the end result is simply a series of disconnected words or phrases with no coherent meaning or value. A valid subsection 10(2) severance must provide the requester with information that is in any way responsive to the request, while at the same time protecting the confidentiality of the portions of the record covered by the exemption.

I have reviewed the record and, in my view, no information that is in any way responsive to the request could be severed from this record and provided to the appellant without disclosing information that legitimately falls within the section 21 exemption.

ISSUE E: If the answer to Issue C is in the affirmative, whether there is a compelling public interest in

disclosure of the record that clearly outweighs the purpose of the exemption, as provided by section 23 of the Act.

The appellant submitted that section 23 should be invoked as "...the need for full disclosure of government activities clearly outweighs any other factors."

The institution submitted that no compelling public interest has been demonstrated and that section 23 should not apply.

Section 23 of the Act reads as follows:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (emphasis added)

Commissioner Linden considered the proper interpretation of section 23 in Order 61 (Appeal Number 880166), dated May 26, 1989, and found that two requirements must be satisfied in order to invoke the application of the so_called "public interest override". As stated at page 11 of that Order:

> ...there must be a compelling public interest in disclosure and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question (emphasis added).

The Act is silent as to who bears the burden of proof in respect of section 23. However, I concur with the statement made by Commissioner Linden in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. Therefore, the burden of establishing that section 23 applies is on the appellant.

Having reviewed the contents of the record and considered the representations of the appellant, I have reached the conclusion that the circumstances of this case are not sufficient to invoke the application of section 23. In my view, the public interest is already adequately and properly served by the institution's accountability both to the Legislature and to the Board of Directors appointed by the Lieutenant Governor in Council.

Accordingly, I uphold the decision of the head not to disclose the records at issue in this appeal.

Original signed by: June 20, 1990
Tom Wright Date
Assistant Commissioner